MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

May 9, 2013, through July 18, 2013

CORBIN R. DAVIS
REPORTER OF DECISIONS

VOLUME 301
FIRST EDITION

2013

Copyright 2013 by Michigan Supreme Court

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

COURT OF APPEALS

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

Chief Clerk/Research Director:
LARRY S. ROYSTER[1]

---

[1] To May 28, 2013.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019

Justices	
MICHAEL F. CAVANAGH	2015
STEPHEN J. MARKMAN	2021
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2015
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2015

Commissioners

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

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

State Court Administrator

CHAD C. SCHMUCKER

Clerk: LARRY S. ROYSTER[1]
Reporter of Decisions: CORBIN R. DAVIS[2]
Crier: DAVID G. PALAZZOLO

[1] From May 28, 2013.

[2] From May 28, 2013.

TABLE OF CASES REPORTED

(Lines set in small type refer to orders appearing in the Special Orders section beginning at page 801.)

PAGE

A

Adair v Michigan (On Fourth Remand) 547
All Star Lawn Specialists Plus, Inc, Auto-Owners Ins Co v 515
All Star Lawn Specialists Plus, Inc, Auto-Owners Ins Co v . 801
Angelucci v Dart Properties Inc 209
Artemis Technologies, Inc, System Soft Technologies, LLC v 642
Atwell, Bev Smith, Inc v 670
Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc 515
Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc 801
Auto-Owners Ins Co, Perkins v 658

B

Barrow v City of Detroit Election Comm 404
Beierling, Urbain v 114
Bev Smith, Inc v Atwell 670
Burris v KAM Transport, Inc 482

C

Carruthers, People v 590

PAGE

Carruthers, People v 801
City of Detroit Election Comm, Barrow v 404
City of Detroit Election Comm, Wilcoxon v 619
Commerce & Industry Ins Co v Dep't of
Treasury 256
Cunningham, People v (After Rem) 218

D

Daniels Estate, *In re* 450
Dart Properties Inc, Angelucci v 209
Dells, Pioneer State Mutual Ins Co v 368
Dep't of Treasury, Commerce & Industry Ins
Co v 256
Dep't of Treasury, Power v 226

F

Falker, Yost v 362

H

Hammel Associates, LLC, Independent Bank v ... 502
Hill, Porter v 295

I

In re Daniels Estate 450
In re Moss 76
In re Stan Estate 435
Independent Bank v Hammel Associates, LLC 502
Island Lake Arbors Condominium Ass'n v
Meisner & Associates, PC 384

J

Jones, People v 566

PAGE

K

KAM Transport, Inc, Burris v 482
Kane v Williamstown Twp 582

L

Lenawee County v Wagley 134
Lloyd, People v 95

M

Macomb County Treasurer, Sal-Mar Royal
Village, LLC v 234
Malinowski, People v 182
Martz, People v 247
McDade, People v 343
Meisner & Associates, PC, Island Lake Arbors
Condominium Ass'n v 384
Michigan, Adair v (On Fourth Remand) 547
Mitchell, People v 282
Moss, *In re* 76

N

Nix, People v 195

P

People v Carruthers 590
People v Carruthers 801
People v Cunningham (After Rem) 218
People v Jones 566
People v Lloyd 95
People v Malinowski 182
People v Martz 247
People v McDade 343
People v Mitchell 282
People v Nix 195

PAGE

People v Rivera 188
People v Snyder (After Rem) 99
Perkins v Auto-Owners Ins Co 658
Pioneer State Mutual Ins Co v Dells 368
Porter v Hill 295
Power v Dep't of Treasury 226

R

Rains v Rains 313
Rivera, People v 188

S

Sal-Mar Royal Village, LLC v Macomb County Treasurer 234
Snyder, People v (After Rem) 99
Stan Estate, *In re* 435
System Soft Technologies, LLC v Artemis Technologies, Inc 642

T

Treasury (Dep't of), Commerce & Industry Ins Co v 256
Treasury (Dep't of), Power v 226

U

Urbain v Beierling 114

W

Wagley, Lenawee County v 134
Wayne County, Wayne County Retirement System v 1

PAGE

Wayne County Retirement System v Wayne County 1
Wilcoxon v City of Detroit Election Comm 619
Williamstown Twp, Kane v 582

Y

Yost v Falker 362

Court of Appeals Cases

WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM v
WAYNE COUNTY

Docket No. 308096. Submitted March 12, 2013, at Detroit. Decided May 9, 2013, at 9:00 a.m. Leave to appeal sought.

The Wayne County Employees Retirement System and the Wayne County Retirement Commission brought an action in the Wayne Circuit Court against Wayne Charter County and the Wayne County Board of Commissioners, alleging that a county ordinance defendants enacted in 2010 concerning the retirement system, Wayne County Enrolled Ordinance No. 2010-514, violated Const 1963, art 9, § 24 and the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq*. The ordinance placed a $12 million limit on the balance of the retirement system's reserve for inflation equity known as the Inflation Equity Fund (IEF), which was funded by investment earnings on pension assets. The ordinance also placed a $5 million limit on a discretionary distribution of money from the IEF known as the "13th check," which had been made annually in varying amounts to eligible retirees and survivor beneficiaries to help fight the effects of inflation since the IEF was created in the mid-1980s. The ordinance required any amount in the IEF exceeding the $12 million dollar cap to be debited from the IEF and credited to the assets of the defined benefit plan, where it would be used to offset or reduce the annual required contribution (ARC) that the county was required to make to the defined benefit plan pursuant to Const 1963, art 9, § 24. The ordinance also imposed amortization periods and caps to be used in calculating the ARC. The county filed a counterclaim alleging, among other things, that the retirement commission had violated its fiduciary duties by mismanaging the retirement system's assets. The court, Michael F. Sapala, J., granted defendants' motion for summary disposition regarding plaintiffs' constitutional and statutory objections to the ordinance, and plaintiffs appealed as of right. The court granted summary disposition in favor of plaintiffs on the fiduciary-duty count of the county's counterclaim, and the county cross-appealed.

The Court of Appeals *held*:

1. The 2010 amendment of section 141 of the Wayne County Code of Ordinances (WCCO) that authorized the county to use IEF assets to offset its ARC violated the applicable version of MCL 38.1133(6), which provided that the retirement system must be a separate and distinct trust fund whose assets are for the exclusive benefit of the participants and their beneficiaries, because it allowed the county to benefit from the use of retirement system assets. The offset provision also violated the applicable version of MCL 38.1133(6)(c), which prohibited the retirement commission, as an investment fiduciary, from causing the system to engage in a transaction if it knew or should have known that the transaction would directly or indirectly allow assets of the retirement system to be used by or for the benefit of the county for less than adequate consideration. The criteria for making 13th-check distributions set forth in WCCO, § 141-32(c) and (d), were not affected by the holdings, but the issue regarding WCCO, § 141-32(f), which concerned the possibility of reimbursement of the $32 million, was rendered moot. WCCO, § 141-32(e), a surplus provision that allowed for an offset when a defined benefit plan was overfunded, was invalid under MCL 38.1140m, which sets forth the retirement commission's authority to determine an ARC through an actuary, but only to the extent that it made the exercise of an offset a decision for the county and not the retirement commission. The remaining language in WCCO, 141-32(e), was legally sound.

2. The portions of WCCO, § 141-32 that imposed a $12 million balance cap on the IEF and a $5 million cap on the distribution of IEF assets were valid only to the extent they applied prospectively, not to the $44 million that was in the IEF when the 2010 ordinance was enacted. The $32 million that exceeded the cap was required to be returned to the IEF for 13th-check distributions and could not be used to satisfy the county's ARC obligations. Prospective application of the caps would not impair or diminish accrued financial benefits in violation of Const 1963, art 9, § 24 because individual retirees and survivor beneficiaries were not legally or contractually entitled to a 13th check. Because the caps concerned structural aspects of the retirement plan that were legislative in nature, their enactment was within the purview of the county board under MCL 46.12a and did not intrude on any of the powers assigned solely to the retirement commission under PERSIA.

3. The board acted outside its authority by amending WCCO, § 141-36, to prescribe the actuarial formula, amortization periods, and actuarial methods used to determine the ARC. The 35-year cap on the amortization period set forth in WCCO,

§ 141-36(a)(1)(A), directly conflicted with MCL 38.1140m, which prohibits determining the required employer contribution by using an amortization period greater than 30 years. The remaining amortization caps added to WCCO, § 141-36, as well as the prescription in WCCO, § 141-36(a)(2), of the actuarial cost method to be employed in calculating the ARC, conflicted with the retirement commission's sole discretion to calculate the ARC through employment of an actuary and consideration of actuarial standards of practice. Therefore, these provisions were invalid.

4. The trial court did not err by granting summary disposition of the claims that the retirement commission had breached its fiduciary duties under MCL 38.1133(3) or WCCO, § 141-35(h). The retirement commission did not have a fiduciary duty to allocate investment losses to the IEF because the IEF ordinance was silent in this regard except in the sense that if there were investment losses, no funds could be allocated to the IEF for the given year. The retirement commission did not breach its fiduciary duties by setting the IEF investment return threshold rate unacceptably low or by crediting the full amount of any excess investment earnings, rather than only a portion of the excess, to the IEF. Given that for six of the eight years at issue the IEF received no funding at all, allowing some funds to reach the IEF in 2006 and 2007 was not financially imprudent, particularly when the amounts the IEF received would have resulted in only a minuscule change in the underfunded status of the defined benefit plans. The county lacked standing to claim that the retirement commission breached its fiduciary duties by issuing 13th checks from the IEF because, given that the amount of any decrease in total disbursements would not have flowed back to the defined benefit plans, the county suffered no special injury and had no substantial interest at stake. For the same reason, the county had no standing to argue that the retirement commission breached its fiduciary duties by making 13th-check distributions to ineligible recipients. Regardless, a review of the total annual 13th-check distributions shows that, as a matter of law, the county acted prudently and exercised reasonable care in maintaining the fiscal soundness of the IEF. The retirement commission also did not breach its fiduciary duties by failing to maintain and implement written policies related to the management of the IEF pursuant to MCL 38.1133(3)(f). Assuming the county had standing to make this argument, the matters the county identified were discretionary and did not lend themselves to or require written policies under PERSIA.

5. The retirement commission did not violate Const 1963, art 9, § 24 by diminishing or impairing accrued financial benefits

through the mismanagement of the retirement system's assets. To the extent that this claim was predicated on the same acts or omissions that constituted the claims for breach of fiduciary duty, the county did not have standing to bring it. In regard to the remaining arguments, there was no actual diminishment or impairment of defined benefit assets because the retirement system, acting under a construct created by the county board in the IEF ordinance, merely allowed certain investment earnings to flow into the IEF instead of cutting the flow and permitting those earnings to be stockpiled with existing defined benefit plan assets.

6. Defendants' argument that the trial court should have ordered plaintiffs to pay their attorney fees and costs with IEF assets as opposed to defined benefit plan assets was factually and legally undeveloped and therefore was not addressed.

Affirmed in part and reversed in part.

Racine & Associates (*Marie T. Racine* and *Jennifer A. Cupples*) and *Jaffee, Raitt, Heuer & Weiss, PC* (by *Brian G. Shannon*), for the Wayne County Employees Retirement System and the Wayne County Retirement Commission.

Dickinson Wright PLLC (by *Francis R. Ortiz*, *Phillip J. DeRosier*, *Scott A. Petz*, and *Jeffrey E. Ammons*) for Wayne Charter County.

Amicus Curiae:

VanOverbeke, Michaud & Timmony, P.C. (by *Francis E. Judd* and *Michael J. VanOverbeke*), for the Michigan Association of Public Employee Retirement Systems.

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

MURPHY, C.J. This case concerns retirement system assets, formulas, allocations, and funding, and it involves a constitutional and statutory challenge by plaintiffs Wayne County Employees Retirement System (the Retirement System) and Wayne County Retirement

Commission (the Retirement Commission) in regard to a county ordinance enacted in 2010 by defendant Charter County of Wayne (the County) through a vote of defendant Wayne County Board of Commissioners (the County Board). Plaintiffs argue that the ordinance violates Const 1963, art 9, § 24, and the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq*. The trial court granted defendants' motion for summary disposition, rejecting plaintiffs' constitutional and statutory objections to the ordinance. Plaintiffs appeal this ruling as of right. We hold that, while some of the language is safe from challenge, multiple provisions of the ordinance violate PERSIA, most importantly a provision requiring an offset of certain inflation reserve assets against the County's annual contribution to the pension fund. The offset provision improperly authorized the County to take excess Retirement System inflation reserve assets and use them for the County's benefit. The benefit of the offset to the County was that it greatly reduced the amount of money needed to be paid from the County's own coffers to satisfy constitutionally mandated pension funding obligations. We find it unnecessary, for the most part, to analyze this case under Const 1963, art 9, § 24. Furthermore, the trial court granted summary disposition in favor of plaintiffs relative to count III of the County's counterclaim, which alleged that the Retirement Commission mismanaged the assets of the Retirement System, violating certain fiduciary duties. The County has cross-appealed that ruling. We hold that the trial court did not err in summarily dismissing the fiduciary-duty claims, given that the County lacked standing to raise such claims and/or failed to establish the existence of a genuine issue of material fact with respect to the claims. We also reject a couple of additional cursory arguments posed by the County regard-

ing attorney fees and costs and Const 1963, art 9, § 24, which the trial court did not address. In sum, we affirm in part and reverse in part.

I. OVERVIEW

The ordinance at issue placed a $12 million limit on the balance of a reserve for inflation equity, referred to as the Inflation Equity Fund (IEF), which previously had no particular dollar cap, and which is funded by investment earnings, exceeding a certain threshold rate of return, on pension assets pursuant to an actuarially based formula. The ordinance additionally placed a $5 million limit on the distribution of monies from the IEF to eligible retirees and survivor beneficiaries, commonly referred to as the "13th check" distribution, which also had no prior dollar cap, and which, although discretionary, had been made annually in varying amounts without fail since the inception of the IEF in the mid-1980s. Twelve regular monthly pension distributions, paid from assets of the defined benefit plan—which include contributions by the County and its employees, and the investment earnings thereon—are enjoyed by those eligible as an accrued financial benefit on the basis of service rendered.[1] The purpose or intent behind creating and funding the IEF was to provide extra cash to assist retirees and survivor beneficiaries in fighting the effects of inflation. The use of regular cost-of-living allowances (COLAs) predated the creation of the IEF and the payment of 13th checks.

The challenged ordinance further required that the amount in the IEF in excess of the $12 million dollar cap, which excess was approximately $32 million given

[1] The County's defined contribution plan is not implicated in this case. The County oversees multiple defined benefit and hybrid plans.

that the IEF's balance had grown to around $44 million at the time of the ordinance's enactment, be debited from the IEF and credited to the defined benefit plan assets. In turn, the ordinance mandated use of the excess, the $32 million, to offset or reduce the County's defined benefit annual required contribution (ARC), with the credited amount thereafter being deemed part of the defined benefit plan assets. IEF and defined benefit plan assets are all held together in trust, but accounting records provide for a distinct allocation or crediting of the assets.[2] The Retirement Commission is responsible for determining the County's ARC for purposes of defined benefit funding, and the Retirement Commission employs an actuary to make the necessary actuarial calculations and develop ARC numbers. Assets in the IEF are not taken into consideration in fixing the amount of the ARC. The ordinance effectively allowed defendants to satisfy ARC obligations through an accounting transaction that substantially depleted assets that had accumulated in the IEF and were chiefly designated for 13th checks, shifting and adding the "excess" IEF assets to the defined benefit plan assets as opposed to attaining ARC compliance by adding to the defined benefit plan assets through a direct contribution from County coffers. Finally, the ordinance addi-

---

[2] Plaintiffs often note that IEF assets *are* defined benefit plan assets, considering that a person covered by a defined benefit plan enjoys a right to standard, mandatory pension payments (12 monthly pension checks) and to participate in the IEF program (13th check). However, there is no dispute that accounting records allocate a particular amount to the IEF out of the overall trust fund total. For purposes of this opinion and ease of reference, when we speak of "IEF assets," it will pertain to asset amounts designated for distribution through the IEF program with the understanding that the program falls under the benefit umbrella of the defined benefit plan packages, and when we speak of "defined benefit plan assets," it will pertain to asset amounts designated for regular pension payments and not allocated or credited to the IEF in accounting records.

tionally imposed particular amortization periods and caps to be used in calculating the ARC.

The Michigan Constitution provides in relevant part:

> 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. [Const 1963, art 9, § 24.]

Plaintiffs argued that the ordinance violated both clauses of Const 1963, art 9, § 24, by diminishing or impairing accrued financial benefits, and by effectively abrogating the County's annual funding obligation or ARC. The trial court disagreed, ruling on cross-motions for summary disposition that "the IEF is not an accrued financial benefit" and that payment of the 13th check is entirely discretionary, not mandatory, under the ordinance and applicable collective bargaining agreements (CBAs).

Plaintiffs also contended that the ordinance violated various provisions of PERSIA by taking a credit against the Retirement System's trust assets for the County's benefit during a period of underfunding, by overriding the Retirement Commission's discretion in taking such a credit, by treating trust assets as assets of the County, and by the imposition of amortization periods and caps in derogation of the Retirement Commission's discretion. The trial court again disagreed, ruling on cross-motions for summary disposition that § 20m of PERSIA, MCL 38.1140m, "does not address or prohibit the transfer of funds from the IEF . . . to meet the County's [ARC] [o]bligation." With respect to additional PERSIA provisions relied on by plaintiffs in support of their

arguments, the trial court rejected them for the many reasons set forth in defendants' summary disposition brief. Plaintiffs appeal the rulings on their constitutional and statutory challenges as of right.

The County cross-appeals the trial court's ruling granting summary disposition in favor of plaintiffs with respect to count III of the County's counterclaim, which sought declaratory and injunctive relief on the basis that the Retirement Commission violated various fiduciary duties in managing the assets of the Retirement System. The County alleged a number of improprieties by the Retirement Commission in count III, including allocating investment losses to defined benefit plan assets but not to the IEF, electing to make 13th-check distributions when defined benefit plans were underfunded, directing the Retirement System's assets to the IEF and away from the defined benefit plan assets despite the fact that the plans were underfunded, making 13th-check payments to all members of the various retirement plans despite the ineligibility of members who participated solely in the defined contribution plan, failing to establish written policies and objectives for determining when IEF distributions should be made, and in bringing an untenable lawsuit. On cross-motions for summary disposition, the trial court granted summary disposition in favor of plaintiffs, ruling that plaintiffs had submitted evidence showing compliance with the Retirement Commission's fiduciary duties and other legal obligations and that the County had failed to present evidence sufficient to create a genuine issue of material fact on its claims, thereby entitling plaintiffs to judgment as a matter of law.[3]

[3] The County's counterclaim contained three counts, with the first count simply requesting a declaration that the ordinance was lawful and enforceable, which issue was subsumed in the ruling that rejected plaintiffs' constitutional and statutory challenges, and the second count seeking a declaration that parts of the ordinance remained legally sound

II. BACKGROUND

A. UNDERLYING COUNTY AUTHORITY: MICHIGAN CONSTITUTION, CHARTER COUNTIES ACT, AND WAYNE COUNTY CHARTER

Under the authority of Const 1963, art 7, § 2, "[a]ny county may . . . adopt . . . a county charter in a manner and with powers and limitations to be provided by general law . . . ." Pursuant to 1966 PA 293, the Legislature enacted the charter counties act (CCA), MCL 45.501 *et seq.* "Every county adopting a charter under the provisions of . . . [the CCA] shall be a body corporate." MCL 45.501. "Wayne County adopted a home-rule charter which took effect on January 1, 1983, establishing a county government with a chief executive officer in accordance with the [CCA.]" *Lucas v Wayne Co Election Comm*, 146 Mich App 742, 744; 381 NW2d 806 (1985); see also Home Rule Charter for the County of Wayne.[4]

The CCA contains certain mandates for county charters adopted under the act. Specifically, under MCL 45.514(1)(e), a charter must provide for "[t]he continuation and implementation of a system of pensions and retirement for county officers and employees in those counties having a system in effect at the time of the adoption of the charter."[5] MCL 45.514(1)(e) further provides that a system provided under a charter "shall recognize the accrued rights and benefits of the officers

---

and viable assuming the court were to agree with certain objections to the ordinance. Summary dismissal of count III, therefore, closed the case in its entirety.

[4] Wayne County Charter, § 1.112, states in part that the County, "a body corporate, possesses home rule power enabling it to provide for any matter of County concern and all powers conferred by constitution or law upon charter counties or upon general law counties, their officers, or agencies."

[5] There is no dispute that Wayne County had a system of pensions and retirement for county officers and employees in place at the time the charter was adopted.

and employees under the system then in effect," "shall not infringe upon nor be in derogation of those accrued rights and benefits," and "shall not preclude future modification of the system."

Article VI of the Wayne County Charter addresses the subject of retirement and, consistently with the requirements of MCL 45.514(1)(e), § 6.111 provides:

> The Wayne County Employees Retirement System created by ordinance is continued for the purpose of providing retirement income to eligible employees and survivor benefits. The County Commission may amend the ordinance, but an amendment shall not impair the accrued rights or benefits of any employee, retired employee, or survivor beneficiary.

See also *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 234; 704 NW2d 117 (2005). Wayne County Charter, § 6.112, provides that the Retirement Commission is composed of eight members, including "[t]he [chief executive officer (CEO)] or the designee of the CEO, the chairperson of the County Commission, and 6 elected members," four of whom must be active employees and two of whom must be retired employees. "The Retirement Commission shall administer and manage the Retirement System," and "[t]he costs of administration and management of the Retirement System shall be paid from the investment earnings of the Retirement System." *Id*. "The financial objective of the Retirement System is to establish and receive contributions each fiscal year which, as a percentage of active member payroll, are designed to remain approximately level from year to year." *Id*. at § 6.113. Wayne County Charter, § 6.113, further provides that "contributions shall be sufficient to (i) cover fully costs allocated to the current year by the actuarial funding method, and (ii) liquidate over a period of years the unfunded costs allocated to prior years by the actuarial funding method."

B. COUNTY ORDINANCE SCHEME REGARDING RETIREMENT—IN GENERAL

Chapter 141 of the Wayne County Code of Ordinances (WCCO) governs the subject of retirement. WCCO, § 141-1, provides that "[t]he county employees' retirement system established effective December 1, 1944, is hereby continued and restated under authority of the Home Rule Charter for the county and . . . MCL 46.12a[.]"[6] With respect to the interplay between the WCCO and CBAs, WCCO, § 141-2, provides that "[a] conflict between the provisions of the retirement chapter and the provisions of a collective bargaining agreement shall be resolved, to the extent of the conflict, in accordance with the collective bargaining agreement." The WCCO currently refers to and delineates the rules concerning multiple defined benefit plans, one defined contribution plan, and a hybrid plan. WCCO, §§ 141-10, 141-20 to 141-22.1.[7]

WCCO, § 141-35, addresses various aspects of the Retirement Commission, and in regard to the Retirement Commission's investment authority, subsection (h) provides:

> The retirement commission is the trustee of the assets of the retirement system. The retirement commission has the authority to invest and reinvest the assets of the retirement

[6] MCL 46.12a addresses the authority of a county board of commissioners with respect to insurance, retirement, and pension benefits for county employees.

[7] In general terms, a "defined benefit plan" is a "plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usu. for life, after retirement," that "are measured by and based on various factors such as years of service rendered and compensation earned." Black's Law Dictionary (7th ed), p 543 (under "employee benefit plan"). A "defined contribution plan" is "an employee retirement plan in which each employee has a separate account — funded by the employee's contributions and the employer's contributions (usu. in a preset amount), the employee being entitled to receive the benefit generated by the individual account." *Id*.

> system subject to all terms, conditions, limitations and restrictions imposed by the state on the investments of public employee retirement systems. The retirement commission may employ investment counsel to advise the board in the making and disposition of investments. In exercising its discretionary authority with respect to the management of the assets of the retirement system, the retirement commission shall exercise the care, skill, prudence, and diligence, under the circumstances then prevailing, that an individual of prudence acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and similar objectives.

With respect to parameters governing the Retirement Commission's handling of assets, WCCO, § 141-35(*i*)(1), provides that "[t]he assets of the retirement system shall be held and invested for the sole purpose of meeting the obligations of the retirement system and shall be used for no other purpose."

WCCO, § 141-37, addresses "reserve accounting" with respect to reserves for accumulated member contributions, for member accounts, for pension payments, for defined benefit employer contributions, for defined contribution employer contributions, and for undistributed investment income and administrative expenses. WCCO, § 141-37(a) through (f). WCCO, § 141-37(g), provides that "[t]he descriptions of the reserve accounts shall be interpreted to refer to the accounting records of the retirement system and not to the segregation of assets by reserve account," although "[t]he retirement commission may segregate assets attributable to defined contribution benefits." We note that the IEF is not identified as a reserve covered by WCCO, § 141-37.

C. HISTORY OF INFLATION EQUITY PROGRAM AND THE 2010 ORDINANCE

There is no dispute that, before the creation of the IEF, the County used COLAs at times to address the

effects of inflation on the buying power of pension income. Wayne County Enrolled Ordinance No. 86-284, adopted and made effective July 24, 1986, provided for and recognized the establishment of the IEF as of November 30, 1985, and set forth the formula by which to calculate the amount required to be credited or allocated to the IEF at the end of a fiscal year[8] predicated on investment earnings above a threshold rate of return. The 1986 enrolled ordinance further stated that "the board of trustees may, not more frequently than once a year, distribute to retired members and survivor beneficiaries a percentage of the balance in the [IEF]," and it indicated that the "percentage shall be selected by the board of trustees but shall not be less than twenty percent nor more than fifty percent."[9]

In relationship to the pertinent language in the 1986 enrolled ordinance, Wayne County Enrolled Ordinance No. 94-747, adopted and made effective November 17, 1994, replaced the term "board of trustees" with "retirement commission," but was otherwise substantively unchanged from the 1986 version, including the language that made the IEF distribution discretionary.[10]

---

[8] The fiscal year for the County runs from October 1 to September 30. When we refer to a particular year in this opinion, it relates to the County's fiscal year unless otherwise indicated.

[9] We note that the "enrolled ordinances" discussed here generally encompassed more than one WCCO section in the retirement chapter and dealt with a variety of matters. Our attention is focused on that language in the enrolled ordinances that is pertinent to the issues on appeal and that ultimately has a connection to WCCO, §§ 141-32 and 141-36, and the amendment of those sections in 2010 by the ordinance at issue. The amendment of these two sections, which are addressed with particularity below, forms the basis of plaintiffs' lawsuit.

[10] With respect to calculating the amount required to be credited to the IEF, the 1994 enrolled ordinance, using language comparable to the 1986 enrolled ordinance, provided:

In relationship to the relevant language in the 1994 enrolled ordinance, Wayne County Enrolled Ordinance No. 2000-536, adopted and made effective September 7, 2000, contained some substantive changes. First, with respect to the calculation regarding the amount to be credited annually to the IEF, the 2000 enrolled ordinance spoke of "a portion of the excess . . . of the rate of return" instead of just "[t]he excess . . . of the rate of return," leaving it to the Retirement Commission to "establish the portion of the excess rate of return used in [the] calculation."[11] Further, while a distribution

---

The retirement commission shall credit the reserve with the following amount at the end of each fiscal year:

The excess, if any, of the rate of return on the actuarial value of retirement system defined benefit assets over the rate established for this purpose by the retirement commission, multiplied by the actuarial present value of pensions being [paid to] retired members and survivor allowance beneficiaries, both as reported in the annual actuarial valuation.

Here is an example of the formula at work for the years 1998 and 2008. The actuarial present value of the pensions was $611,233,276 in 1998. The actual rate of investment return on the actuarial value of retirement system defined benefit assets was 10.09 percent. The threshold rate of investment return set by the Retirement Commission was 8 percent. The excess rate of return was therefore 2.09 percent, which is multiplied by the actuarial present value of the pensions ($611,233,276). The product is $12,774,775, which was the amount credited to the IEF in 1998. The actuarial present value of the pensions was $883,852,759 in 2008. The actual rate of investment return on the actuarial value of retirement system defined benefit assets was 5.51 percent. The threshold rate of investment return set by the Retirement Commission was 9 percent. Because there was no excess rate of return, zero percent is multiplied by the $883,852,759, resulting, of course, in a product of zero. Accordingly, no money was credited to the IEF in 2008, although $9.2 million in 13th checks was paid out that year from an IEF existing balance of $65.7 million.

[11] With respect to the remainder of the formula, the 2000 enrolled ordinance was identical to the 1986 and 1994 enrolled ordinances. See footnote 10 of this opinion. Therefore, with the 2000 enrolled ordinance,

from the IEF remained discretionary on the Retirement Commission's part ("may . . . distribute"), the percentage of the balance in the IEF subject to potential distribution was no longer restricted to the 20 to 50 percent range. Rather, the percentage of the IEF balance that could be distributed was now left entirely up to the Retirement Commission without the range limitation. The amendments in 2000 essentially increased the Retirement Commission's discretionary authority relative to the IEF.

In the various versions of the IEF ordinance discussed earlier, while there was a formula used to calculate the amount to credit to the IEF in a fiscal year, no particular dollar limitations on the IEF's balance were ever set forth. Additionally, in the various versions of the IEF ordinance, while initially employing a 20 to 50 percent range in determining the percentage of the IEF subject to possible distribution before subsequently leaving it entirely up to the Retirement Commission's discretion, there were no particular dollar limitations on a distribution in a given year. This all changed with Wayne County Enrolled Ordinance No. 2010-514, adopted and made effective September 30, 2010, the last day before fiscal year 2011. The current version of WCCO, § 141-32, embodies changes made in the 2010 enrolled ordinance, and it provides in full as follows:

> (a) The retirement commission shall maintain a reserve for inflation equity [IEF] *provided that the fund shall be limited to no more than $12,000,000*.
>
> (b) (1) *Subject to the limit of (a) above*, the Retirement Commission may credit the reserve at the end of each fiscal

---

the Retirement Commission's decisions that directly affected the flow of funds into the IEF included establishing the threshold return rate, as previously was the case, and now also determining how much of the investment earnings in excess of the threshold rate of return should go to the IEF.

year with a portion of the excess, if any, of the rate of return on the actuarial value of retirement system defined benefit assets over the rate established for this purpose by the Retirement Commission.

(2) The Retirement Commission shall establish the portion of the reserve fund available for distribution to retired members and survivor beneficiaries; *provided that portion shall not exceed $5,000,000*.

(3) *The calculation of "defined benefit assets" shall exclude the County's retirement contribution for that fiscal year as set forth in Sec. 141.36 provided the amount in the reserve fund in excess of the limit set forth in (a) above shall be debited from the reserve fund and credited to the Defined Benefit Plan assets and such credit shall offset and/or reduce the County's defined benefit contribution requirement and thereafter be considered Defined Benefit Plan assets*.

(c) The Retirement Commission may restrict the distribution and/or the minimum permanent pension to retired members and survivor beneficiaries having a pension effective date prior to dates selected from time to time by the Retirement Commission.

(d) The formula for the distribution shall be as from time to time determined by the Retirement Commission and shall take into account the period of retirement and period of credited service.

(e) Nothing in this section shall preclude *the County* from reducing or eliminating its contribution for a fiscal year in which defined benefit assets exceed defined benefit liabilities.

(f) Within 9 months of first annual distribution from this fund, the [chief financial officer] shall explore and report to the Wayne County Commission whether it is advantageous to issue bonds as a strategy to fully fund the retirement system and *reimburse the Inflation Equity fund of $32 million dollars*. [Emphasis added.][12]

---

[12] We note that with respect to WCCO, § 141-32(c) and (d), the language in these provisions had been part of the IEF ordinance from the very start

As reflected above, WCCO, § 141-32(b)(3), refers to WCCO, § 141-36, which, as with WCCO, § 141-32, was also modified by Wayne County Enrolled Ordinance No. 2010-514. WCCO, § 141-36, which addresses the County's ARC, provides in part that the "[c]ontribution requirements for defined benefits shall be determined by annual actuarial valuation; provided that the contribution requirement may be reduced or eliminated for a fiscal year pursuant to the procedures in section 141-32." WCCO, § 141-36(a)(2). Accordingly, Wayne County Enrolled Ordinance No. 2010-514, as codified in WCCO, §§ 141-32 and 141-36, effectively granted defendants the authority to take the excess between the newly imposed $12 million IEF limit and the preexisting $44 million in the IEF,[13] and use that $32 million excess as a credit against the County's ARC obligation. Of additional relevance, Wayne County Enrolled Ordinance No. 2010-514 also modified the language in WCCO, § 141-36, by imposing certain amortization caps with respect to the formula for determining the ARC. We shall discuss the details of that change in part II(D) of this opinion, which focuses on the ARC.

Records of the Retirement System indicated that 13th-check distributions have been made without fail since the inception of the IEF and that the amount annually disbursed fluctuated from year to year, at times decreasing from the previous year. In chronological order, from 1986 through 2009, the following amounts represent the aver-

in 1986, and Wayne County Enrolled Ordinance No. 2010-514 did not result in any changes. These provisions are not at issue. Further, in regard to WCCO, § 141-32(e), the language in this provision is new, having been incorporated by the 2010 enrolled ordinance. We shall discuss this particular provision later in the opinion.

[13] The actuary's annual actuarial valuation report dated September 30, 2010, indicated that the balance in the IEF was $44,220,597 and had been $49,210,581 on the same date a year earlier.

age individual 13th checks that were distributed by the Retirement Commission to retirees and survivor beneficiaries: $677; $843; $823; $1,281; $1,842; $972; $1,361; $1,984; $2,045; $1,440; $1,538; $1,836; $2,382; $2,355; $2,603; $2,907; $2,938; $2,953; $2,380; $2,361; $2,030; $1,685; $1,703; and $1,699.[14] In chronological order, from 1986 through 2009, the following amounts reflect monies credited to the IEF at the end of the fiscal year under the investment return formula: $7.1 million; $5.9 million; $13.1 million; $17.6 million; zero; $21.7 million; $26 million; $9.5 million; $156,000; $16.3 million; $18.3 million; $22.3 million; $12.7 million; $45.9 million; $41.1 million; $1.7 million; zero; zero; zero; zero; $10.6 million; $23.2 million; zero; and zero.

D. THE ANNUAL REQUIRED CONTRIBUTION (ARC)

Pursuant to the second clause of Const 1963, art 9, § 24, "[f]inancial 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." "[T]he purpose of the provision was to prevent the shifting of the burden for pensions from the taxpayers who derived benefit from the services rendered to future taxpayers by 'back door' spending, *i.e.*, by diverting current funding to finance unfunded accrued liability." *Jurva v Attorney General*, 419 Mich 209, 224-225; 351 NW2d 813 (1984).[15] The

---

[14] In chronological order, from 1986 through 2009, the following amounts are the total disbursements in the year by the Retirement Commission in the form of 13th checks (in millions of dollars): $4; $5.1; $5; $7.8; $11.3; $5.9; $8.4; $12.3; $12.7; $8.9; $9.5; $11.3; $14.6; $14.2; $15.5; $17.1; $17.1; $17.1; $13.3; $13.3; $11.1; $9.2; $9.2; and $9.4.

[15] "Unfunded accrued liabilities" are the amounts needed, as estimated according to actuarial projections, to satisfy existing pension obligations. *Shelby Twp Police & Fire Retirement Bd v Shelby Twp*, 438 Mich 247, 256 n 4; 475 NW2d 249 (1991).

establishment and maintenance of the actuarial soundness of pension systems was the delegates' overriding concern at the Constitutional Convention. *Id.* at 225. In regard to the annual funding requirement of Const 1963, art 9, § 24, our Supreme Court in *Shelby Twp Police & Fire Retirement Bd v Shelby Twp*, 438 Mich 247, 255-256; 475 NW2d 249 (1991), observed:

> Our assessment of art 9, § 24 and our examination of the constitutional debates, reveals the framers' clear intent to create a contractual obligation to ensure the full payment of financial benefits in the pension and retirement system. Permitting the township to fund only pensions payable in that year to current retirees and beneficiaries would unjustly alleviate the township of its obligation to fully fund the pension system.
>
> We therefore find that 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.

Section 20m of PERSIA, MCL 38.1140m,[16] addresses the Retirement Commission's governance over ARC formulas and determinations, actuary participation, and other ARC-related matters, stating in part:

> The governing board vested with the general administration, management, and operation of a system or other decision-making body that is responsible for implementation and supervision of any system [here, the Retirement Commission] shall confirm in the annual actuarial valuation and the summary annual report required under section 20h(2)[, MCL 38.1140h(2)] that each plan under this act provides for the payment of the required employer contribution as provided in this section and shall confirm in the summary annual report that the system has received

[16] MCL 38.1140m was recently amended pursuant to 2012 PA 347, effective March 28, 2013. We are quoting the previous version of MCL 38.1140m, which governs in this case.

> the required employer contribution for the year covered in the summary annual report. The required employer contribution is the actuarially determined contribution amount. . . . The governing board vested with the general administration, management, and operation of a system or other decision-making body of a system shall act upon the recommendation of an actuary and the board and the actuary shall take into account the standards of practice of the actuarial standards board of the American academy of actuaries in making the determination of the required employer contribution.

"[T]he statutory language is unequivocal that the Board [here, the Retirement Commission] determines the amount the employer . . . contributes annually to the retirement system and that the employer, in turn, is 'required' to make the contribution." *Bd of Trustees of the Policemen & Firemen Retirement Sys of Detroit v Detroit*, 270 Mich App 74, 80-81; 714 NW2d 658 (2006). It is the Retirement Commission's responsibility to ensure that the Retirement System is adequately funded. *Id*. at 75.

Returning to our discussion of WCCO, § 141-36, which was amended by Wayne County Enrolled Ordinance No. 2010-514 relative to the ARC and amortization caps, the section previously provided in pertinent part:

> a)(1) The financial objective of the retirement system is to receive contributions each fiscal year which, as a percentage of member payroll, are designed to remain level from year to year and are sufficient to:
>
> a. Fund the actuarial cost allocated to the current year by the actuarial cost method; and
>
> b. Fund unfunded actuarial costs allocated to prior years by [the] actuarial cost method over a period or periods of future years as determined by the retirement commission

> based on consultation with the actuary and approval by resolution of the county commission.

WCCO, § 141-36, as amended by the 2010 enrolled ordinance, now provides in relevant part:

> (a)(1) The financial objective of the retirement system is to receive contributions each fiscal year which, as a percentage of member payroll, are designed to remain level from year to year and are sufficient to (i) fund the actuarial cost allocated to the current year by the actuarial cost method, and (ii) fund unfunded actuarial costs to prior years by the actuarial cost method as follows:
>
> a. Over not more than 35 years for amounts existing December 1, 1982.
>
> b. Over not more than 25 years for amounts arising from benefit changes effective after November 30, 1982.
>
> c. Over not more than 15 years for amounts arising from experience[d] losses or gains during retirement system fiscal years ending after November 30, 1981.

As can be gleaned from reading the two versions of WCCO, § 141-36, with the amendment, the County Board imposed specific caps on amortization periods where previously there were no identified caps and such matters were determined by the Retirement Commission on the basis of consultation with an actuary and the approval of the County Board. Both versions of WCCO, § 141-36, provided for an annual actuarial valuation for purposes of determining the ARC, but, as indicated earlier, the amended version provided for a reduction or elimination of the ARC on the basis of the IEF excess and credit to the defined benefit plan assets upon application of the $12 million IEF balance limitation under WCCO, § 141-32.

In an affidavit supplied by Judith Kermans, who was employed by the Retirement System's actuary as a senior consultant and regional director, she averred

that the County's defined benefit plans "are funded by member contributions, employer contributions[,] and investment income on Retirement System assets"; that members contribute a percentage of their pay; that Wayne County, the employer, "is charged with contributing the actuarially determined remaining amount needed to fund the Retirement System obligations to pay pension benefits currently in payment status and benefits that will be paid in the future"; that the actuary prepares the actuarial valuation for purposes of calculating the County's ARC; and that the "ARC is calculated as a percentage of member covered payroll." Kermans further averred that the "actuarial valuation is intended to produce [an ARC] which is sufficient (1) to cover the actuarial costs allocated to the current year by the actuarial cost method (the normal cost); and (2) to finance over a period of future years, the actuarial costs not covered by present assets and anticipated future normal costs (i.e. the unfunded actuarial accrued liability)." Kermans indicated that the Retirement System "has been in a negative . . . net cash flow position for several years," and as of September 30, 2010, the date of the enactment of the ordinance at issue, "the Retirement System was 60% funded, based upon the Funding Value of Assets and 51% funded, based on the Market Value of Assets." Kermans stated that, as of September 30, 2009, the ARC was calculated to be "30.26% of County covered payroll for fiscal year 2011," and that "[b]ased upon an ARC of 30.26%, the estimated required Employer dollar contribution for Fiscal Year 2011 [was] expected to be between $39 Million and $40 Million[.]" We finally note that, in her deposition, Kermans testified that the IEF is separate and "not used to calculate the ARC, it is walled off." Defendants do not dispute that characterization.

E. THE LITIGATION

Plaintiffs filed suit against defendants, arguing that WCCO, §§ 141-32 and 141-36, as amended by Wayne County Enrolled Ordinance No. 2010-514, violated various constitutional and statutory provisions, and plaintiffs sought relief in the form of mandamus, a declaratory judgment, an injunction, and attorney fees on the basis of the violations. The County filed a counterclaim, alleging, in count III, that the Retirement Commission violated its fiduciary duties in myriad ways relative to administering the IEF and making 13th-check distributions over the years. The parties filed competing motions for summary disposition with respect to plaintiffs' complaint and count III of the County's counterclaim. The trial court granted summary disposition in favor of defendants in regard to the constitutional and statutory challenges presented by plaintiffs in their complaint. The trial court granted summary disposition in favor of plaintiffs as to count III of the County's counterclaim. The parties appeal and cross-appeal the summary disposition rulings. Details with respect to the complaint, counterclaim, the cross-motions for summary disposition, the documentary evidence submitted by the parties in connection with the summary disposition motions, and the trial court's ruling will be discussed when relevant to our analysis of the issues on appeal.

III. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews de novo rulings on motions for summary disposition, issues of statutory construction, matters concerning the interpretation and application of municipal ordinances, and questions of constitutional law. *Midland Cogeneration Venture Ltd Partnership v Naf-*

taly, 489 Mich 83, 89; 803 NW2d 674 (2011); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008); *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407; 761 NW2d 371 (2008). Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion. *Guardian Environmental Servs, Inc v Bureau of Constr Codes & Fire Safety*, 279 Mich App 1, 5-6; 755 NW2d 556 (2008). The decision whether to grant injunctive relief is discretionary, although equitable issues are generally reviewed de novo, with underlying factual findings being reviewed for clear error. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999). With respect to mandamus, in *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012), this Court stated:

> We review for an abuse of discretion a circuit court's decision on a request for mandamus. However, we review de novo the first two elements required for issuance of a writ of mandamus—that defendants have a clear legal duty to perform, and plaintiffs have a clear legal right to performance of the act requested—as questions of law. [Citations omitted.]

Finally, we review de novo the question of law whether to recognize a claim for breach of fiduciary duty. *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 20; 824 NW2d 202 (2012).

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

Although the trial court did not specify the particular subrule under MCR 2.116(C) that it was invoking when ruling on the motions for summary disposition, it is clear from the language used in its opinions and orders and its reliance on documentary evidence, going outside the confines of the pleadings, that the court was relying on

MCR 2.116(C)(10), which dictates the analysis that we will apply. *Spiek v Dep't of Transp*, 456 Mich 331, 338; 572 NW2d 201 (1998). In general, MCR 2.116(C)(10) provides for summary disposition where 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. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). 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. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, to weigh the evidence, or to 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). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

C. PRINCIPLES OF CONSTITUTIONAL, STATUTORY, AND ORDINANCE INTERPRETATION

With respect to the interpretation of ordinances and statutes, in *Bonner v City of Brighton*, 298 Mich App 693, 704-705; 828 NW2d 408 (2012), this Court observed:

> When reviewing an ordinance, we apply the same rules applicable to the construction of statutes. "The goal of statutory construction, and thus of construction and interpretation of an ordinance, is to discern and give effect to the intent of the legislative body." The words used by the legislative body provide the most reliable evidence of its intent. Unless otherwise defined, we assign the words in a municipal ordinance their plain and ordinary meanings, avoiding an interpretation that would render any part of an ordinance surplusage or nugatory. Also, unless a different intent is manifest, the language used by the legislative body must be understood and read in its grammatical context. The legislative body is deemed to have intended the meaning clearly expressed in an ordinance's unambiguous language, which must be enforced as written. " 'A necessary corollary of these principles is that a court may read nothing into an unambiguous [ordinance] that is not within the manifest intent of the [legislative body] as derived from the words of the [ordinance] itself.' " [Citations omitted.]

In regard to construing the Michigan Constitution, "[o]ur goal . . . is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). The rule of "common understanding" is applied in the analysis. *Id*. "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *Id*. at 573-574 (citation omitted). Debates during the Constitutional Convention, as well as the Address to the People, can serve as aids in determining the ratifiers' intent. *Id*. at 574.

D. DECLARATORY RELIEF, MANDAMUS, AND INJUNCTIONS

"In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights

and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). "An 'actual controversy' under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights," but "courts are not precluded from reaching issues before actual injuries or losses have occurred." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012).

"A writ of mandamus is an extraordinary remedy that will only be issued if '(1) the party seeking the writ has a clear legal right to the performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result.' " *Detroit City Clerk*, 295 Mich App at 366-367 (citation omitted).

With respect to whether a permanent injunction should issue, in *Kernen v Homestead Dev Co*, 232 Mich App 503, 514-515; 591 NW2d 369 (1998), this Court noted the following factors to take into account:

> "(a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment." [Citation omitted; quotation format condensed.]

Courts balance the benefit of an injunction to a requesting plaintiff against the damage and inconvenience to the

defendant, granting an injunction as appears most consistent with justice and equity under all the surrounding circumstances of the particular case. *Id*. at 514.

E. DISCUSSION

1. PERSIA

With respect to plaintiffs' arguments under PERSIA, they contend that WCCO, §§ 141-32 and 141-36, as amended by Wayne County Enrolled Ordinance No. 2010-514,[17] violate MCL 38.1133(6) and MCL 38.1140m by taking a credit against retirement system trust assets, for the benefit of a party in interest—i.e., the County—during a period of underfunding. Additionally, plaintiffs argue that the 2010 ordinance violates MCL 38.1133(1) and MCL 38.1140m by taking a credit against retirement system trust assets, for the benefit of the County, that circumvents the discretion of the Retirement Commission. Finally, plaintiffs assert that the 2010 ordinance violates MCL 38.1140m by treating retirement system trust assets as though they were assets of the County and by imposing amortization periods and caps that override the Retirement Commission's discretion. The trial court, in granting summary disposition in favor of defendants on plaintiffs' PERSIA claims, ruled that MCL 38.1140m does not prohibit or address the transfer of IEF assets to satisfy the County's ARC obligation. In regard to the remainder of plaintiffs' PERSIA-based arguments, the trial court simply expressed agreement with the arguments proffered by defendants in their brief, which arguments, when relevant, will be discussed later.

---

[17] Hereafter, we shall simply refer to "the 2010 ordinance" when speaking of Wayne County Enrolled Ordinance No. 2010-514 and its amendatory effect on WCCO, §§ 141-32 and 141-36.

(a) VIOLATION OF THE EXCLUSIVE-BENEFIT RULE—MCL 38.1133(6)

We hold that the offset provision in the 2010 ordinance directly conflicts with and violates the exclusive-benefit rule embodied in MCL 38.1133(6). A municipal ordinance that is in direct conflict with a state statute is preempted by state law. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). MCL 38.1133[18] provided in relevant part:

> (1) The provisions of this act shall supersede any investment authority previously granted to a system under any other law of this state.
>
> * * *
>
> (6) *The system shall be a separate and distinct trust fund and the assets of the system shall be for the exclusive benefit of the participants and their beneficiaries* and of defraying reasonable expenses of investing the assets of the system. . . . [Emphasis added.]

The "system" here is the Wayne County Employees Retirement System,[19] which, under MCL 38.1133(6), constitutes a separate and distinct trust fund. With respect to whether particular assets are included in "assets of the system," MCL 38.1132a provides that the term " '[a]ssets,' for the purpose of meeting asset limitations contained in . . . [PERSIA], means the total of the cash and investments of a system valued at market." MCL 38.1133(6) is not concerned with asset limitations; therefore, we shall not rely on the statutory definition in MCL 38.1132a. That said, the phrase

---

[18] MCL 38.1133 was recently amended by 2012 PA 347, effective March 28, 2013. We are quoting the previous version of MCL 38.1133, which governs in this case.

[19] For purposes of PERSIA, "system" is defined as "a public employee retirement system created and established by this state or any political subdivision of this state." MCL 38.1132e(5).

"assets of the system" is clearly broad in scope and comprehensive, and it would necessarily encompass all assets held by the Retirement System, including the defined benefit plan assets and the assets in the IEF. There is no argument to the contrary. Accordingly, pursuant to MCL 38.1133(6), the IEF assets "shall be for the exclusive benefit of the participants and their beneficiaries," along with being available for use to defray reasonable investment-related expenses.

"The Legislature's use of the word 'shall' in a statute generally 'indicates a mandatory and imperative directive.' " *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006), quoting *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). The term " 'exclusive' is defined as 'not divided or shared with others [or] single or independent; sole.' " *Northville Charter Twp v Northville Pub Schs*, 469 Mich 285, 292; 666 NW2d 213 (2003), quoting *The American Heritage Dictionary of the English Language* (1981). A "benefit" is " 'something that is advantageous or good; an advantage.' " *Ottawa Co v Police Officers Ass'n of Mich*, 281 Mich App 668, 673; 760 NW2d 845 (2008), quoting *Random House Webster's College Dictionary* (1992). Thus, for purposes of complying with MCL 38.1133(6), it was imperative and mandatory that assets in the IEF be held solely for the good of participants and beneficiaries, who alone could use those assets to their advantage—not the County, the County Board, or anyone else for that matter.

There can be no dispute that, before the 2010 ordinance went into effect, the IEF assets were held and used for the exclusive benefit of participants and their beneficiaries. With the enactment of the 2010 ordinance, the "excess" IEF assets in the amount of $32 million, as created by the newly imposed $12 million

IEF cap on a preexisting $44 million IEF balance, absolutely had to retain their status as assets "for the exclusive benefit of the participants and their beneficiaries" to comply with MCL 38.1133(6). We conclude, however, that as a result of the 2010 ordinance, the County obtained the authority to use the excess IEF assets advantageously and for its own financial good and benefit. Regardless of the fact that, by operation of the 2010 ordinance, the excess assets—once part of the IEF and now part of the defined benefit plan assets on the accounting records—were still to be used for the benefit of participants and their beneficiaries in the form of regular pension payments, the County also enjoyed an enormous cost savings benefit. Accordingly, it cannot be said that assets of the system were held or used "for the *exclusive* benefit of the participants and their beneficiaries." (Emphasis added.)

The 2010 ordinance required that the amount in the IEF in excess of the $12 million dollar limit be debited from the IEF and credited to the defined benefit plan assets, with the ordinance mandating use of the $32 million excess to offset or reduce the County's ARC. Therefore, the 2010 ordinance resulted in a $32 million reduction, not directly in the actuarially based ARC calculation itself, but in the amount of money that the County had to take directly from its own coffers in order to satisfy the ARC obligation. The $32 million savings, which we decline to characterize as a minor or an incidental benefit, freed up County funds for other uses. To describe the effect of the 2010 ordinance as not being beneficial to the County is to wholly ignore the motive behind enacting the ordinance in the first place and the resulting fiscal reality.[20] The fact that the assets were

[20] In the summer of 2010, the County had proposed to temporarily suspend the 13th-check payments until the Retirement System was fully

used for the County's benefit is further made evident upon examination of WCCO, § 141-32(f), which contemplated the County's chief financial officer exploring the issuance of bonds as a strategy to "*reimburse* the Inflation Equity fund of $32 million dollars." (Emphasis added.) The concept of reimbursement necessarily entails an original benefit conferred upon and used by the reimbursing party.

Had the 2010 ordinance not been enacted, $32 million would have been added to the defined benefit plan assets by the County in the ARC, and the IEF would have retained its $44 million balance. With the enactment of the 2010 ordinance, $32 million still ended up being added to the defined benefit plan assets, so the enactment made no difference on that matter, but the IEF balance was decreased by $32 million down to $12 million. We find it difficult, therefore, to conclude that Retirement System members truly remained benefited in relationship to the $32 million after the 2010 ordinance's enactment, considering that the Retirement System unquestionably lost $32 million, and we find it impossible to conclude that the County was not benefited, as if the $32 million simply evaporated to no one's advantage.

---

funded again; however, the proposal was rejected by the County Board. In an August 24, 2010, letter from the human resources director to county employees, he communicated the proposal's rejection and warned that the likely result would be 400-500 layoffs of county employees on October 1, 2010, as the County would be forced to eliminate several programs and services. The letter concluded by indicating that the County would "continue[] to explore every available option to address the enormous budget challenges that continue to confront [it]," as "[t]he alternative [would] be unfortunate indeed." The option that eventually came to fruition was the 2010 ordinance. Given this context, the County undoubtedly enjoyed a financial benefit in being able to reach and use the $32 million in the IEF through the enactment of the 2010 ordinance.

We find it important to emphasize the nature and operational effect of the 2010 ordinance. From the sole perspective of an individual retiree or survivor beneficiary, payment of a 13th check cannot be viewed as an accrued financial benefit because there is no vested or enforceable right to a 13th check, given the discretionary distribution language that has always been part of the IEF ordinance and the lack of any CBA language requiring disbursement of a 13th check. See *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 313-315; 806 NW2d 683 (2011); *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 653-654; 698 NW2d 350 (2005); *Shelby Twp*, 438 Mich at 254 n 3; *Kosa v State Treasurer*, 408 Mich 356, 370-371; 292 NW2d 452 (1980). However, once a particular dollar amount, if any, was arrived at under the IEF formula, including the discretionary components controlled by the Retirement Commission, the IEF ordinance had always *compelled or mandated* the allocation or crediting of said amount to the IEF.[21] And the assets in the IEF were dedicated for use by retirees and survivor beneficiaries in the form of a 13th check as a hedge against inflation. By September 30, 2010, the IEF had an accumulated balance of approximately $44 million that was intended and designated for 13th-check distributions; indeed, there had never been, for the most part, any other permitted use of IEF assets.[22] The IEF, in and of itself, can be accu-

---

[21] The three previous versions of the IEF ordinance all dictated that, at the end of each fiscal year, the Retirement Commission "shall credit" assets to the IEF pursuant to the formula; however, with the 2010 ordinance, the language, as reflected in WCCO, § 141-32(b)(1), was changed to "may credit."

[22] The various versions of the IEF ordinance did permit the Retirement Commission to use a portion of the IEF assets to provide minimum permanent pensions. Judith Kermans stated that "the provisions for

rately characterized as a reserve belonging to and vested in the Retirement System's participants as a whole, outside the reach of defendants, to be used to assist retirees and survivor beneficiaries in fighting the devaluing of the dollar by inflation.[23]

Instead of honoring and protecting the IEF in connection with its designed purpose, the County Board improperly invaded the assets of the IEF to lessen its financial burden with respect to the ARC. The 2010 ordinance dipped into assets that had already been set aside for a particular purpose pursuant to the requirements of previous versions of the IEF ordinance. The 2010 ordinance essentially authorized retroactive application of the $12 million IEF cap, capturing and diverting assets pledged for a different use. Aside from providing for minimum permanent pensions and inflation equity, the IEF ordinance had never previously authorized any other use, nor did it contain any language suggesting that existing IEF assets could be tapped or diverted by defendants after allocation to the IEF. Defendants had no legal basis to exercise dominion

---

minimum permanent pension payments were complied with in the past through a transfer by the Retirement System of funds from the IEF reserve to the defined benefit assets in order to cover the increased pension costs for those that qualified for the minimum permanent pension payments." Minimum permanent pensions are not at issue.

[23] Indeed, from a broad perspective, taking into consideration not individual retirees or survivor beneficiaries but all of them together as a group, the 13th-check program itself could arguably be viewed as an accrued financial benefit for purposes of the first clause contained in Const 1963, art 9, § 24, which benefit was diminished and impaired by the transfer of $32 million out of the IEF. "[T]here exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993), citing *Taylor v Michigan*, 360 Mich 146, 154; 103 NW2d 769 (1960). Because the offset issue can be resolved under PERSIA, we ultimately decline to rule on whether it violates Const 1963, art 9, § 24.

and control over IEF assets for its own benefit once they were in the IEF and under the control of the Retirement Commission.

Our characterization of the 2010 ordinance, the IEF, and their relationship to each other finds support in the documentary evidence. In her affidavit, Judith Kermans voiced her understanding that establishment of the IEF was required by ordinance, that the IEF was created "for the payment of cost of living payments, commonly referred to as the 13th check," that the IEF was funded by "a portion of investment earnings over a minimum earnings requirement (threshold) established by the Retirement Commission," and that "the County has never made additional contributions specifically to . . . the IEF." Augustus Hutting, an attorney and former chair of the Retirement Commission who had served on it for 20 years, averred in his affidavit that "[t]he IEF Ordinance does not permit the Retirement System to use the IEF reserve for any purpose other than payment of the specific benefits set forth in the Ordinance, i.e. 13th Checks and the minimum permanent pension payments which were taken care of many years ago." This same averment was made by Ronald Yee, who was director of the Retirement System from 1997 to 2010 and a former trustee. Hutting also asserted that the trustees followed "the mandate of the IEF Ordinance to maintain, manage[,] and administer the 13th Check benefit in accordance with the IEF Ordinance, as it changed from time to time."

Next, we deem it necessary to distinguish the offset under the 2010 ordinance from the typical offset referred to in MCL 38.1140m. As part of PERSIA, MCL 38.1140m provides that, "[i]n a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of

actuarial accrued liability." Here, there is no dispute that the amortized accrued assets of the defined benefit plans did not exceed the actuarial accrued liability of the plans, that the plans were underfunded when the 2010 ordinance was enacted and had been for several years, and that the offset employed under the 2010 ordinance was not based on the offset language in MCL 38.1140m. The statutory offset concerns healthy pension plans that are overfunded and enjoy a surplus—that is, the accrued assets exceed accrued liabilities. Examined within the context of MCL 38.1140m, the IEF assets were simply not surplus assets. With respect to a legally sound offset under MCL 38.1140m, excess pension assets, which are designated to be used to cover pension payments and are already part of a retirement system's trust fund, could be viewed as being used for the benefit of the public employer by effectively diminishing the employer's ARC. Such an offset, therefore, has attributes and operates in a manner suggesting a violation of the exclusive-benefit rule in MCL 38.1133(6). However, the Legislature directly and specifically authorized the offset in MCL 38.1140m in regard to true surplus situations, and "[i]t is . . . axiomatic that 'where a statute contains a general provision and a specific provision, the specific provision controls.' " *Duffy v Dep't of Natural Resources*, 490 Mich 198, 215; 805 NW2d 399 (2011) (citation omitted). The apparent protection against invalidation under the exclusive-benefit rule that is accorded to offsets pursuant to MCL 38.1140m is simply not implicated with respect to the offset in the 2010 ordinance.

In sum, the 2010 ordinance violated the exclusive-benefit rule of MCL 38.1133(6) by authorizing the County to take advantage of and benefit from the use of assets of the Retirement System, IEF assets, instead of leaving those assets in place for the exclusive benefit of

the participants and their beneficiaries. The County, in raiding the IEF for its own benefit, depleted and redirected IEF assets that had been designated for a purpose other than payment of regular pension benefits, i.e., payment of 13th checks, circumventing the intent of the IEF ordinance. We next address and reject defendants' argument, premised on foreign rulings, that the exclusive benefit rule does not invalidate the offset in the 2010 ordinance.

(b) RULINGS OUTSIDE MICHIGAN REGARDING THE EXCLUSIVE-BENEFIT RULE

Defendants argue in their appellate brief, and insisted at oral argument, that the 2010 ordinance does not violate or conflict with the exclusive-benefit rule in MCL 38.1133(6) under the analysis in *Hughes Aircraft Co v Jacobson*, 525 US 432; 119 S Ct 755; 142 L Ed 2d 881 (1999), and *Claypool v Wilson*, 4 Cal App 4th 646; 6 Cal Rprt 2d 77 (Cal Ct App, 1992), because retirement assets in the IEF continued to be used for the exclusive benefit of members and not for the County's own benefit. Any incidental benefit enjoyed by the County, according to defendants, is insufficient to constitute a violation of PERSIA.

We initially note that, even if the cases cited by defendants can be deemed analogous, they are not binding on us in relationship to our interpretation of PERSIA and we decline to apply their holdings. The plain and unambiguous language of MCL 38.1133(6) supports our analysis and conclusion. However, because much of defendants' argument on the issue is devoted to *Hughes* and *Claypool*, we will engage in an examination of both cases.

In *Hughes*, retired beneficiaries of a defined benefit plan sued, in a class action, their former employer

Hughes and the company's retirement plan itself, claiming they had violated the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq*., by amending the plan to provide for an early retirement program and a noncontributory benefit structure. As a result of employee and employer contributions over the years and investment growth, the assets of the plan had come to substantially exceed the amount necessary to fund all current and future defined benefits. Because of the surplus, Hughes suspended its employer contributions in 1987. In 1989, Hughes amended the plan to establish an early retirement program pursuant to which significant additional retirement benefits were offered to particular active eligible employees. The plan was then amended again two years later in 1991, with new participants not being permitted to contribute to the plan and thereby receiving fewer benefits. Existing members had the option to continue making contributions or be treated as new participants. *Hughes*, 525 US at 435-436.

The retirees argued, in part, that Hughes violated 29 USC 1103(c)(1), ERISA'a anti-inurement prohibition, "by benefiting itself at the expense of the [p]lan's surplus." *Id*. at 437. More particularly, they contended that "the creation of the new contributory structure permitted Hughes to use assets from the surplus attributable to employer *and* employee contributions for its sole and exclusive benefit, in violation of ERISA's anti-inurement provision." *Id*. at 441. ERISA's anti-inurement provision stated that a plan's assets " 'shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.' " *Id*. at 442, quoting 29 USC 1103(c)(1).

The United States Supreme Court initially noted that "[s]ince a decline in the value of a [defined benefit] plan's assets does not alter accrued benefits, members similarly have no entitlement to share in a plan's surplus—even if it is partially attributable to the investment growth of their contributions." *Hughes*, 525 US at 440-441. Here, retirees and survivor beneficiaries *as a group* had an entitlement to share in the IEF assets at some juncture, as those assets had been specifically allocated and were intended for distribution to retirees and survivor beneficiaries in the form of 13th checks. The *Hughes* Court proceeded to reject the retired beneficiaries' anti-inurement argument, holding:

> As the language [in 29 USC 1103(c)(1)] makes clear, the section focuses exclusively on whether fund assets were used to pay pension benefits to plan participants, without distinguishing either between benefits for new and old employees under one or more benefit structures of the same plan, or between assets that make up a plan's surplus as opposed to those needed to fund the plan's benefits. [The retirees] do not dispute that Hughes used fund assets for the sole purpose of paying pension benefits to [p]lan participants. Furthermore, at all times, Hughes satisfied its continuing obligation under the provisions of the [p]lan and ERISA to assure that the [p]lan was adequately funded. In other words, Hughes did not act impermissibly by using surplus assets from the contributory structure to add the noncontributory structure to the [p]lan. The act of amending a pre-existing plan cannot as a matter of law create two *de facto* plans if the obligations (both preamendment and postamendment) continue to draw from the same single, unsegregated pool or fund of assets. ERISA provides an employer with broad authority to amend a plan, and nowhere suggests that an amendment creating a new benefit structure also creates a second plan. Because only one plan exists and [the retirees] do not allege that Hughes used any of the assets for a purpose other than to pay its obligations to the [p]lan's beneficiaries, Hughes could not

> have violated the anti-inurement provision under ERISA § 403(c)(1). [*Hughes*, 525 US at 442-443 (citations omitted).][24]

Consistently with our earlier discussion, we conclude that the $32 million in the IEF that was shifted to the defined benefit plan assets simply did not constitute true "surplus" assets. Rather than having a surplus of assets, the defined benefit plans were severely underfunded. And while we appreciate that IEF assets and defined benefit plan assets were pooled together in a single trust fund, the IEF assets were indeed segregated in terms of accounting records. Although the redirected IEF assets would still ultimately go to retirees and survivor beneficiaries under the 2010 ordinance, the IEF was created as a distinct and separate reserve that was never devoted to the payment of standard accrued pension benefits, but was instead primarily intended and designed for the payment of 13th checks. As opposed to the facts in *Hughes*, under the directives of the 2010 ordinance, the pension payment obligations did not genuinely continue to draw from the same single unsegregated fund of assets, given that the excess IEF assets would now be used to help cover regular pension payments. And, although their assets were pooled and invested together, the IEF received individualized treatment that was distinguishable from that given to the fund of defined benefit plan assets, effectively resulting in fund segregation.

We cannot conclude that taking assets from the IEF and adding them to the defined benefit plan's assets is comparable to using legitimate surplus assets from the old contributory structure of the Hughes plan to add

---

[24] We note that the *Hughes* Court, in the context of the anti-inurement discussion, failed to explain why Hughes was not receiving a benefit, such that use of the retirement assets by plan participants was truly *exclusive*.

the noncontributory structure, because the assets in the Hughes plan were always and remained pure defined benefit plan assets. In other words, money contributed by employees during their employment with Hughes, which employees later became the retirees filing suit, was never earmarked for anything but the future distribution of defined benefit plan payments to retirees in general. That is simply not the case here, where certain monies were earmarked for the IEF and the 13th-check program and then later appropriated by the County, much to its benefit, in order to pay the ARC. In defendants' appellate brief, they acknowledge that "the evidence is undisputed that the assets held in the IEF are *not* Defined Benefit Plan assets." As Judith Kermans stated, IEF assets are "walled off." *Hughes* did not have to contend with anything comparable to the underlying IEF ordinance and its mandates that controlled for over 20 years. The excess IEF assets created by the 2010 ordinance unmistakably inured to the benefit of the County. It was as if the County Board reached into the pockets of the Retirement System, retrieved Retirement System funds previously allocated to the IEF for 13th checks under the County Board's very own ordinance, and then handed the funds back to the Retirement System for purposes of the ARC, pretending it was County money and depriving the Retirement System of $32 million.

Another relevant aspect of *Hughes* was the argument by the retired beneficiaries that Hughes breached its fiduciary duties under ERISA by amending the plan in 1991 to create the noncontributory structure in violation of 29 USC 1106(a)(1)(D). *Hughes*, 525 US at 437. ERISA prohibits a fiduciary from, with actual or constructive knowledge, causing the retirement plan to engage in a transaction that "constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a

party in interest, of any assets of the plan[.]" 29 USC 1106(a)(1)(D).[25] The *Hughes* Court first held that the fiduciary claim failed because plan sponsors, such as Hughes, who merely alter the form, structure, or other terms of a plan are not fiduciaries. *Hughes*, 525 US at 443-445. The United States Supreme Court acknowledged a possible exception for sham transactions that were " 'meant to disguise an otherwise unlawful transfer of assets to a party in interest[.]' " *Id.* at 445, quoting *Lockheed Corp v Spink*, 517 US 882, 895 n 8; 116 S Ct 1783; 135 L Ed 2d 153 (1996). After indicating that the retired beneficiaries had raised the "sham transaction" exception, the *Hughes* Court proceeded to analyze the substance of their claim, concluding that it still failed because the incidental benefits conferred upon Hughes in amending the plan, such as lower labor costs, were not impermissible under ERISA. *Hughes*, 525 US at 445. The Supreme Court, in examining the concept of incidental benefits, stated:

> "[A]mong the 'incidental' and thus legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily." [*Id.*, quoting *Lockheed Corp*, 517 US at 893-894.]

Again, we cannot conclude that saving $32 million was "incidental" in any sense of the word. To the extent that *Hughes* supports a contrary conclusion, we again decline to apply *Hughes*. The term "incidental" is

---

[25] The applicable version of PERSIA had a comparable provision—then MCL 38.1133(6)(c), currently MCL 38.1133(8)(c)—that provides additional support for our ruling that the offset was statutorily invalid. It is addressed in the next section of this opinion.

defined as "happening or likely to happen in an unplanned or subordinate conjunction with something else," or "incurred casually and in addition to the regular or main amount[.]" *Random House Webster's College Dictionary* (2001). It cannot honestly and reasonably be disputed that the main purpose of the 2010 ordinance was to benefit the County by reducing the amount of money that the County had to directly pay to satisfy the ARC. The benefit was certainly not unplanned or incurred casually.

An aspect of *Hughes* that differs entirely from the case at bar is that the plan amendments made by Hughes in adding the noncontributory structure to the plan was clearly not motivated by financial desperation and the need for a quick fix. To a great extent, *Hughes* stands for the unremarkable proposition that an employer, for purposes of ERISA,[26] can use surplus defined benefit plan assets as an offset against required contributions. Indeed, WCCO, § 141-32(e), as codified and added by the 2010 ordinance, provides that "[n]othing in this section shall preclude the County from reducing or eliminating its contribution for a fiscal year in which defined benefit assets exceed defined benefit liabilities." This "surplus" and "offset" provision, which is not applicable to the offset at issue, is generally consistent with *Hughes*, although plaintiffs do cursorily argue that WCCO, § 141-32(e), is problematic because it places the authority with the County to invoke the offset and not the Retirement Commission. We visit that argument later. *Hughes* is also consistent with MCL 38.1140m,

[26] We note that ERISA has no application to the Wayne County Employees Retirement System because it is a governmental pension plan. *In re Pensions of 19th Dist Judges under Dearborn Employees Retirement Sys*, 213 Mich App 701, 707; 540 NW2d 784 (1995) (noting that "ERISA does not apply to Dearborn's retirement system because it is a governmental plan"), citing 29 USC 1002(32) and 1003(b)(1).

which, as stated earlier, provides that, "[i]n a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability." We have already explained that the offset in the 2010 ordinance is not based on the offset provision in MCL 38.1140m, thereby relegating the ordinance offset to the dictates of the exclusive-benefit rule. We conclude that *Hughes* provides no basis to reevaluate or question our construction and application of the exclusive-benefit rule in MCL 38.1133(6).

In *Claypool*, a California statute repealed three different supplemental COLA programs and diverted funds from those programs for use by employers of public employees as an offset to contributions the employers were otherwise required to make to fund public employee pensions. The petitioners argued "that the use of the former supplemental COLA funds to reduce employer contributions violate[d] [the] California Constitution," which stated that public pension assets were trust funds to " 'be held for the exclusive purposes of providing benefits to participants in the pension . . . system and their beneficiaries and defraying reasonable expenses of administering the system.' " *Claypool*, 4 Cal App 4th at 673, quoting Cal Const, art 16, § 17(a). The California appellate court held that there was no constitutional violation, given that the former COLA funds continued to be held for the exclusive purpose of providing pension benefits. *Claypool*, 4 Cal App 4th at 674. We note that two of the three former COLA programs were enacted under statutes warning that the benefits "may be available for only a limited period of time." *Id*. at 655-656. Moreover, the statute governing the third COLA program also indicated that availability may be limited, and the petitioners further conceded that the funds from this program, based on its

mode of operation, had already "bec[o]me employer assets for purposes of the effect on the employers' contribution obligations" before the enactment of the challenged statute that repealed the three supplemental COLA programs and created the offset. *Id*. at 657.

Here, the IEF did not have the limiting or restrictive language used in the former COLA programs at issue in *Claypool*.[27] We also note that with the statutory repeal of the three supplemental COLA programs, the California Legislature did enact a new alternative COLA program. *Claypool*, 4 Cal App 4th at 658. Although in the context of a different appellate argument, the *Claypool* court stated that "[t]he saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee." *Id*. at 665. In this case, there were no comparable new advantages to county retirees; the 13th-check program was eviscerated absent mandatory reimbursement of the $32 million. And, according to the actuary expert, Judith Kermans, the addition of the $32 million IEF excess to the defined benefit assets merely increased the plan from being 60 percent funded to 61 percent funded, a *de minimis* amount. To the extent that *Claypool* is analogous and supports a different conclusion than that we reach here, we decline to follow *Claypool*, which we view as an aberration.

(c) VIOLATION OF THE PROHIBITED-TRANSACTION RULE—MCL 38.1133(6)(c)

Under the applicable version of MCL 38.1133(6)(c), and comparable to the ERISA provision discussed in

[27] We acknowledge that the California court, in rendering its ruling, did not specifically refer to the limited nature of the COLA programs; therefore, we cannot ascertain with any certainty that the court considered the matter to be of any relevance.

Hughes, "an investment fiduciary shall not cause the system to engage in a transaction if he or she knows or should know that the transaction is . . . , either directly or indirectly[,] . . . [a] transfer to, or use by or for the benefit of, the political subdivision sponsoring the system of any assets of the system for less than adequate consideration." The plain and unambiguous language of the statute absolutely prohibits the Retirement Commission, an investment fiduciary, MCL 38.1132c(1), from, with actual or constructive knowledge, causing the Retirement System to engage in a transaction that directly or indirectly allows assets of the Retirement System to be used by or for the benefit of the County, a political subdivision sponsoring the system, for less than adequate consideration. We conclude that, in violation of MCL 38.1133(6)(c), the 2010 ordinance effectively forced the Retirement Commission to knowingly cause the Retirement System to engage in a transaction that directly or indirectly permitted or authorized the County to use or benefit from the use of assets in the IEF absent any consideration. Stated otherwise, the 2010 ordinance required the Retirement Commission to breach a fiduciary duty, engaging the Retirement System in a prohibited transaction.

The reallocation or transfer of IEF assets certainly constituted a "transaction" for purposes of MCL 38.1133(6)(c). Even defendants acknowledge in their appellate brief that the 2010 ordinance "authorize[d] the transfer of funds from the IEF to the Defined Benefit Plans." Furthermore, the 2010 ordinance required a debiting and crediting of assets to and from the IEF and defined benefit plan, which would qualify as an administrative task performed by the Retirement Commission. See MCL 38.1133(2); Wayne County Charter, § 6.112; *Detroit Policemen & Firemen Retirement Sys Bd of Trustees*, 270 Mich App at 75 (board of trustees

has the responsibility for administering, managing, and operating retirement system); *Wayne Co Retirement Comm*, 267 Mich App at 234 ("The Retirement Commission is the administrative body responsible for overseeing the operational and administrative functions of the Retirement System.").[28] Accordingly, the 2010 ordinance effectively required the "investment fiduciary . . . [to] cause the system to engage in a transaction[.]" MCL 38.1133(6). We have already found, relative to our analysis of the exclusive-benefit rule, that the County benefited greatly from the use of the excess IEF assets. We recognize that defendants are not investment fiduciaries and that they set into motion the prohibited transaction; however, we conclude that it was a sham transaction involving, *effectively*, an unlawful transfer of assets to the County for use to satisfy obligations relative to the ARC. *Hughes*, 525 US at 445.

(d) SPECIFIC COUNTY CODE SECTIONS AND SUBSECTIONS

We hold that, for the reasons stated, the offset provision in the 2010 ordinance violates PERSIA, particularly the exclusive-benefit rule in MCL 38.1133(6)

[28] MCL 38.1133(2) provides that "[t]he assets of a system may be invested, reinvested, held in nominee form, and managed by an investment fiduciary subject to the terms, conditions, and limitations provided in this act." Pursuant to this statutory provision, it was the Retirement Commission that had management authority over "assets of [the] system," including the IEF assets. While we decline to express reliance on MCL 38.1133(2) as additional support for our ruling, it is arguable that the crediting and debiting aspect of the 2010 ordinance, whereby assets were moved out of the IEF by the County, was a purely managerial task reserved solely for the Retirement Commission under MCL 38.1133(2). Absent the shifting of assets under the 2010 ordinance from the IEF to the defined benefit plans, the offset against the ARC could not independently survive. We do note, however, that given our holdings regarding the exclusive-benefit rule and prohibited-transaction rule, even the Retirement Commission itself could not have employed the offset at issue.

and the prohibited-transaction rule in MCL 38.1133(6)(c). That said, we deem it necessary to carefully spell out the effect of our ruling on the various paragraphs in WCCO, §§ 141-32 and 141-36, which sections we are not invalidating in their entirety, and to also engage in some additional analysis on arguments not framed in terms of the offset issue. Notably, WCCO, § 1-17, provides that "[e]ach chapter, article, division or section or, whenever divisible, subsection of this Code is hereby declared to be severable; and the invalidity of any chapter, article, division, section or divisible subsection shall not be construed to affect the validity of any other chapter, article, division, section or subsection of this Code."

As discussed earlier, the language in WCCO, § 141-32(c) and (d), which concern Retirement Commission criteria for making 13th-check distributions, had been part of the IEF ordinance from the beginning; the 2010 ordinance did not alter the language, and the language has not been challenged by plaintiffs. Accordingly, those provisions are left untouched by our ruling. With respect to WCCO, § 141-32(f), this provision explores the possibility of reimbursement of the $32 million and is rendered moot by our ruling.

We next address WCCO, § 141-32(e), which was added by the 2010 ordinance, and which provides that nothing in the IEF ordinance "preclude[s] *the County* from reducing or eliminating its contribution for a fiscal year in which defined benefit assets exceed defined benefit liabilities." (Emphasis added.) As noted earlier, this is a surplus provision that allows for an offset when a defined benefit plan is overfunded. We conclude, on the basis of a concession by defendants, that this provision is invalid under MCL 38.1140m, but only to the extent that it makes the exercise of an offset a decision for the County and not the

Retirement Commission. We find no reason to void the remaining language in WCCO, § 141-32(e), which is indisputably legally sound. MCL 38.1140m sets forth the Retirement Commission's authority to determine an ARC through an actuary, and, once again, it also provides that, "[i]n a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability." Defendants' main contention in regard to MCL 38.1140m is that it only concerns defined benefit plan assets and associated ARCs, not a reserve such as the IEF, for which there is no ARC; therefore, the statute neither addresses nor bars the offset provided for in the 2010 ordinance. Defendants state that, with respect to the offset language in MCL 38.1140m, it is defined benefit plan assets "that may be used, *in the Retirement Commission's discretion*, to offset the County's ARC when the *Defined Benefit Plans* are overfunded." (Initial emphasis added.) Accordingly, with respect to WCCO, § 141-32(e), we must conclude that defendants would agree that the reference to "the County" being able to reduce or eliminate its ARC for a fiscal year when there is a surplus in defined benefit plan assets is inconsistent with MCL 38.1140m's offset provision, as the decision to allow an offset, according to defendants, is for the Retirement Commission. Given defendants' statement, we decline to independently determine whether MCL 38.1140m solely leaves an offset decision to the Retirement Commission at times of surplus relative to defined benefit plan assets and liabilities. We take no position on the matter, and this opinion is not to be construed as endorsing defendants' position.

In regard to WCCO, § 141-32(b)(3), which sets forth the debit from the IEF, the credit to the defined benefit plan assets, and the offset, it is invalidated as being in

violation of and in direct conflict with PERSIA.[29] Similarly, we invalidate, under PERSIA, the language in WCCO, § 141-36(a)(2), that provides for the reduction or elimination of the ARC pursuant to the offset in WCCO, § 141-32. In regard to WCCO, § 141-32(b)(1), which addresses the formula for determining how much to credit or allocate to the IEF at the end of a fiscal year, the 2010 ordinance amended the formula language and changed the "shall credit" terminology to "may credit." These changes have not been challenged by plaintiffs; therefore, we leave them intact. However, WCCO, § 141-32(b)(1), also has a prefatory clause subjecting the IEF funding calculation to the $12 million limit, which is found in WCCO, § 141-32(a). With respect to the $12 million IEF balance cap, as well as the $5 million cap on the distribution of IEF assets to retirees by the Retirement Commission, which is found in WCCO, § 141-32(b)(2),[30] the

[29] We note that count II of the County's counterclaim asserted in part that even if the offset is determined to violate PERSIA, the debiting of the $32 million from the IEF and crediting of that amount to the defined benefit plan assets could survive invalidation of the offset. In other words, $32 million should still be added to the defined benefit plan assets and removed from the IEF, but the County would simply not be able to receive the $32 million ARC offset and savings. To the extent that this opinion has not already disposed of this argument, we reject it, as the County would still receive a benefit by additional funds being allocated to the defined benefit plan assets. Indeed, in the context of the County's cross-appeal and its argument that it has standing to raise fiduciary-duty claims, the County contends that it incurred a special injury and had a substantial interest that was detrimentally affected because of the effect on the ARC when the Retirement Commission failed to allow more funds to remain with the defined benefit plan assets, instead funneling the money to the IEF under its discretionary authority. Additionally, the shift of IEF funds to the defined benefit plan assets totally ignored the prior controlling versions of the IEF ordinance and the intent manifested therein. The transferred excess IEF assets must be reallocated back to the IEF and used for the purpose intended.

[30] WCCO, § 141-32(b)(2), also provides that, subject to the $5 million cap, "[t]he Retirement Commission shall establish the portion of the . . .

County had alleged in its counterclaim that should it be determined that the offset is invalid under MCL 38.1140m, the IEF dollar caps themselves could nonetheless survive scrutiny.

Although we have not invalidated the offset pursuant to MCL 38.1140m, we agree that the IEF dollar caps are generally sustainable with one important restriction. The $12 million cap on the IEF's balance absolutely cannot be employed in relationship to the approximately $44 million that was in the IEF, as previously allocated, at the time the 2010 ordinance was enacted. This conclusion must be reached given our holding regarding the offset and our determination that the excess $32 million could not legally be transferred to the defined benefit plan assets or elsewhere and should have remained part of the IEF until disposed of by the Retirement Commission according to the 13th-check program. Our holding today effectively results in the $32 million that was offset against the County's ARC being returned, restored, or credited to the IEF, with the County being required to satisfy its ARC obligations absent consideration of that $32 million. However, we conclude that the $12 million IEF limitation can operate prospectively and in a manner that does not infringe on the Retirement Commission's right to use the preexisting $44 million in the IEF for 13th-check distributions as intended and envisioned. A proper prospective application of the $12 million IEF limitation would entail limiting future funding of the IEF until it dropped below $12 million, which is exactly how WCCO, § 141-32(b)(1), operates and is presently structured, where it provides the formula for annual funding of the

---

[IEF] available for distribution to retired members and survivor beneficiaries[.]" This general discretionary language is consistent with the prior version of the IEF ordinance and is not challenged by plaintiffs.

IEF, subject to the $12 million IEF balance limit. Accordingly, WCCO, § 141-32(b)(1), remains wholly intact and WCCO, § 141-32(a)—the provision setting forth the $12 million IEF limit—also remains in effect, but with the caveat that the limit is inapplicable in regard to the previously existing $44 million (or $32 million excess) until those IEF assets are first reduced down to $12 million.[31] With respect to the $5 million dollar IEF distribution limit found in WCCO, § 141-32(b)(2), it is already prospective in nature, operating to limit disbursements made after the 2010 ordinance became effective.

With regard to any arguments that might conflict with our position on the $5 million and $12 million IEF caps, plaintiffs have not focused on challenging those limitations in and of themselves, instead building their arguments more around the offset and the $32 million reduction in the IEF. To the extent that plaintiffs' constitutional and statutory arguments can be construed to challenge the IEF dollar restrictions, absent contemplation of any offset, we remain of the view that the caps are legally sound. From the inception of the IEF, there have always been restrictions on the funding of the IEF with investment earnings, considering that a formula controlled the amount of monies that flowed into it. And with respect to IEF distributions by way of 13th checks, up until the enactment of Wayne County Enrolled Ordinance No. 2000-536 when it was left entirely to the Retirement Commission's discretion, the Retirement Commission was restricted in doling out

[31] We appreciate that return of the $32 million to the IEF might not bring it up to $44 million depending on any IEF disbursements made in the interim. Also, throughout this opinion we have used rounded or approximated numbers, but, for purposes of remand and implementation of our ruling, exact dollar amounts must of course be used.

13th checks to 20 to 50 percent of the IEF balance. The current restrictions, although in different form, are comparable.

Application of the $5 million *prospective* limitation on IEF disbursements, as well as the $12 million *prospective limitation* on the IEF's balance, simply does not result in any impairment or diminishment of accrued financial benefits for purposes of Const 1963, art 9, § 24. Individual retirees and survivor beneficiaries have never been legally or contractually entitled to a 13th check under the IEF ordinance, let alone a particular amount, so the $5 million IEF distribution cap is not constitutionally offensive. And while we have indicated that the IEF can be viewed as a vested reserve belonging and in relationship to the Retirement System's participants as a whole for purposes of 13th checks, the $5 million cap honors that status by still allowing the payment of 13th checks from the IEF, controlling the flow but only to a limited degree. And as long as the $12 million IEF balance cap is applied prospectively as directed in this opinion, there would likewise be no unconstitutional impairment or diminishment.

With respect to PERSIA, MCL 38.1140m appears to only address ARCs relative to defined benefit plans, along with the Retirement Commission's role in determining ARCs, which matters have no relevance to the IEF caps. Next, MCL 38.1133(2) empowers the investment fiduciary to invest, reinvest, hold in nominee form, and manage assets of a system. And as we previously acknowledged, the Retirement Commission oversees the operational and administrative functions of the Retirement System. *Detroit Policemen & Firemen Retirement Sys Bd of Trustees*, 270 Mich App at 75; *Wayne Co Retirement Comm*, 267 Mich App at 234. We conclude that the placement of a prospective $12 mil-

lion cap on the balance of the IEF and $5 million restriction on IEF disbursements to retirees and survivor beneficiaries concerns retirement plan parameters and structural aspects of the plan that are legislative in nature and within the purview of the County Board. See MCL 46.12a (authorizing county boards of commissioners to adopt and establish retirement plans and to set financial parameters subject to limitations imposed by law). The dollar limitations or caps relate to defining the extent of the IEF benefit, which is precisely what the County has also done in the context of setting forth in the WCCO the rights of members relative to various defined benefit plans. For example, with respect to defined benefit plan number two, WCCO, § 141-20(d)(2), currently provides that "[t]he amount of county-financed pension shall not exceed 75 percent of average final compensation." And again, limitations on the funding of the IEF and disbursement of 13th checks had been part of the IEF program for years by way of formulas imposed by the County. The IEF limitations do not intrude on any of the powers assigned solely to the Retirement Commission. It is also important to note that the Retirement Commission still plays a significant role in determining IEF matters. Subject to the caps, the Retirement Commission "may credit" to the IEF the excess rate of investment return and "shall establish the portion of the . . . [IEF] available for distribution to retired members and survivor beneficiaries[.]" WCCO, § 141-32(b)(1) and (2). This language remains effective. Also, the Retirement Commission retains control over setting the criteria with respect to 13th-check disbursements. WCCO, § 141-32(c) and (d). In sum, the IEF caps contained in the WCCO, in regard to prospective application as explained above, stand.

Although we have held that the $5 million and $12 million IEF-related caps, as confined by our opinion,

survive plaintiffs' challenge, the County Board is of course free to vote to repeal or amend those provisions should the County Board feel that the invalidation of the offset circumvents the intent or purpose behind the surviving provisions.[32]

Another aspect of plaintiffs' appeal concerns that component of the 2010 ordinance that modified WCCO, § 141-36, in regard to the actuarial formula and amortization periods used to determine the defined benefit ARC. We hold that the language in WCCO, § 141-36, that was added to the section pursuant to the 2010 ordinance is invalid under MCL 38.1140m, which provides in relevant part:

> The required employer contribution is the actuarially determined contribution amount. An annual required employer contribution in a plan under this act shall consist of a current service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability. . . . Except as otherwise provided in this section, for fiscal years that begin after December 31, 2005, the required employer contribution shall not be determined using an amortization period greater than 30 years. . . . A required employer contribution for a plan administered under this act shall allocate the actuarial present value of future plan benefits between the current service costs to be paid in the future and the actuarial accrued liability. The governing board vested with the general administration, management, and operation of a system or other decision-making body of a

---

[32] For instance, the $12 million IEF balance limitation may have been arrived at in contemplation of the IEF's existing $44 million balance and the amount needed to satisfy the ARC, with the $5 million IEF distribution cap being set in relationship to the $12 million. The elimination of the offset, therefore, may call into question the continuing relevance of the dollar limitations. However, our role is restricted to determining the legality of the caps, and it is up to the County Board to decide whether it wishes to continue imposing the limitations absent the offset.

> system shall act upon the recommendation of an actuary and the board and the actuary shall take into account the standards of practice of the actuarial standards board of the American academy of actuaries in making the determination of the required employer contribution.

As to WCCO, § 141-36(a)(1)(A), the 35-year cap on the amortization period directly conflicts with the statutory language providing for a 30-year cap. Moreover, with respect to the remaining amortization caps added to WCCO, § 141-36, through enactment of the 2010 ordinance, they conflict with the Retirement Commission's *sole* discretion in calculating the ARC through employment of an actuary and consideration of actuarial standards of practice. *Detroit Policemen & Firemen Retirement Sys Bd of Trustees*, 270 Mich App at 82-85 (amortization periods in Detroit City Code conflicted with MCL 38.1140m, thereby directly interfering with the governing board's authority to decide the annual contribution, including a determination of amortization periods). As this Court explained:

> A plain reading of . . . MCL 38.1140m[] compels the conclusion that, while the amortization period is capped at no greater than 30 years at the end of 2005, the actuary and the Board have discretion, within that limit, to determine the appropriate amortization period. Indeed, the . . . language evidences the Legislature's intent to grant the Board the authority to determine the amortization period because it included limits (caps) in its grant of authority to the Board to determine the employer's annual contribution. Further, it is self-evident that, because the Board has the responsibility to determine the employer's annual contribution to the system and to ensure that the system is adequately funded, an integral element of that calculation is how much the city must annually contribute to pay down its unfunded liabilities. Again, how long those liabilities are amortized, according to the calculations of the actuary,

> directly affects the adequacy of the system funding and the amount Detroit must pay each year.
>
> Because MCL 38.1140m authorizes the Board to set the annual amortization periods, the statute conflicts with Detroit City Code, § 54–2–6, which dictates that, after 1974, the amortization period shall decrease one year each year from 30 years to 20 years and that, once the period reaches 20 years, the amortization rate shall remain at 20 years. Therefore, under the ordinance, by 1984, the amortization period would be 20 years and remain 20 years regardless of whether the Board and an actuary conclude that Detroit's contribution should be different. [*Id*. at 82-84.]

Accordingly, the County Board here acted outside of its authority by involving itself in actuarial ARC matters and the setting of amortization caps.[33]

2. CROSS-APPEAL—THE COUNTY'S COUNTERCLAIM

On cross-appeal, the County argues that the trial court erred by denying its motion for summary disposition and granting plaintiffs' motion for summary disposition with respect to count III of the County's counterclaim alleging breach of fiduciary duties. The County contends that the Retirement Commission owes fiduciary duties under state law and the WCCO. The County maintains that the Retirement Commission breached its fiduciary duties by holding the IEF harmless from investment losses, by making 13th-check distributions to ineligible defined contribution plan

[33] We note that the second sentence in WCCO, § 141-36(a)(2), was also added by the 2010 ordinance. It provides that "[t]he actuarial cost method shall be one which produces a contribution requirement not less than the contribution requirement produced by the individual entry-age normal cost method." Plaintiffs cursorily challenge this provision as an invasion of the Retirement Commission's authority and discretion in calculating, through an actuary, the ARC. We agree on the basis of MCL 38.1140m and its construction in *Detroit Policemen & Firemen Retirement Sys Bd of Trustees*, 270 Mich App at 82-85.

retirees, and by failing to maintain and implement written policies related to the management of the IEF. The County further argues that the Retirement Commission breached its fiduciary duties by, without any regard to the underfunded status of the defined benefit plans, setting the IEF investment return threshold rate at an unacceptable level, over-allocating funds to the IEF, and making large 13th-check distributions. The trial court ruled that there was no genuine issue of material fact that the Retirement Commission had discharged its duties in a manner consistent with MCL 38.1133(3). The trial court indicated that, although the County may disagree with the decisions made by the Retirement Commission, the County failed to present evidence indicating that the Retirement Commission breached its fiduciary duties.

We note that plaintiffs raise an unpreserved argument that the County lacked standing to present claims concerning the fiduciary duties of the Retirement Commission, because those duties are owed to members and plan participants and not the County. MCL 38.1133(3) does provide that "[a]n investment fiduciary shall discharge his or her duties solely in the interest of the participants and the beneficiaries[.]" We shall address the standing issue in the context of each of the fiduciary-duty claims. With respect to the preservation failure, we may overlook preservation requirements when an issue of law is raised and the facts necessary for its resolution have been presented, as is the case here. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

(a) FIDUCIARY DUTY PRINCIPLES AND INITIAL OBSERVATIONS

With respect to the issue of fiduciary duties under PERSIA, MCL 38.1133(3) provides in relevant part that an investment fiduciary shall:

(a) Act with the same care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with those matters would use in the conduct of a similar enterprise with similar aims.

* * *

(f) Prepare and maintain written objectives, policies, and strategies with clearly defined accountability and responsibility for implementing and executing the system's investments.

Similarly, WCCO, § 141-35(h), provides that, "[i]n exercising its discretionary authority with respect to the management of the assets of the retirement system, the retirement commission shall exercise the care, skill, prudence, and diligence, under the circumstances then prevailing, that an individual of prudence acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and similar objectives."

In analyzing the arguments raised by the County, we must, under MCL 38.1133(3), view the arguments in the context of whether the Retirement Commission discharged its duties and acted with the appropriate level of care, skill, prudence, and diligence relative to the best interests of the participants and beneficiaries, not defendants. The underlying premise of the County's fiduciary-duty claims is that priority had to be given to the care, viability, funding, and sustainability of the defined benefit plans over the IEF, given that payment of defined benefit pensions is obligatory, guaranteed, and constitutionally safeguarded, as opposed to the discretionary IEF distributions, which are bonus-like in nature. For the sake of argument, we shall assume the validity of that premise and proceed with our analysis.

(b) IEF AND INVESTMENT LOSSES

There is no dispute that IEF and defined benefit plan assets are pooled and invested together. The County points out that in some years there were large investment losses, such as $155 million in 2008 and $22 million in 2009.[34] This resulted in a reduction, according to the County, in the funded status of the defined benefit plans.[35] The County argues that, despite the fact that IEF monies were used for investment purposes, 100 percent of the investment losses were allocated to the defined benefit plans by the Retirement Commission, with the IEF being immune to the losses and held harmless. The County notes that the Retirement Commission even made millions of dollars in 13th-check disbursements during the years of heavy investment losses. In requests for admissions, plaintiffs conceded "that the IEF does not share in investment losses of the Retirement System." The County argues that the Retirement Commission breached its fiduciary duties by failing to allocate losses in proportion to and correlation with the IEF's percentage of the investment pool. For example, if defined benefit plan assets constituted 90 percent of the investment pool and IEF assets made up the remaining 10 percent, it would be prudent, in

[34] Plaintiffs note that those losses related to the return on the *market value* of assets, -15.20 percent for 2008 and -2.60 percent for 2009, and that with respect to the return on the *funding (actuarial) value* of the assets, which is used for purposes of the IEF formula, the numbers were 5.50 percent and 1.60 percent, respectively. This distinction would appear to create a disconnect in the logic of the County's argument.

[35] The following numbers reflect the funded percentage of the defined benefit plans over the years: 1986 — 92.61; 1987 — 90.46; 1988 — 92.65; 1989 — 94.86; 1990 — 94.49; 1991 — 100.52; 1992 — 95.85; 1993 — 96.41; 1994 — 97.77; 1995 — 94.24; 1996 — 100.00; 1997 — 100.54; 1998 — 97.04; 1999 — 105.51; 2000 — 108.56; 2001 — 106.38; 2002 — 103.22; 2003 — 98.90; 2004 — 94.83; 2005 — 91.96; 2006 — 89.43; 2007 — 81.05; 2008 — 73.58; 2009 — 67.23.

regard to a $100 million investment loss, to allocate $10 million in losses to the IEF, reducing its assets by that sum. The County complains that the Retirement Commission's failure to fairly allocate losses to the IEF inappropriately forced a greater percentage of the losses on the defined benefit plan assets, depleting the plan. The County maintains that the Retirement Commission's actions resulted in a *de facto* transfer of funds to the IEF even in years in which the IEF funding formula would not permit a credit to the IEF, thereby violating the IEF.

For purposes of this particular argument, we shall assume that the County has standing. As plaintiffs alluded, we note that while the IEF does not share in investment losses, it also does not necessarily proportionately share in investment gains. Only when the actual rate of return on the funding value of assets exceeds the threshold rate of return set by the Retirement Commission does the IEF enjoy the addition of new assets. And in a year in which there is an investment gain but the rate of return does not exceed the threshold rate, nothing flows into the IEF, even though IEF assets, pooled together with defined benefit plan assets, had all been invested together and saw a gain; the defined benefit plans are allocated all of the gains, with none going to the IEF.

We are not prepared to hold that the Retirement Commission had a fiduciary duty to allocate investment losses to the IEF. The IEF ordinance, which governs all the aspects or components of the IEF, has always been silent in regard to investment losses, except in the sense that if there were investment losses, no funds could be allocated to the IEF for the given year. The IEF ordinance, in its various versions, contemplated funding of the IEF only where the actual rate of return on invest-

ments exceeded the threshold rate set by the Retirement Commission. With a focus on the interests of the participants and beneficiaries, and assuming the preeminence of defined benefit plan assets in comparison to IEF assets, there perhaps is a logical argument that a fiduciary duty would entail proportionally allocating investment losses to the IEF. The problem with that position, in our view, is that were the Retirement Commission to allocate investment losses to the IEF, a disgruntled retiree who received a diminished 13th check could reasonably argue that the Retirement Commission violated the IEF ordinance, when it simply does not provide for depletion of the IEF on the basis of investment losses. A rational construction of the IEF ordinance is that it already takes into account a poor investment year by prohibiting a credit to the IEF if the threshold rate of return is not met and that, therefore, the intent of the County Board with regard to bad investment years was to go no further in harming the IEF than simply denying it funding for the year. And again, the IEF does not always enjoy an influx of assets even if there is a positive rate of return, despite IEF assets being part of the investment pool. It would have been quite simple for the County Board to include language in the IEF ordinance requiring an allocation of investment losses to the IEF, but this was never done. The County argues that the IEF ordinance is not the end-all and does not expressly prohibit allocation of investment losses to the IEF. We, however, conclude that a loss allocation could reasonably be construed as a violation of the IEF ordinance, such that we cannot conclude that the Retirement Commission had a fiduciary duty to make IEF loss allocations. Accordingly, we conclude that this particular fiduciary duty claim fails as a matter of law.

(c) DISCRETIONARY IEF MATTERS AND UNDERFUNDED STATUS OF DEFINED BENEFIT PLANS

The County next argues that the Retirement Commission breached its fiduciary duties by failing to use reasonable care and prudence in setting the threshold investment rates of return for purposes of funding the IEF during years when the defined benefit plans were underfunded. The premise of this argument is that if the Retirement Commission set a higher threshold rate in a given year, a smaller amount of funds, if any, would have been credited to the IEF, thereby leaving more money for the defined benefit plans, which were in need of the money considering their underfunded status. The County also maintains that the Retirement Commission breached its fiduciary duties by failing to use reasonable care and prudence when it came to its authority to credit only a "portion of the excess" of investment earnings to the IEF under the IEF formula, which discretion was first granted to the Retirement Commission in 2000 pursuant to Wayne County Enrolled Ordinance No. 2000-536. The documentary evidence reflected that despite the Retirement Commission's flexibility since 2000 to only credit a portion of the excess investment earnings to the IEF, the full amount of the excess, when it existed, was credited entirely to the IEF by the Retirement Commission. The County asserts that, during times when the defined benefit plans were underfunded, the Retirement Commission had a fiduciary duty to exercise its discretion by limiting the amount of excess investment earnings credited to the IEF, thereby leaving more money for the needy defined benefit plans.

For purposes of the threshold-rate and portion-of-the-excess arguments, we shall assume that the County had standing. With respect to the substance of the two

arguments, the County focuses on those years after 2002 when the funded status of the defined benefit plans decreased steadily. In 2002, the defined benefit plans were 103.22 percent funded, and the percentage fell to 98.90 percent in 2003, decreasing a little bit more each year thereafter until reaching 67.23 percent in 2009. From 2002 through 2005, the Retirement Commission set the threshold rate of return at 8 percent each year. From 2002 through 2005, no money whatsoever was credited to the IEF, as the actual rate of investment return on the funding value of assets each of those years was below 8 percent. The setting of a higher threshold rate of return would therefore have been irrelevant during this period. Also, because of this fact, there was no need to exercise any discretion with respect to limiting the IEF allocation to only a portion of the excess investment earnings; there was no excess. Accordingly, if the County's argument is any way predicated on the years 2002 through 2005, it must fail.

After four straight years in which no money was added to the IEF, the Retirement Commission bumped up the threshold rate of return to 9 percent in 2006, which did produce a $10.6 million allocation to the IEF, where the actual rate of return was 10.35 percent, the excess rate was 1.35 percent, and the actuarial pension value was $789.5 million. In 2007, the Retirement Commission retained the 9 percent threshold rate, which produced a $23.2 million allocation to the IEF, where the actual rate of return was 11.74 percent, the excess rate was 2.74 percent, and the actuarial pension value was $848.7 million. As reflected in the numbers, in 2006 and 2007, the Retirement Commission did not exercise its discretion by way of limiting the excess investment earnings credited to the IEF to only a "portion of the excess." In 2008, the threshold rate of return was kept at 9 percent, but the actual rate of

return was 5.51 percent, so there was no allocation of assets to the IEF. In 2009, the threshold rate of return was once again set at 9 percent by the Retirement Commission. Because the actual rate of return was 1.59 percent, there was again no money credited to the IEF. Given these circumstances, the only possible years in which the Retirement Commission may have breached its fiduciary duties were 2006 and 2007, years in which the defined benefit plans were funded, respectively, at 89.43 percent and 81.05 percent.

We hold, as a matter of law, that reasonable minds would not differ in concluding that the Retirement Commission did not breach its fiduciary duties as argued by the County. There is no genuine issue of material fact, and the Retirement Commission is entitled to judgment as a matter of law. In regard to the threshold-rate argument, in and of itself, the Retirement Commission would have had to set the rate above 10.35 percent in 2006 and above 11.74 percent in 2007 in order to eliminate any IEF funding, which would have been a significant increase from the 8 percent in 2005. Regardless, the threshold rate argument is essentially subsumed in the portion-of-the-excess argument, which gave the Retirement Commission the discretion to, for the most part, disregard an excess rate of return by limiting the IEF funding to a portion of the excess.[36] After four straight years, 2002 to 2005, of absolutely zero funds being credited to the IEF, the Retirement Commission permitted a grand total of $33.8 million to pass to the IEF in a two-year period, which was modest by past comparisons and followed by two more years of

---

[36] The word "portion" would suggest that the Retirement Commission could not prevent 100 percent of the excess investment earnings from passing to the IEF, but could block all but a penny. See *Random House Webster's College Dictionary* (2001) (defining "portion" as "a part of a whole").

no additions to the IEF. There were six out of eight years in which the IEF received no funding. And while it is true that the defined benefit plans were underfunded in 2006 and 2007 and that 13th-check disbursements were made both years, in amounts lower, we note, than those made in the previous nine years, we cannot conclude, when viewed in context and in relationship to the years of no IEF funding, that allowing some funds to reach the IEF for a couple of years was financially imprudent. Assuming the supremacy of the defined benefit plans for purposes of a fiduciary duty, the Retirement Commission still had a fiduciary duty to provide some level of financial care to the IEF, assisting retirees and survivor beneficiaries in fighting inflation and paying bills. Also, the actuarial value of the pensions in 2006 was $789.5 million and $848.7 million in 2007, and the addition of $10.6 million in IEF assets in 2006 and $23.2 million in 2007 would have resulted in a minuscule change in the underfunded status of the defined benefit plans.[37]

Next, the County contends that the Retirement Commission breached its fiduciary duties by issuing 13th checks from the IEF without regard to the underfunded status of the defined benefit plans. As reflected earlier in this opinion, millions of dollars in IEF disbursements were made by the Retirement Commission every single year for the life of the IEF program, including years

[37] Although not argued by the Retirement Commission, we are troubled by the timing of the County's counterclaim. The counterclaim was filed on January 31, 2011, and the County is complaining about fiduciary breaches in 2006 and 2007, which would have been known at the time for purposes of accrual. The statute of limitations for breach of a fiduciary duty is three years. MCL 600.5805(10); *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005); *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977).

when the defined benefit plans were underfunded. We initially conclude that the County lacks standing with respect to this particular claim. Standing can exist when a "litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large[.]" *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). This issue is different from the ones pertaining to the threshold rate of return and the discretion to limit excess investment earnings from being allocated to the IEF, which directly affected the amount of assets available for the defined benefit plans. With respect to IEF distributions or disbursements of 13th checks, the assets are already part of the IEF and not subject to being returned for use in the defined benefit plans. For example, in fiscal year 1991, the balance of the IEF at the beginning of the year was $22,678,161; the addition to the IEF at the end of that fiscal year under the formula was $21,747,734, giving a total balance of $44,425,895; and 13th-check disbursements totaled $5,992,439, leaving a balance of $38,433,456. Had the Retirement Commission instead disbursed only $3 million in 13th checks, the ending IEF balance would of course be higher, $41,425,895, but that would have no direct effect on the amount of defined benefit plan assets; the IEF disbursements only affected the IEF balance. The amount of any decrease in total disbursements would not flow back to the defined benefit plans; therefore, a reduction in IEF disbursements would not in turn require lesser contributions by the County. There is no special injury, nor is a substantial interest at stake. The appropriate party for pursuing a claim based on imprudent 13th-check disbursements would be a retiree or survivor beneficiary concerned with the solvency of the IEF program and the availability of future 13th checks.

Moreover, a review of the total annual 13th-check distributions made over the years in conjunction with examination and consideration of the amount of available assets in the IEF in a given year plainly shows that, as a matter of law, the County acted prudently and exercised reasonable care in maintaining the fiscal soundness of the IEF. The Retirement Commission never disbursed unreasonable percentages of existing IEF balances.

(d) RETIREE ELIGIBILITY FOR 13TH CHECKS

The County next argues that the Retirement Commission breached its fiduciary duties by making 13th-check distributions to ineligible defined contribution plan retirees. Under WCCO, § 141-21(c), which addresses the defined contribution plan, "[t]he retirement commission may pay the pension from the retirement system or purchase an annuity." The focus of the parties' arguments here is on whether a defined contribution plan retiree who has annuitized his or her benefits can properly receive 13th-check distributions, when the IEF program is designed solely for those participating in a defined benefit plan. We decline to address the substance of this issue because the County has no standing to make its argument. Consistent with our standing ruling in regard to total 13th-check distributions in years where the defined benefit plans were underfunded, there is no special injury, nor is a substantial County interest at stake. Assuming 13th-check disbursements should not have been made to certain retirees because they had only participated in the defined contribution plan, it would either have increased the amount of available assets in the IEF or perhaps slightly increased the disbursements to eligible retirees and survivor beneficiaries with no change in

the total disbursements and IEF balance. Any assumed savings would have been enjoyed by the IEF itself or eligible retirees and survivor beneficiaries and would not have been passed on to the defined benefit plans. Absent an effect on the defined benefit plan assets, there would be no correlative effect on the County's contributions. The proper party to pursue a fiduciary duty claim on the basis of 13th-check payments to ineligible retirees would be eligible retirees or survivor beneficiaries whose 13th-check payments were threatened or diluted by the allegedly improper distributions.[38]

(e) WRITTEN POLICES FOR THE IEF

The County argues that the Retirement Commission breached its fiduciary duties by failing to maintain and implement written policies related to the management of the IEF. The County essentially takes all the other fiduciary-duty claims addressed earlier and contends

[38] In relationship to our earlier standing analysis regarding the total amount of 13th-check distributions, claimed by the County to be imprudently high, and in regard to distributions to possibly ineligible defined contribution plan retirees, it is conceivable that less demand on the IEF, assuming imprudent decision-making by the Retirement Commission, would have led to discretionary acts by the Retirement Commission to stem the stream of funds into the IEF, leaving more for the defined benefit plans and less of an ARC. However, this position is so speculative and tenuous that we refuse to apply it to conclude that the County has standing. Additionally, if there had been smaller or fewer IEF disbursements, the IEF balance would have been higher, increasing the amount of the overall investment pool, and with investment gains being allocated chiefly to the defined benefit assets, it could be argued that the County had a sufficient interest in smaller or fewer IEF disbursements. However, given market volatility and downturns, the allocation of some investment earnings to the IEF, and the huge disparity between the amount of IEF assets and defined benefit plan assets, any County interest in smaller or fewer IEF disbursements is insufficient and overly speculative for purposes of standing.

that the Retirement Commission should have had written policies in place in relationship to the subject matter of the claims, e.g., "holding the IEF harmless from investment losses[.]"

Again, MCL 38.1133(3)(f) provides that the investment fiduciary shall "[p]repare and maintain written objectives, policies, and strategies with clearly defined accountability and responsibility for implementing and executing the system's investments." This provision governs *investment* activities, and we question whether the IEF-related arguments posed by the County actually concern investment decision-making. The County, recognizing this in part, claims that there should nonetheless be a fiduciary duty to implement written policies concerning the IEF because it would be generally prudent for an investment fiduciary to do so. We decline the County's invitation to demand more than PERSIA in the context of the particular matters about which the County claims a written policy should exist. A written policy on how to address and allocate investment losses with respect to the IEF seems nonsensical, as the only question is whether such allocation should occur and a reasonable construction of the IEF ordinance would prohibit it. The County is demanding written policies on IEF discretionary matters that do not tend to lend themselves to written policies or that do not require written policies. A more appropriate course would be for the County Board to amend the IEF ordinance to address the concerns raised by the County. On those matters upon which we found a lack of County standing, e.g., complaints about the amount of total annual IEF disbursements, the same standing holding would equally apply in regard to written policies on the matter. On those matters not previously rejected on a standing analysis, we do find a lack of standing with respect to the County's argument that written policies

in relationship to those matters should have been implemented, e.g., a written policy with respect to the threshold rate of return. Because we could only speculate in regard to what the Retirement Commission would have included in a written policy, finding a special injury or substantial interest would be equally speculative. The proper party with standing is a participant or beneficiary to whom fiduciary duties are owed under PERSIA.

The County has failed to convince us that a fiduciary duty exists relative to written policies, that there was any breach of a presumed fiduciary duty, or that the County has standing on the issue.

(f) ADDITIONAL ISSUES

The County argues that the trial court erred by failing to address its argument that the Retirement Commission violated the first clause of Const 1963, art 9, § 24, by diminishing and impairing accrued financial benefits through the mismanagement of the Retirement System's assets. The County asserts that the failure by the Retirement System to prioritize the funding of the defined benefit plans as opposed to the IEF resulted in fewer defined benefit plan assets, which are designated to pay accrued financial benefits. The alleged mismanagement alluded to by the County consists of the acts or omissions addressed earlier in connection with the breach of fiduciary-duty claims, which now serve as the predicate for the County's assertions under Const 1963, art 9, § 24. We first note that, even though the County raised this issue for purposes of summary disposition, count III of the counterclaim makes no mention of a constitutional violation. Regardless, the constitutional claim fails as a matter of law. With respect to the constitutional claim

based on the fiduciary duty arguments for which we found a lack of standing, the same analysis and conclusion applies. In regard to the remaining arguments underlying the constitutional claim, we hold that there was no actual diminishment or impairment of defined benefit assets when the Retirement System, acting under a construct created by the County Board in the IEF ordinance, merely allowed certain investment earnings to flow into the IEF instead of cutting the flow and permitting those earnings to be stockpiled with existing defined benefit plan assets. If one were to take the County's rationale to its logical end, the whole IEF program itself would be unconstitutional.

Finally, the County argues that the trial court erred by failing to order plaintiffs to pay their attorney fees and costs with IEF assets as opposed to defined benefit plan assets. The County maintains that, win or lose on appeal, the attorney fees and costs incurred by plaintiffs must come from the IEF, as the lawsuit primarily concerned the IEF. The trial court did not directly address this issue, instead simply ruling that no party was entitled to the payment of attorney fees by the opposition. We find the County's argument to be factually and legally undeveloped, and we decline to address the issue. The County provides no legal authority or analysis in support of its cursory single-page argument that the payment of plaintiffs' attorney fees and costs should come from the IEF. As stated by our Supreme Court in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his

position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [Citation omitted.]

IV. CONCLUSION

We hold that plaintiffs established, as a matter of law, violations of PERSIA's exclusive-benefit rule embodied in MCL 38.1133(6), PERSIA's prohibited-transaction rule found in MCL 38.1133(6)(c), and, under MCL 38.1140m, PERSIA's directive giving the Retirement Commission sole authority, through an actuary, to devise and calculate the ARC formula. On the basis of these PERSIA violations, we invalidate and strike down those provisions in the 2010 ordinance, as codified in WCCO, §§ 141-32 and 141-36, regarding the transfer or reallocation of IEF assets, the offset, the amortization caps and ARC formula, the potential reimbursement of the $32 million IEF excess, and the County's control over an offset decision relative to true defined benefit plan surpluses. The net effect of our ruling is that the excess IEF assets amounting to approximately $32 million must be debited from the defined benefit plan assets and allocated or credited back to the IEF in the accounting records, with the County being left responsible to comply with its ARC obligations absent consideration of the $32 million offset. However, we also hold that the remaining provisions in the 2010 ordinance are sound and remain intact, including the IEF funding and disbursement caps, as prospectively limited. Accordingly, with respect to plaintiffs' challenge of the 2010 ordinance and the trial court's ruling, we affirm in part and reverse in part. Finally, we hold that the trial court did not err by summarily dismissing the County's fiduciary-duty claims, nor is there a basis to reverse on peripheral matters raised in the County's cross-appeal

related to Const 1963, art 9, § 24, and payment of attorney fees and costs with IEF assets.

Affirmed in part, reversed in part, and remanded for proceedings and entry of judgment consistent with this opinion. We do not retain jurisdiction. As a public question was involved in this appeal, we decline to award taxable costs pursuant to our discretion under MCR 7.219(A).

O'CONNELL and BECKERING, JJ., concurred with MURPHY, C.J.

In re MOSS

Docket No. 311610. Submitted February 13, 2013, at Detroit. Decided May 9, 2013, at 9:05 a.m. Leave to appeal denied, 495 Mich ___.

The Department of Human Services (DHS) petitioned the St. Clair Circuit Court, Family Division, for the termination of A. Vega's parental rights to her youngest daughter and her son. The court, Elwood L. Brown, J., found that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood of harm if child returned to parent's home) and that termination would be in the children's best interests. Respondent appealed the termination order.

The Court of Appeals *held*:

1. 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. The record showed that respondent's substance abuse affected her ability to provide proper care and custody for the children given that she had used drugs in the children's presence and took them with her to purchase drugs. She lived at a homeless shelter with the children, and there was no evidence that she would be able to provide suitable housing for them in the reasonably foreseeable future. Nor was there a reasonable expectation that she would be able to provide proper care and custody within a reasonable amount of time considering the children's ages. Respondent had a long history of mental illness that was difficult to manage, repeatedly experiencing psychotic episodes in which voices told her to harm her children. Although respondent was seeking treatment, previous attempts had been unsuccessful. She also testified about numerous problems in adjusting her medications to successfully control her symptoms. Additionally, there was a reasonable likelihood given respondent's conduct or capacity that the children would be harmed if returned to her home given her long history of substance abuse and mental illness. Respondent had had thoughts of harming her youngest daughter and had acted on those thoughts by attempting to suffocate her. The trial court found that the risk of harm to the children would be too great if respondent

went off her medication for any reason. The trial court did not clearly err by finding by clear and convincing evidence statutory grounds for termination under MCL 712A.19b(3)(g) and (j).

2. MCL 712A.19b(5) provides that if the trial court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court must order termination of parental rights and that additional efforts for reuniting the child with the parent not be made. Respondent argued that the trial court had to find by clear and convincing evidence that termination was in the children's best interests. While MCL 712A.19b clearly states that the statutory grounds for termination must be proved by clear and convincing evidence, it does not provide a standard of proof for the best-interest determination. Normally, the Legislature's failure to spell out a standard of proof would require application of the preponderance of the evidence standard. Termination-of-parental-rights cases are not strictly civil cases, however, and determining the requisite standard of proof that due process requires for the best-interest determination necessitates applying the test developed in *Mathews v Eldridge*, 424 US 319 (1976). *Mathews* requires consideration of three factors: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

3. Under *Mathews*, whether termination of parental rights is in the child's best interests must be proved by a preponderance of the evidence rather than by clear and convincing evidence. With respect to the first *Mathews* factor, there are two private interests affected in a proceeding to terminate parental rights: (1) the parent's fundamental liberty interest in the care, custody, and management of the child and (2) the child's interest in a normal family home. The child and the parent share an interest in preventing erroneous termination of their natural relationship during the stage of the proceeding at which the state must establish a statutory ground for termination, thus favoring the use of error-reducing procedures such as the heightened standard of proof of clear and convincing evidence. Once the petitioner proves parental unfitness, however, the interests of the child and the parent diverge, and they may become adversaries because the child's interests in a normal family home align more with the state's interest in terminating parental rights and providing the

child with a stable home. Although the parent still has an interest in maintaining a relationship with the child, this interest is lessened by the trial court's determination that the parent is unfit to raise the child. The need for a heightened standard of proof is not present at the best-interest stage. With respect to the risk of an erroneous deprivation through application of a preponderance of the evidence standard, at the best-interest stage the child's interest in a normal family home is superior to any interest the parent has. Applying the clear and convincing standard of proof at the best-interest stage would benefit the parent but would be a detriment to the child because an erroneous finding that termination is not in the child's best interests would preserve the parent-child relationship of a parent who has been found unfit. Thus, a clear and convincing evidence standard does not adequately safeguard the child's interest in a normal family home. With respect to the final *Mathews* factor, the governmental interests are a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of termination proceedings. The use of a clear and convincing evidence standard at the best-interest stage could impose an increased financial burden on the state because additional evidence could be required to meet the higher standard of proof and impair the state's *parens patriae* interest in preserving and promoting the welfare of the child. In this case, respondent acted on her thoughts of harming her youngest daughter by attempting to suffocate her numerous times, brought the children with her while purchasing drugs, used crack cocaine in front of her son, and did not have stable housing. Her ultimate success regarding her substance abuse and mental health treatments was uncertain at best, and the DHS accordingly proved by a preponderance of the evidence that termination was in the children's best interests.

4. Under MCL 712A.19a(2), reasonable efforts must generally be made to reunite the parent and children unless certain aggravating circumstances exist. The DHS, however, is not required to provide reunification services when termination of parental rights is the agency's goal. Pursuant to MCR 3.977(E), termination is required at the initial disposition hearing and additional reunification efforts must not be ordered if (1) the original petition requested termination, (2) the trial court finds by a preponderance of the evidence that one or more of the grounds for assuming jurisdiction over the child under MCL 712A.2(b) was established, (3) the court finds on the basis of clear and convincing legally admissible evidence that one or more facts alleged in the petition are true and establish certain enumerated grounds for termina-

tion, and (4) termination is in the child's best interests. The DHS's initial petition requested termination, the trial court found by a preponderance of the evidence that there were grounds to assume jurisdiction, the trial court found by clear and convincing evidence that at least one ground for termination had been established, and the trial court found that termination was in the children's best interests. Therefore, all the requirements of MCR 3.977(E) were met, and no reunification efforts were required.

Affirmed.

WILDER, J., concurring, agreed that the trial court did not err by finding that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(g) and (j) and that termination was in the children's best interests, but disagreed that the due process balancing test of *Mathews* applied. Respondent did not raise a due process challenge on appeal. Even if a due process challenge had been properly raised, *Mathews* was inapplicable because once grounds for termination are established by clear and convincing evidence under MCL 712A.19b(3), a parent has no further liberty interest to protect and, thus, has no due process right to be affected. Judge WILDER concluded that this case should have been resolved solely in accordance with the relevant statutes and court rules. The plain language of MCL 712A.19b(5) indicates that a clear and convincing standard does not apply to the best-interest determination. Because MCR 3.977(E)(4), the court rule specifically applicable to this case, fails to provide a standard of proof relevant to a trial court's best-interest determination, the preponderance of the evidence standard provided in MCR 3.972(C)(1) applies.

TERMINATION OF PARENTAL RIGHTS — BEST-INTEREST DETERMINATION — STANDARD OF PROOF — PREPONDERANCE OF THE EVIDENCE.

MCL 712A.19b(5) provides that if the trial court finds that there is at least one ground for termination of parental rights under MCL 712A.19b(3) and that termination of parental rights is in the child's best interests, the court must order termination of parental rights and that additional efforts for reuniting the child with the parent not be made; whether termination of parental rights is in the child's best interests need be proved by only a preponderance of the evidence rather than by clear and convincing evidence.

Michael D. Wendling, Prosecuting Attorney, and *Timothy K. Morris*, Chief of Appeals, for petitioner.

John L. Livesay for respondent.

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

OWENS, J. Respondent appeals as of right an order terminating her parental rights to her youngest daughter and her son. The trial court found, for the reasons stated in the referee's findings of fact and conclusions of law, that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(g) and (j) and that termination would be in the best interests of the children. For the reasons set forth in this opinion, we affirm.

First, respondent argues that there was not clear and convincing evidence to terminate her parental rights pursuant to MCL 712A.19b(3)(g) and (j). 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 Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence. 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." *Id*. at 296-297.

The trial court terminated respondent's rights under MCL 712A.19b(3)(g) and (j), which provide as follows:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *

> (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 record shows that respondent's substance abuse affects her ability to provide proper care and custody for the children. Testimony showed that she used drugs in the presence of the children and that she took them with her to purchase drugs on at least one occasion. Respondent was also living at a homeless shelter with the children, and there was no evidence that she would be able to provide suitable housing for the children in the reasonably foreseeable future.

Moreover, the facts do not show that there is a reasonable expectation that respondent would be able to provide proper care and custody within a reasonable amount of time considering the children's ages. She has a long history of mental illness that has been difficult to manage. She repeatedly experienced psychotic episodes, including auditory hallucinations in which she was told to harm her children. Although respondent was seeking treatment, the testimony at trial established that previous attempts at treatment were unsuccessful. She had been admitted at least three times for psychiatric care at hospitals in Michigan, Illinois, and Florida, and respondent testified about difficulties arising when her medications ran out. She also testified about numerous problems in adjusting her medications to successfully control her symptoms.

In addition, the record shows that there is a reasonable likelihood, based on the conduct or capacity of respondent, that the children would be harmed if returned to respondent's home. Respondent has a long history of substance abuse and mental illness, and her treatment has been unsuccessful for both. At the termination hearing, it was undisputed that respondent had thoughts of harming her youngest daughter and that she acted on those thoughts by attempting to suffocate her. Although respondent testified that she no longer had thoughts of harming her daughter since she received the proper medication, the trial court found that the risk of harm to the children would be too great if respondent went off her medication for any reason. Furthermore, respondent's oldest daughter had previously been removed and placed in foster care because respondent had thoughts of harming her. The record shows that respondent falsified drug tests in order to regain custody and that after regaining custody, respondent continued to have thoughts of harming her daughter.

Given the facts of record, we conclude that the trial court did not clearly err in finding by clear and convincing evidence statutory grounds for termination under MCL 712A.19b(3)(g) and (j).

Next, respondent argues that petitioner failed to prove by clear and convincing evidence that termination of her parental rights was in the best interests of the children. We disagree. Although respondent asserts that the trial court must find by clear and convincing evidence that termination is in the best interests of the children, there is no statute, court rule, or caselaw requiring such. The statute clearly states that the statutory grounds for termination must be proved by clear and convincing evidence, but does not provide a

standard of proof for the best-interest determination. MCL 712A.19b(3) and (5). MCL 712A.19b(5) provides the following regarding the best-interest determination:

> If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.

Before it was amended by 2008 PA 199, the statute read:

> If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is *clearly* not in the child's best interests. [MCL 712A.19b(5), as amended by 2000 PA 232 (emphasis added).]

Accordingly, because of the statutory language at the time, our Supreme Court concluded that once the trial court finds that there are statutory grounds for termination, the trial court must terminate parental rights unless it finds by clear evidence that termination is not in the child's best interests. *Trejo*, 462 Mich at 354. However, because the statute as amended in 2008 does not include the term "clearly," the clear-evidence standard no longer applies to the best-interest determination.[1] Thus, the current statute does not provide a standard of proof. For the reasons that follow, we hold that the preponderance of the evidence standard applies to the best-interest determination.

---

[1] Assuming, without deciding, that "clear evidence" is similar to what is required under the clear and convincing evidence standard, the pre-2008 statute provided a heightened standard of proof to prevent termination rather than to permit termination.

Initially, we note that in civil cases, the Legislature's failure to spell out a standard of proof would usually require application of the preponderance of the evidence standard. *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993). However, termination-of-parental-rights cases are not strictly civil cases, as recognized by the United States Supreme Court in *Santosky v Kramer*, 455 US 745, 762; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Rather, they bear "many of the indicia of a criminal trial." *Id*. Further, the Michigan Court Rules, which are adopted by our Supreme Court, are silent on the standard of proof required for the best-interest determination, as is Michigan caselaw. See MCR 3.977(E)(4), (F)(1)(c), and (H)(3)(b). So in the absence of explicit Michigan law on the issue, we must determine whether the preponderance of the evidence standard can be constitutionally applied to the best-interest determination. To do so, we look for guidance in *Santosky*, the leading case from the United States Supreme Court regarding the requisite standard of proof in termination-of-parental-rights proceedings.

Santosky examined the constitutionality of the state of New York's parental-rights-termination statute. *Santosky*, 455 US at 748-749. Specifically, *Santosky* analyzed whether New York's statute, which authorized the trial court to terminate a parent's rights to the child if the state proved by a fair preponderance of the evidence that the parent had permanently neglected the child, satisfied the due-process requirements of the Fifth and Fourteenth Amendments. See *id*. at 748-751. At the time, New York's termination proceedings consisted of two parts: (1) a fact-finding hearing to prove permanent neglect and (2) a dispositional hearing to determine what placement was in the child's best interests. *Id*. at 748. Under New York's statute, once

the state established permanent neglect by a fair preponderance of the evidence at the fact-finding hearing, the parent's rights to the child could be terminated if termination was determined to be in the best interests of the child. *Id*. at 748-749.

To determine the requisite standard of proof that due process would require for the fact-finding stage of the termination proceeding, the Court weighed the three factors specified in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976). *Santosky*, 455 US at 758-768. *Mathews* stated that

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

First, the *Santosky* Court noted that the private interest affected in a termination proceeding is "commanding," because victory by the state at the fact-finding hearing declares the parent unfit to raise the child and makes termination of parental rights possible. *Santosky*, 455 US at 758-760. Thus, the private interest affected favors a heightened standard of proof. *Id*. at 761. Second, the Court determined that the risk of an erroneous termination of parental rights is severe and that a heightened standard of proof would alleviate that risk more than a preponderance of the evidence standard would. *Id*. at 764-765. Finally, the Court concluded that a heightened standard of proof would not impair the state's interests "in preserving and promoting the welfare of the child" and "in reducing the cost and

burden of such proceedings." *Id*. at 766-768. Thus, the Court held that the clear and convincing evidence standard is the minimal constitutionally mandated standard that must be applied at the fact-finding stage of termination proceedings. *Id*. at 769.

In Michigan, termination proceedings consist of two stages, which are identical in function to the New York stages discussed in *Santosky*. First, we apply a clear and convincing evidence standard to determine whether there are statutory grounds for termination. MCL 712A.19b(3); MCR 3.977(E)(3), (F)(1)(b), and (H)(3)(a). This stage in the termination proceeding is very similar to the fact-finding stage discussed in *Santosky*; we will refer to it as the statutory-grounds stage. See *Santosky*, 455 US at 748. Second, once a statutory ground for termination is established, the trial court must then determine whether termination is in the best interests of the child. MCL 712A.19b(5). This stage in the termination proceedings is also very similar to the dispositional stage that was briefly referred to in *Santosky*; we will refer to it as the best-interest stage. See *Santosky*, 455 US at 748. As was the case in New York, there is not an established standard of proof for the best-interest determination in Michigan, and *Santosky* did not address what standard of proof is constitutionally required at the best-interest stage of termination proceedings. Thus, to determine the requisite standard of proof for the best-interest determination that due process would require, like the *Santosky* Court did, we must apply the test developed in *Mathews*.

Under the first *Mathews* factor, there are two private interests affected in a proceeding to terminate parental rights: (1) the parent's fundamental liberty interest in the care, custody, and management of the child and (2) the child's interest in a normal family home. *Santosky*,

455 US at 758–759. At the statutory-grounds stage in a termination proceeding, the child and the parent "share a vital interest in preventing erroneous termination of their natural relationship" until the petitioner proves parental unfitness. *Id*. at 760. Thus, at the statutory-grounds stage, the use of error-reducing procedures, such as the heightened standard of proof of clear and convincing evidence, is favored. *Id*. at 760-761. However, the same is not true at the best-interest stage of a termination proceeding. This is because the interests of the child and the parent diverge once the petitioner proves parental unfitness. *Id*. at 760. During the best-interest stage of a termination proceeding, the child and the parent may become adversaries because the child's interests in a normal family home align more with the state's interest in terminating parental rights and providing the child with a stable home. See *id*. (noting that in New York, the trial court does not have to consider the parent's interests at the dispositional hearing to determine what is in the child's best interests). Although the parent still has an interest in maintaining a relationship with the child, this interest is lessened by the trial court's determination that the parent is unfit to raise the child. See *id*. at 760-761.

Further, the history of Michigan's termination-of-parental-rights statute indicates that the focus at the best-interest stage has always been on the child, not the parent. Before 1994, while the statute and court rules were silent regarding whether termination had to be in the child's best interests, caselaw held that a juvenile disposition, including termination of parental rights, must be made in the child's best interests. See *In re Franzel*, 24 Mich App 371, 377; 180 NW2d 375 (1970). In 1994, the statute was amended to add language requiring the trial courts to terminate parental rights once a statutory ground was proved, unless it was

clearly not in the best interests of the child. MCL 712A.19b(5), as amended by 1994 PA 264. Once the state presented clear and convincing evidence that at least one ground for termination was established, then "the liberty interest of the parent no longer include[d] the right to custody and control of the children." *Trejo*, 462 Mich at 355. Accordingly, termination was mandatory if a statutory ground was established unless the trial court determined that it was clearly *not* in the child's best interests. Thus, the focus was on the child's interests and not the parent's. Most recently, the statute was amended in 2008 to require the trial courts to find, in addition to a statutory ground, that termination of parental rights is in the child's best interests before termination may be ordered. See 2008 PA 199. Now, if the trial court finds that a statutory ground for termination is established *and* termination is in the child's best interests, then it must order termination of parental rights. MCL 712A.19b(5). However, to determine whether termination is in the child's best interests, the focus still remains on the child. Thus, it is clear that once a statutory ground for termination is established, the interests of the child and the parent no longer coincide, and the need for a heightened standard of proof is not present at the best-interest stage. See *Santosky*, 455 US at 760-761.

The second *Mathews* factor requires us to explore the risk of an erroneous deprivation of the child's and the parent's interests if we were to apply a preponderance of the evidence standard and the probable value, if any, of a clear and convincing evidence standard. See *Santosky*, 455 US at 761. Because the focus is on the parent at the statutory-grounds stage, a clear and convincing evidence standard reduces the risk of an erroneous determination that a fit parent is unfit. *Id*. at 764-765. However, as noted earlier, once a statutory ground for

termination is established, i.e., the parent has been found unfit, the focus shifts to the child and the issue is whether parental rights *should* be terminated, not whether they *can* be terminated. Accordingly, at the best-interest stage, the child's interest in a normal family home is superior to any interest the parent has. See *id*. at 760. If we were to apply the clear and convincing standard of proof at the best-interest stage, the state would bear the greater share of the risk of an erroneous determination. While this would benefit the parent, it would be a detriment to the child because an erroneous finding that the termination of parental rights is not in the best interests of the child would preserve the parent-child relationship of a parent who has been found unfit. This would keep the child in foster care and deprive the child of the opportunity for a permanent and normal family home. Thus, a clear and convincing evidence standard does not adequately safeguard the child's interest in a normal family home. However, a lesser standard of proof—preponderance of the evidence—would better safeguard the child's interest, as well as protect the interests of the parent and the state.

The final *Mathews* factor requires us to examine the governmental interests at stake, which are "a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santosky*, 455 US at 766. The use of a clear and convincing evidence standard at the best-interest stage could impose an increased financial burden on the state because additional evidence might be required to meet the higher standard of proof. In addition, and more importantly, the use of a clear and convincing evidence standard at the best-interest stage would impair the state's *parens patriae* interest in preserving and pro-

moting the welfare of the child. The state's *parens patriae* interest in terminating parental rights arises after the parent has been found unfit. *Id*. at 767 n 17. Thus, once a statutory ground for termination is established, i.e., the parent has been found unfit, the state has a substantial interest in protecting the welfare of the child. The application of a heightened standard of proof—clear and convincing evidence—hinders the state's interest in protecting the welfare of the child.

Thus, in light of the foregoing analysis, we hold that whether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence.[2]

In this case, the record shows that respondent acted on her thoughts of harming her youngest daughter by attempting to suffocate her numerous times. The record also shows that she brought the children with her while purchasing drugs, that her son had seen her using crack cocaine before, and that she did not have stable housing. Further, the record shows that given her history, her ultimate success regarding her substance abuse and mental health treatments is uncertain at best. Accordingly, the petitioner proved by a preponderance of the evidence that termination was in the children's best interests.

Finally, respondent essentially argues that termination of her parental rights was premature because she should have been offered reunification services. We disagree. Generally, reasonable efforts must be made to reunite the parent and children unless certain aggra-

[2] We note that this determination is further supported by the fact that the Legislature did not include a standard for the best-interest determination when it amended the statute, as it did for the establishment of a statutory ground for termination. Had the Legislature intended the standards to be the same, it could have included such language.

vating circumstances exist. See MCL 712A.19a(2). However, the petitioner "is not required to provide reunification services when termination of parental rights is the agency's goal." *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). Further, the petitioner can request termination in the initial petition. MCL 712A.19b(4); MCR 3.961(B)(6). Pursuant to MCR 3.977(E), termination is required at the initial disposition hearing and additional reunification efforts shall not be ordered if

> (1) the original, or amended, petition contains a request for termination;
>
> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
>
> (3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:
>
> (a) are true, and
>
> (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (*l*), (m), or (n);
>
> (4) termination of parental rights is in the child's best interests.

In this case, the initial petition requested termination, the trial court found by a preponderance of the evidence that there were grounds to assume jurisdiction, and the trial court found by clear and convincing evidence that at least one of the grounds for termination had been established. Further, the trial court found that it was in the best interests of the children for respondent's rights to be terminated. Therefore, all the

requirements of MCR 3.977(E) were met and no reunification efforts were required.

Affirmed.

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

WILDER, J. (*concurring*). I join in the majority's conclusions that the trial court did not err by finding that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(g) and (j) and that termination was in the best interests of the children. I disagree with the majority, however, that because the 2008 amendment of MCL 712A.19b(5) does not explicitly state a standard of proof for the trial court to use in making its best-interest determination, the due-process balancing test enunciated in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976), should apply.

In *Mathews*, the United States Supreme Court implemented a balancing test to be used to determine whether certain procedures were adequate to meet the requirements of due process:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id*. at 335.]

In my view, *Mathews* is inapplicable here for two reasons. First, respondent did not make a due-process challenge on appeal. Instead, respondent erroneously

cites MCL 712A.19b(3)[1] as support for her assertion that the best-interest determination, made under MCL 712A.19b(5), also requires a finding of clear and convincing evidence. As the majority also concludes, with the Legislature's amendment of MCL 712A.19b(5), it is plain from the language of the statute that a clear and convincing standard does *not* apply to the best-interest determination. The fact that we reject as erroneous respondent's contention regarding the applicable burden of proof does not necessarily require us to engage in a due-process analysis in order to determine the correct burden of proof.

Second, even if a due-process challenge were properly before us, *Mathews* remains inapplicable because once grounds for termination are established by clear and convincing evidence under MCL 712A.19b(3), a parent has no further liberty interest to protect and, thus, has no due process right to be affected. See *In re Parole of Hill*, 298 Mich App 404, 412; 827 NW2d 407 (2012) ("Whether the due process guarantee is applicable depends initially on the presence of a protected property or liberty interest. It is only when a protected interest has been found that we may proceed to determine what process is due.") (citations and quotation marks omitted). Our Supreme Court has held, "Once the petitioner has presented clear and convincing evidence that persuades the court that at least one ground for termination is established under [MCL 712A.19b(3)], the liberty interest of the parent no longer includes the right to custody and control of the children." *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). In other words, at that point, "the

[1] MCL 712A.19b(3) provides that the *grounds for termination* must be established by clear and convincing evidence; it does not pertain to the best-interest requirement under MCL 712A.19b(5).

parent's interest in the companionship, care, and custody of the child gives way to the state's interest in the child's protection." *Id*. at 356; see also *In re Foster*, 285 Mich App 630, 635; 776 NW2d 415 (2009).

Because a parent against whom there exists clear and convincing evidence to terminate parental rights no longer has a liberty interest including the right to custody and control of the children, I would conclude that this case should be resolved solely in accordance with the relevant statutes and court rules. The general rule in a civil case is that when an applicable statute "does not spell out a particular standard of proof," "the usual 'preponderance of the evidence' quantum of proof in civil cases is therefore considered to apply." *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993). In the context of a termination-of-parental-rights proceeding, the Supreme Court recognized and affirmed this principle by its adoption of MCR 3.972(C)(1), which 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 trial, notwithstanding that the petition contains a request to terminate parental rights.

Since MCR 3.977(E)(4), the court rule specifically applicable to this case, fails to provide a standard of proof relevant to a trial court's best-interest determination, the preponderance of the evidence standard provided in MCR 3.972(C)(1) does apply here.

For the reasons stated, I agree that the judgment of the trial court should be affirmed. However, rather than using the *Mathews* due-process analysis, I would affirm the best-interest findings of the trial court as having been made in a manner consistent with the plain language of MCL 712A.19b(5) and MCR 3.972(C)(1).

PEOPLE v LLOYD

Docket No. 310355. Submitted May 8, 2013, at Lansing. Decided May 14, 2013, at 9:00 a.m.

Rebekah M. Lloyd was charged in the Bay Circuit Court with assault with intent to do great bodily harm less than murder, MCL 750.84, and assault with a dangerous weapon, MCL 750.82. Defendant had assaulted the victim by striking her in the eye with a high-heeled shoe. The victim lost her eye and subsequently wore a prosthetic. The jury found defendant guilty of the lesser included offense of misdemeanor assault, MCL 750.81, on both counts, and because there was only a single assault, the court, Joseph K. Sheeran, J., vacated one of the convictions and sentenced defendant to 93 days in jail. In addition, the court ordered defendant to pay $126,561.63 in restitution to the victim, an amount the court determined under MCL 780.826(5) by tripling the amount of actual restitution. Defendant appealed, arguing that the court abused its discretion by tripling the restitution award.

The Court of Appeals *held*:

MCL 780.826(5), which governs restitution for misdemeanors, provides that if a crime resulting in bodily injury also results in the death of a victim or a serious impairment of a body function of a victim, the trial court may order up to three times the amount of restitution otherwise allowed under the provision. Under MCL 780.826(5)(c), serious impairment of a body function includes the loss of an eye. At sentencing, the victim testified that the assault had left her emotionally, physically, and financially devastated. Because there was no dispute that the victim suffered a serious impairment of a body function, the trial court was authorized to order restitution. The statute gives a court discretion to order as much as triple the amount of any other restitution allowed, but neither limits nor specifies what the court may consider in exercising the discretion to do so.

Affirmed.

SENTENCES — RESTITUTION — TRIPLE RESTITUTION.

MCL 780.826(5), which governs restitution for misdemeanors, provides that if a crime resulting in bodily injury also results in

the death of a victim or a serious impairment of a body function of a victim, the trial court may order up to three times the amount of restitution otherwise allowed under that provision; the statute gives a trial court discretion to order as much as triple the amount of any other restitution allowed, but neither limits nor specifies what the court may consider in exercising the discretion to do so.

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

State Appellate Defender (by *Valerie R. Newman*) for defendant.

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

PER CURIAM. Defendant appeals as of right a probation order entered following conviction by a jury of misdemeanor assault, MCL 750.81. Defendant received a sentence of 93 days in jail and was ordered to pay $126,561.63 in restitution to the victim. Defendant now argues that the trial court abused its discretion by tripling the restitution award pursuant to MCL 780.826(5) of the Crime Victim's Rights Act, MCL 780.751 *et seq*.[1] We affirm.

Defendant assaulted the victim by striking her in the eye with a high-heeled shoe. The victim lost her eye and now wears a prosthetic. The prosecution

[1] The parties have referred throughout the proceedings to restitution ordered pursuant to MCL 780.766. That section, however, involves restitution by defendants convicted of felonies. Because the jury convicted defendant of a misdemeanor, we assume that the trial court ordered restitution pursuant to MCL 780.826, which is in the article of the Crime Victim's Rights Act that covers various misdemeanor offenses.

charged defendant with assault with intent to do great bodily harm less than murder, MCL 750.84, and assault with a dangerous weapon, MCL 750.82. The jury found defendant guilty of the lesser included offense of misdemeanor assault on both counts. Because there was only a single assault, the trial court vacated one of the convictions.

At sentencing, the victim testified that the assault has left her emotionally, physically, and financially devastated. The prosecution requested $42,187.21 in actual restitution pursuant to MCL 780.826(2) and asked the court to triple the award pursuant to MCL 780.826(5). The trial court agreed and ordered restitution in the amount of $126,561.63. We review for an abuse of discretion a trial court's order of restitution. *People v Byard*, 265 Mich App 510, 511; 696 NW2d 783 (2005).

Defendant argues that the trial court should not have ordered three times the amount of restitution under MCL 780.826(5), which states, "If a crime resulting in bodily injury also results in the death of a victim or serious impairment of a body function of a victim, the court may order up to 3 times the amount of restitution otherwise allowed under this section."[2] As used in that subsection, "serious impairment of a body function of a victim" includes the loss of an eye. MCL 780.826(5)(c).

Because there is no dispute that the victim suffered a serious impairment of a body function, the trial court was authorized to order restitution under this section of the statute. Significantly, the plain language of the statute gives the trial court discretion to order as much as triple the amount of any other restitution allowed, but neither limits nor specifies what the trial court may consider in

[2] The language of MCL 780.766(5) is identical.

exercising the discretion to do so. *Byard*, 265 Mich App at 511-512.

Affirmed.

FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ., concurred.

PEOPLE v SNYDER (AFTER REMAND)

Docket No. 310208. Submitted April 2, 2013, at Lansing. Decided May 21, 2013, at 9:00 a.m.

Brian L. Snyder was convicted by a jury in the Van Buren Circuit Court, Paul E. Hamre, J., of larceny in a building. Defendant appealed. The Court of Appeals, while retaining jurisdiction, remanded the matter to the trial court in an unpublished opinion per curiam, issued March 26, 2013 (Docket No. 310208), holding that the trial court erred by failing to articulate on the record why it determined that evidence of defendant's prior conviction for larceny in a building was admissible for impeachment purposes under MRE 609. In an accompanying unpublished order entered the same day, the Court of Appeals instructed the trial court to conduct an analysis regarding whether the evidence of defendant's prior larceny conviction was of significant probative value on the issue of credibility and whether the prejudicial effect of the evidence of the conviction outweighed its probative value. On remand, the trial court determined that the crime being used for impeachment purposes was dramatically different from the crime defendant was on trial for. It also determined that the prior conviction was indicative of veracity and that the probative value of the evidence outweighed its prejudicial effect.

After remand, the Court of Appeals *held*:

1. MRE 609 creates a presumption that evidence of prior convictions is inadmissible to impeach a witness's credibility, however, the presumption can be overcome in two ways. First, if the prior conviction contained an element of dishonesty or false statement, the evidence is admissible with no further analysis required. MRE 609(a)(1). Second, if the prior conviction contained an element of theft, the evidence may be admissible if certain conditions are met. MRE 609(a)(2). As a first step, regardless of whether the witness is the defendant, the court must determine that the evidence of the prior theft crime conviction has significant probative value on the issue of credibility and that the prior theft crime was one that was punishable by imprisonment in excess of one year or death. MRE 609(a)(2)(A) and (B). For purposes of the probative-value determination, the court should consider only the age of the conviction and the

degree to which a conviction of the crime is indicative of veracity. Generally, the older the conviction, the less probative it is. In general, theft crimes are minimally probative on the issue of credibility or, at most, are moderately probative of veracity.

2. A further step is required when the witness is the defendant in a criminal trial. In such a case the evidence of a prior conviction is inadmissible unless the court further determines that the probative value of the evidence outweighs its prejudicial effect. MRE 609(a)(2)(B). For purposes of assessing prejudicial effect, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. MRE 609(b).

3. When the prior conviction is identical to the charged offense, it is highly prejudicial. Prejudice escalates with the increased importance of the defendant's testimony to the decisional process.

4. The trial court offered no reason why evidence of defendant's prior larceny conviction is of "significant" probative value with regard to defendant's credibility or why the prior crime or its surrounding circumstances are indicative of veracity.

5. The evidence of defendant's prior larceny conviction is not of significant probative value on the issue of his credibility. The evidence is merely of minimal or moderate probative value. The evidence of the prior conviction was inadmissible under MRE 609(a)(2)(B). The trial court abused its discretion by admitting the evidence. When, as in this case, a prior conviction is not significantly probative of credibility, the prejudicial-effect inquiry is unnecessary because the prior conviction has already failed to meet the requirement of MRE 609(a)(2)(B) that the evidence is of significant probative value. If the evidence had met the standard of being of significant probative value, the Court of Appeals would, nevertheless, hold that the prejudicial effect of the evidence outweighed its probative value and that the evidence should not have been admitted.

6. The erroneous admission of the evidence of defendant's prior conviction undermined the reliability of the verdict. Defendant met his burden of showing that the error was prejudicial. It affirmatively appears more probable than not that the evidence affected the outcome of the case.

Reversed and remanded.

1. EVIDENCE — WITNESSES — EVIDENCE OF PRIOR CONVICTIONS — IMPEACHMENT EVIDENCE.

A trial court, in determining whether evidence that a witness has been convicted of a prior theft crime offense should be admitted for

impeachment purposes, must first determine that the proffered theft crime conviction has significant probative value on the issue of credibility by considering only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity; generally, the older the conviction the less probative it is; theft crimes are generally minimally probative on the issue of credibility or, at most, are moderately probative of veracity (MRE 609[a][2][B], and [b]).

2. CRIMINAL LAW — EVIDENCE — EVIDENCE OF PRIOR CONVICTIONS — DEFENDANT WITNESSES.

Evidence of a witness's prior conviction is inadmissible for impeachment purposes when the witness is the defendant in a criminal trial unless the court determines that the evidence has significant probative value on the issue of credibility and further determines that the probative value of the evidence outweighs its prejudicial effect; the court, for purposes of assessing prejudicial effect, shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify; prejudice escalates with the increased importance of the defendant's testimony to the decisional process; when the prior conviction is identical to the charged offense, the evidence is highly prejudicial (MRE 609[a][2][B], and [b]).

3. TRIAL — JURY INSTRUCTIONS — EVIDENCE — WITNESSES — EVIDENCE OF PRIOR CONVICTIONS.

Although jurors are presumed to follow their instructions and instructions are presumed to cure most errors, this is not the case with improperly admitted evidence of a witness's prior conviction.

Thomas J. Mattern for defendant.

AFTER REMAND

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

PER CURIAM. Defendant was convicted by a jury of larceny in a building, MCL 750.360. He appeals as of right. For the reasons hereinafter set forth, we reverse his conviction and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

Defendant visited William Lesterhouse's antique store in Mattawan on October 30, 2011, close to closing time. After the store closed, defendant had a sandwich and a drink with Lesterhouse and Lesterhouse's sister. The next day, Lesterhouse discovered four silver pieces were missing and reported this to the Mattawan Police Department. Lesterhouse went with Chief of Police Donald Verhage to Scott's Coin and Jewelry in Portage and located the silver pieces along with Lesterhouse's gold watch, which Lesterhouse had not realized was missing. Defendant had sold the silver items and the gold pocket watch to Scott's. Lesterhouse testified that defendant did not have permission to take the items and was not given the items. The silver items were worth approximately $1,650 and the watch was worth approximately $750.

Defendant testified that Lesterhouse gave him two of the silver bowls in exchange for some arrowheads and a stone tool, worth approximately $800. According to defendant, Lesterhouse gave defendant the two additional silver pieces and the gold watch. Defendant claimed that after the store closed and they ate sandwiches, Lesterhouse made sexual advances toward defendant, which defendant rejected. Defendant testified that he took the box of silver items and the watch and left.

Before trial, defendant moved to prevent evidence of his prior conviction for larceny in a building from being admitted pursuant to MRE 609. At the hearing on defendant's motion, defendant explained that his prior conviction occurred in 2010 and that the prior conviction involved defendant's taking cash from his mother's workplace. The trial court declined to make any findings on the record with regard to the admissibility of

the evidence of defendant's prior conviction and took the matter under advisement. The court subsequently issued an opinion in which it made no findings. The trial court's entire opinion was as follows:

> Upon review of this matter the court finds the defendant's prior conviction of larceny in a building is not prejudiced by the prosecutor's use of this conviction to impeach the defendant.
>
> Therefore the defendant's motion to preclude the conviction [sic] use for impeachment is denied.

Following his conviction, defendant appealed. The prosecution did not file a brief on appeal. On defendant's initial appeal, we concluded that the trial court had erred by failing to adhere to the strict language of MRE 609(b), which requires that the trial court "articulate, on the record, the analysis" why evidence of a defendant-witness's prior theft crime convictions is admissible. *People v Snyder*, unpublished opinion per curiam of the Court of Appeals, issued March 26, 2013 (Docket No. 310208). In an accompanying order, we instructed that on remand the trial court "shall conduct an analysis regarding whether defendant's prior larceny conviction was of 'significant probative value on the issue of credibility,' MRE 609(a)(2)(B), and whether the prejudicial effect of the conviction outweighed the probative value. MRE 609(b)." *People v Snyder*, unpublished order of the Court of Appeals, entered March 26, 2013 (Docket No. 310208).

On March, 28, 2013, the trial court issued its findings on remand. Specifically, the trial court found, in relevant part, as follows:

> 5. The court finds that the crime being used for impeachment is dramatically different from the case the Defendant was now [sic] on trial for.

6. These differences include but are not limited to the following:

A. Theft of cash versus personal items.

B. Theft from the victim's home versus a business.

C. The Defendant knew the victim in the case now before the court and used the victim's invitation to dinner to gain access to the stolen goods.

D. In the prior conviction for theft, the money was taken without any justification proffered by the Defendant. In the case now before the court, the Defendant's position was that the items in question were given to him by the victim and that no theft occurred.

Consequently, the prior conviction was indicative of veracity and as stated in the court's original finding, the prejudicial impact of the conviction is outweighed by its probative value.

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision whether to admit or exclude evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

III. ANALYSIS

A. THE TRIAL COURT ERRED

The rules of evidence are interpreted according to the principles of statutory interpretation. See *People v Caban*, 275 Mich App 419, 422; 738 NW2d 297 (2007) (citation omitted). Accordingly, if the plain language of a rule of evidence is unambiguous, we "must enforce the meaning expressed, without further judicial con-

struction or interpretation." *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003) (quotation marks and citation omitted).

1. MRE 609 FRAMEWORK

MRE 609 permits the admission of evidence of some prior convictions, but for a specific and narrowly defined purpose: impeachment of a witness's credibility. The Supreme Court has recognized the danger that "a jury will misuse prior conviction evidence by focusing on the defendant's general bad character, rather than solely on his character for truthtelling." *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988). Accordingly, MRE 609 creates a presumption that evidence of prior convictions is inadmissible to impeach a witness's credibility. MRE 609(a) ("[E]vidence that the witness has been convicted of a crime *shall not be admitted unless* . . . .") (emphasis added). That presumption can be overcome, however. First, if the prior conviction "contained an element of dishonesty or false statement," it is admissible with no further analysis required. MRE 609(a)(1). Second, if the prior conviction "contained an element of theft," it may be admissible if certain conditions are met. MRE 609(a)(2). Which conditions need be met are in part a function of whether the witness is the defendant.

As a first step, regardless of whether the witness is the defendant, the court is required to determine that the proffered prior theft crime conviction has "*significant* probative value on the issue of credibility . . . ."[1] MRE 609(a)(2)(B) (emphasis added). "For purposes of

[1] The other requirement that must be met regardless of whether the witness is the defendant is that the prior theft crime conviction must have been one that "was punishable by imprisonment in excess of one year or death . . . ." MRE 609(a)(2)(A). There is no dispute that this

[this] probative value determination . . . the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity." MRE 609(b). Regarding the age of the conviction, as a general matter, the older a conviction, the less probative it is. See *People v Meshell*, 265 Mich App 616, 636; 696 NW2d 754 (2005). Regarding "the degree to which a conviction of the crime is indicative of veracity," our courts have not held that theft crimes are inherently of "*significant* probative value on the issue of credibility." MRE 609(a)(2)(B) (emphasis added). Rather, our courts have held that, in general, "[t]heft crimes are minimally probative on the issue of credibility," *Meshell*, 265 Mich App at 635, or, at most, are "moderately probative of veracity . . . ." *Allen*, 429 Mich at 610-611.

Where, as here, the witness is the defendant in a criminal trial, a further step is required. Specifically, "if the witness is the defendant in a criminal trial, [the prior conviction is inadmissible unless] the court further determines that the probative value of the evidence outweighs its prejudicial effect." MRE 609(a)(2)(B). For purposes of assessing prejudicial effect, "the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify." MRE 609(b). With regard to the prior conviction's similarity to the charged offense, this Court has explained that where, as here, the prior conviction is identical to the charged offense, it is highly prejudicial because "the risk is high that a jury would convict the defendant of this offense because it knew he was guilty of the identical offense . . . ." *People v Minor*, 170 Mich App 731, 736-737; 429 NW2d 229 (1988).

requirement is met in this case; defendant's prior conviction was for larceny in a building, which is a felony. MCL 750.360.

Moreover, the Supreme Court has explained that "prejudice . . . escalate[s] with . . . increased importance of the [defendant's] testimony to the decisional process." *Allen*, 429 Mich at 606.

2. APPLICATION OF THE FRAMEWORK

In our remand order, we instructed the trial court to, inter alia, "conduct an analysis regarding whether defendant's prior larceny conviction was of 'significant probative value on the issue of credibility[.]' " *People v Snyder*, unpublished order of the Court of Appeals, entered March 26, 2013 (Docket No. 310208). The trial court did not do so. Instead, the trial court listed reasons why the facts underlying defendant's prior larceny conviction differed from the facts of the case at bar. These findings are irrelevant to whether evidence of defendant's prior conviction is of significant probative value on the issue of credibility because the rule specifically provides that the trial court "shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity" when conducting this inquiry. MRE 609(b). In short, the trial court has not yet offered any reason why evidence of defendant's prior larceny conviction is of significant probative value with regard to his credibility, despite two opportunities to do so: once before trial and once on remand.

With regard to whether evidence of defendant's prior conviction is of significant probative value on the issue of credibility, the plain text of the rule itself, as well as the Supreme Court's decision in *Allen*, the case in which the Supreme Court adopted the current language of MRE 609, are instructive. The plain language of first clause of MRE 609(a)(2)(B) requires that prior convictions be of "significant" probative value on the issue of

the witness's credibility. The dictionary defines "significant" as, inter alia, "a noticeably or measurably large amount." *Merriam-Webster's Collegiate Dictionary* (2003). Construing the rule to require that the prior theft crime conviction be merely probative of credibility rather than "significant[ly]" probative of credibility would render the first clause of MRE 609(a)(2)(B) surplusage, and "[i]n interpreting a [rule of evidence], we avoid a construction that would render part of the [rule of evidence] surplusage or nugatory." *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009). In the instant case, the trial court made no findings why evidence of defendant's prior larceny conviction was of "significant" probative value on the issue of credibility, despite having been afforded a second opportunity to do so on remand, and we can discern from the record no reasons why evidence of defendant's prior larceny conviction is significantly probative of his character for truthfulness. See *Allen*, 429 Mich 558.

Moreover, in *Allen*, *id*. at 610, one of the defendants, Jeffrey Pedrin,[2] was impeached with evidence of a prior conviction for breaking and entering a building with intent to commit larceny; that conviction was only one year old at the time of the defendant's trial. The Supreme Court held that the conviction was only "moderately probative of veracity," explaining that the only factor that counseled in favor of increasing its probative value was its recentness; the Court did not indicate that the crime itself or its surrounding circumstances were indicative of the defendant's character for truthfulness. *Id*. at 610-611. Similarly, in this case, defendant's prior larceny conviction was only two years old at the time of

[2] *Allen* involved five consolidated appeals by five defendants. Subsequent references in this opinion to "the defendant" in *Allen* are to defendant Pedrin.

trial, and the trial court has provided us with no reasons why the crime or its surrounding circumstances are "indicative of veracity." MRE 609(b). Accordingly, absent reasons from the trial court to conclude otherwise, we conclude that evidence of defendant's prior larceny conviction is not of "significant probative value" on the issue of his credibility, MRE 609(a)(2)(B), but, rather, like most theft crimes, is merely of "minimal[]," *Meshell*, 265 Mich App at 635, or "moderate[]," *Allen*, 429 Mich at 610, probative value on the issue of credibility. We therefore conclude that evidence of his prior conviction was inadmissible under MRE 609(a)(2)(B), and the trial court abused its discretion by admitting it.[3]

Although the trial court's findings are irrelevant to the probative-value inquiry, they would be relevant to the court's determination regarding prejudicial effect, because "the conviction's similarity to the charged offense" is one of the two factors a court may consider in making that determination. MRE 609(b). However, the first clause of MRE 609(a)(2)(B) establishes that the court must determine that the prior conviction is of "*significant* probative value on the issue of credibility . . . ." Accordingly, if, as here, a prior conviction is not significantly probative of credibility, the prejudicial-effect inquiry is unnecessary because the prior convic-

[3] For similar reasons, defendant's prior conviction was not admissible under MRE 609(a). In *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997), this Court explained that mere "thievery is not 'dishonesty' within the meaning of MRE 609(a)(1)." The Court held that "[l]arceny is the most basic of theft offenses," and does not contain an element of dishonesty or false statement because if the Court held that it did, "surely every theft offense [would] contain[] an element of dishonesty, and evidence of every theft would thereby be admissible pursuant to MRE 609(a)(1). MRE 609(a)(1) may not reasonably be construed in such a fashion because to do so . . . would render MRE 609(a)(2) surplusage." *Id*. at 245.

tion has already failed to meet one of the rule's requirements. Therefore, having already concluded that evidence of defendant's prior larceny conviction is not of significant probative value on the issue of his credibility, we need not consider the trial court's findings, because they are relevant only to the prejudice analysis, which we need not reach.

However, even assuming, arguendo, that the trial court had made findings responsive to our remand order and concluded that evidence of defendant's prior larceny conviction was of significant probative value on the issue of credibility, we would still conclude that the prejudicial effect of the evidence of defendant's prior conviction outweighed its probative value. First, with regard to the prior conviction's "similarity to the charged offense," although the trial court is correct that the facts of the prior larceny were different from the facts of the instant case, the offenses themselves were not merely similar, they were identical. Accordingly, with regard to prejudicial effect, "the scale tilts decidedly towards inadmissibility" because "the risk is high that a jury would convict the defendant of this offense because it knew he was guilty of the identical offense" in a previous case. *Minor*, 170 Mich App at 736-737. Indeed, in *Allen*, the Supreme Court concluded that the prejudice increased against the defendant where "[t]he charged offense," breaking and entering an unoccupied building with the intent to unlawfully drive away an automobile, was "very similar to the prior conviction," breaking and entering with the intent to commit a larceny. *Allen*, 429 Mich at 610-611. Second, with regard to the importance of the defendant's testimony to the decisional process, the *Allen* Court concluded that prejudice increased where, as here, the "defendant's testimony was very important to the decisional process, as he had no other means of presenting his version of

events." *Id*. at 611. Similarly, in this case, which was a one-on-one credibility contest between Lesterhouse and defendant, defendant had no other way to present his version of events other than to testify. The *Allen* Court ultimately concluded that the prejudicial effect of the evidence of the defendant's prior conviction outweighed its probative value, and concluded that the trial court erred by admitting it. *Id*. The same result is warranted here.

In summary, we conclude that evidence of defendant's prior conviction was inadmissible because it is not of "significant" probative value on the issue of his credibility and therefore fails to meet the requirements for admissibility under MRE 609(a)(2)(B). Although our analysis could cease here, we also conclude that even assuming arguendo that evidence of defendant's prior conviction was of significant probative value, its probative value was outweighed by its prejudicial effect and the evidence should not have been admitted.

B. THE TRIAL COURT'S ERROR WAS NOT HARMLESS

Where, as here, a preserved, nonconstitutional error has occurred, MCL 769.26 controls this Court's review of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The statute "places the burden on the defendant to demonstrate that 'after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice.' " *Id*., paraphrasing MCL 769.26. Accordingly, reversal is only required "if such an error is prejudicial"; in this context, "prejudicial" means that, after examining the error and "assess[ing] its effect in light of the weight and strength of the untainted evidence . . .

it affirmatively appears that the error asserted undermine[s] the reliability of the verdict." *Id*. (citation and quotation marks omitted).

We note that the trial court issued a limiting instruction to the jury, specifically instructing it to not use the evidence of defendant's prior conviction for any purpose other than to determine whether defendant was a truthful witness. Generally, "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (citation omitted). However, the Supreme Court has explicitly held that this is not the case with regard to improperly admitted prior conviction evidence. As the Supreme Court explained in *Allen*, "[m]ost crimes can, therefore, be seen as evidence of a lack of veracity only when mediated through the belief that the individual has a bad general character," *Allen*, 429 Mich at 571, and therefore, "in the case of most prior conviction evidence the permissible consideration can only be understood by first recognizing the impermissible consideration. Where the two factors are so inextricably linked . . . [a jury cannot be] reasonably expected to follow the instruction." *Id*. at 573. Accordingly, that the trial court issued a limiting instructing is of no consequence to our determination.

We conclude that the erroneous admission of evidence of defendant's prior conviction undermined the reliability of the verdict and, therefore, that defendant has met his burden to show that the trial court's error was prejudicial. This case presented a true one-on-one credibility contest. The only evidence supporting defendant's position, that the items were given to him, was his own testimony. The only evidence supporting Lesterhouse's position, that the items were stolen, was Lesterhouse's testimony. Both versions are consistent

with the items being recovered at Scott's. Indeed, in this case, there is no "untainted evidence" against which to assess the effect of the trial court's error. *Lukity*, 460 Mich at 495. Nor did the prosecution attempt to provide this court with any examples of untainted evidence, because the prosecution did not file an appellate brief. Accordingly, on the record before us, we determine that it affirmatively appears more probable than not that the evidence of the prior conviction affected the outcome of the case. *Id*. at 496. Defendant has met his burden, and we are required to reverse defendant's conviction.

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

STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ., concurred.

URBAIN v BEIERLING

Docket No. 309049. Submitted May 15, 2013, at Detroit. Decided May 21, 2013, at 9:05 a.m.

Katie Urbain brought an action in the Oakland Circuit Court against Petra Beierling, Maureen Clinesmith, and iFive Education, alleging breach of a partnership agreement, breach of fiduciary duty, breach of Beierling's and Clinesmith's duty to render information, improper dissolution of the partnership, civil conspiracy, and concert of action and requesting an accounting. Beierling had developed a concept for an educational software business marketing online learning games to teachers and formed a partnership with Urbain and Clinesmith. There was no written partnership agreement. Clinesmith loaned the partnership $10,000 and the three were equal partners and agreed to equally divide the work, with each to receive 1/3 of the profits after Clinesmith's loan was repaid. The partnership intended to launch the website in early February 2010, but because of several issues, including a personality conflict between Beierling and Urbain, the website launch was delayed and the partnership broke down. The partners had several communications, during which time Beierling told Urbain that Urbain was no longer a partner. Beierling and Clinesmith dissolved the partnership and commenced a successor partnership, consisting of only Beierling and Clinesmith, which launched the website within weeks. The successor partnership, however, sold only one unit for a total of $69.99. The court, Rae Lee Chabot, J., granted defendants' motion for summary disposition on all of Urbain's claims. Urbain appealed.

The Court of Appeals *held*:

1. The Uniform Partnership Act (UPA), MCL 449.1 *et seq*., applied in this case. Urbain argued that Beierling and Clinesmith's decision to discontinue the partnership and oust her was wrongful absent the consent of all partners pursuant to MCL 449.18(h) and that discontinuing the partnership was an act that made it impossible to carry on the ordinary business of the partnership and thus had to be authorized by all partners according to MCL 449.9(3)(c). MCL 449.31(1)(b), however, provides that dissolution of a partnership occurs without a violation of the partnership

agreement by the express will of any partner when no definite term or particular undertaking was specified in the agreement. Urbain admitted in her complaint that the partners specified neither a definite term nor a particular undertaking. Because there was no specific term set forth in the partnership agreement, which was open-ended about the partnership's undertakings with regard to developing websites, the partnership could have been dissolved by the express will of any partner under the UPA. Accordingly, neither Clinesmith nor Beierling breached the partnership agreement when they dissolved the partnership, and the trial court properly granted summary disposition for defendants on Urbain's claim alleging breach of the partnership agreement.

2. Urbain also claimed that she was entitled to damages in any event as a result of the dissolution. The UPA seeks to make partners whole economically. MCL 449.18(a) provides that each partner must be repaid his or her contributions, whether by way of capital or advances to the partnership property, and shares equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied. Therefore, on dissolution of the partnership, Urbain was entitled to be repaid her capital contribution and share equally in all profits. However, Urbain did not make a capital contribution and there was no profit to be shared, so she was not entitled to damages.

3. Urbain argued that Beierling and Clinesmith had acted in bad faith, both leading up to and after the discontinuation of the partnership, when they failed to disclose their intent to discontinue the partnership while at the same time allowing Urbain to continue to perform partnership work for which she would reap no rewards. The fiduciary relationship of partners imposes on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each must fully disclose all material facts he or she knows that relate in any way to the partnership's affairs. Disclosure to one or several partners does not fulfill this duty with respect to every other partner. The fiduciary duty between partners arises only from the partnership agreement, however. A partner cannot maintain an action in tort against a partner who by an arbitrary or bad-faith breach of the partnership agreement caused the termination of the partnership. Because the fiduciary relationship between Urbain and Beierling and Clinesmith arose only by virtue of the their agreement, the trial court properly determined that the dissolution of the partnership could not form

the basis for a breach of fiduciary duty and appropriately granted summary disposition for defendants.

4. Urbain maintained that Beierling and Clinesmith breached their fiduciary duty to her when, after discontinuing the partnership, they formed a successor partnership with the same name and converted all partnership assets to the new partnership, thus depriving Urbain of those assets. Under MCL 449.21(1), partners are held accountable as fiduciaries. Every partner must account to the partnership for any benefit and hold as its trustee any profits derived by the partner without the other partners' consent from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by the partner of the partnership's property. The partnership had no physical assets other than a computer that Clinesmith purchased to perform partnership accounting, and the website generated no income except from one subscription sale. The partnership also had an outstanding loan to Clinesmith that to be repaid before any profits were to be distributed.

5. Urbain also contended that Beierling and Clinesmith breached their fiduciary duty to her when they refused to compensate her with an hourly wage for her contributions to the partnership. MCL 449.18(f), however, states that a partner is not entitled to remuneration for acting in the partnership business. As an equal partner, Urbain would have been entitled under MCL 449.18(a) to 1/3 of the partnership's profits, but there were no profits to distribute and she was not entitled to damages.

6. Urbain argued that Beierling and Clinesmith breached their duty to render information to her. MCL 449.20 imposes a duty on partners to render on demand true and full information to any partner of all things affecting the partnership. MCL 449.20 imposes a duty to disclose all known information that is significant and material to the affairs or property of the partnership. With regard to Urbain's status in the partnership immediately before she was ousted, Beierling and Clinesmith did not conceal the fact that they had decided to remove her from the partnership. Rather, all the partners discussed the fact that Beierling no longer wanted to work with Urbain and wanted her out of the partnership and exchanged several communications on the topic. With regard to their failure to provide Urbain information she requested concerning the partnership's financial status at the time of its dissolution, Urbain did not identify what significant and material partnership information she had demanded from Beierling and Clinesmith but did not receive when she was ousted, failed to identify how the circumstances would have differed, and failed to indicate the

damages she suffered as a result of the alleged violation of MCL 449.20. The trial court properly granted summary disposition for defendants on Urbain's claim alleging breach of duty to render information.

7. Under MCL 449.22, a partner has the right to a formal accounting of partnership affairs if (1) the partner is wrongfully excluded from the partnership business or possession of its property by the copartners, (2) the right exists under the terms of any agreement, or (3) other circumstances render it just and reasonable. It was just and reasonable for Urbain to request a formal accounting of partnership affairs when she departed from the partnership. Beierling and Clinesmith eventually provided her a full accounting of the business in discovery but did not do so at the time of her request. Beierling and Clinesmith should have provided Urbain a formal accounting of partnership affairs within a reasonable time after the partnership dissolved, and litigation should not have been necessary for her to obtain the accounting. Urbain failed to demonstrate, however, that she was damaged by the breach because the partnership was not profitable, and the trial court properly granted summary disposition for defendants on Urbain's claim seeking an accounting.

8. MCL 449.40 sets forth the rules for distributing partnership property upon dissolution of a partnership. In general, MCL 449.40(b) provides that creditors should be paid first, then monies owed to partners for liabilities other than for capital and profits, followed by distribution of capital and, finally, profits to partners. Valuation should be made at the time of dissolution, and winding up a partnership's affairs entails gathering the assets, paying and settling debts, and distributing any net surplus to parties entitled to it. Under MCL 449.37, partners who have not wrongfully dissolved the partnership have the right to wind up the partnership affairs. Thus, Beierling and Clinesmith should have afforded Urbain an opportunity to be involved in the winding-up, but she had no input whatsoever because Beierling and Clinesmith took sole control of all partnership affairs, including the launch of the website and partnership finances. The loan, however, was to be repaid before any partnership assets or profits would be distributed to the partners. While it would have been prudent to have a valuation of the partnership's website and other intangibles calculated at the time of partnership's dissolution, doing so would have been a formidable task considering that the website had not yet launched. In any event, the market set the value of the business after the website's launch when only one sale was generated despite extensive targeted marketing to industry pro-

fessionals. There were no assets or profits to distribute to Urbain, and the trial court properly granted summary disposition for defendants on her dissolution-of-partnership claim.

9. A civil conspiracy is a combination of two or more persons seeking by some concerted action to accomplish a criminal or unlawful purpose or accomplish a lawful purpose by criminal or unlawful means. To establish a concert-of-action claim, a plaintiff must prove that all the defendants acted tortiously pursuant to a common design that caused harm to the plaintiff. For both a claim of civil conspiracy and a claim of concert of action, the plaintiff must establish some underlying tortious conduct. A partner cannot maintain an action in tort against a partner who by an arbitrary or bad-faith breach of the partnership agreement caused the termination of the partnership. Because Urbain's civil-conspiracy and concert-of-action claims were based on her claims related to the dissolution of the partnership and those claims arose only from the partnership agreement and therefore sounded in contract rather than tort, Urbain failed to allege a separate actionable tort. Given that Urbain did not establish that Beierling and Clinesmith committed an underlying tort, the trial court properly granted summary disposition for defendants on those claims.

Affirmed.

1. PARTNERSHIP — FIDUCIARY DUTY — DISCLOSURE — BREACH.

The fiduciary relationship of partners imposes on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs and is generally one of full and frank disclosure of all relevant information; each partner has the right to know all that the others know, and each must fully disclose all material facts he or she knows that relate in any way to the partnership's affairs; disclosure to one or several partners does not fulfill this duty with respect to every other partner.

2. PARTNERSHIP — FIDUCIARY DUTY — BREACH — TERMINATION OF PARTNERSHIP– TORTS.

The fiduciary duty between partners arises only from the partnership agreement, so a partner cannot maintain an action in tort against a partner who by an arbitrary or bad-faith breach of the partnership agreement caused the termination of the partnership.

3. CONSPIRACY — CONCERT OF ACTION — TORTS — PARTNERSHIP– TERMINATION OF PARTNERSHIP.

A civil conspiracy is a combination of two or more persons seeking by some concerted action to accomplish a criminal or unlawful

purpose or accomplish a lawful purpose by criminal or unlawful means; to establish a concert-of-action claim, a plaintiff must prove that all the defendants acted tortiously with a common design that caused harm to the plaintiff; for both a claim of civil conspiracy and a claim of concert of action, the plaintiff must establish some underlying tortious conduct; a partner cannot maintain an action in tort against a partner who by an arbitrary or bad-faith breach of the partnership agreement caused the termination of the partnership because claims related to the dissolution of a partnership arise only from the partnership agreement and therefore sound in contract rather than tort.

The Troy Law Firm (by *Daniel E. Chapman* and *Kimberly A. Cochrane*) for Katie Urbain.

Ray M. Toma, P.C. (by *Ray M. Toma* and *Edward F. Kickman*), for Petra Beierling, Maureen Clinesmith, and iFive Education.

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition in this action involving a dissolved partnership.[1] Because the partnership could be dissolved by the express will of any partner pursuant to the Uniform Partnership Act (UPA), MCL 449.1 *et seq.*, plaintiff's breach of fiduciary duty claim fails as a matter of law, plaintiff has failed to present evidence showing that defendants breached their duty to render information, plaintiff's dissolution-of-partnership and accounting claims fail because the partnership had no profits or assets to distribute to the partners, and plaintiff's concert-of-action and civil-conspiracy claims lack merit because plaintiff has failed to establish that defendants committed an underlying tort, we affirm.

---

[1] The parties stipulated the dismissal of defendants' countercomplaint against plaintiff, which is not at issue in this appeal.

I. FACTUAL BACKGROUND

This case arises out of a partnership that lasted approximately four months, from November 2009 through February 2010. Defendant Petra Beierling developed a concept for an educational software business marketing online learning games to teachers. Beierling had contacts in the software and educational arenas and wanted to stream the online games into classrooms through periodic paid subscriptions. Beierling pitched her idea to two friends, plaintiff Katie Urbain and defendant Maureen Clinesmith. Both Urbain and Clinesmith were interested, and the three women formed a partnership. The partnership did not have a written partnership agreement.

Initially, Clinesmith orally agreed to invest $10,000 in the partnership, and, for purposes of equity, Beierling's and Urbain's equity stakes were to be valued by the amount of time that each person invested in the business at an hourly rate of $25. Very shortly thereafter, Clinesmith decided to become an active partner and loaned the partnership money instead of investing money in the business. The three partners decided to be equal partners and equally divide the work, each receiving 1/3 of the profits after Clinesmith's loan was repaid. After Clinesmith opted to become an active partner, the partners abandoned the idea of tracking hours. Urbain testified that she kept track of the hours that she performed work for the partnership for only the first few days.

Over the next several months, the partners worked to create a marketing plan to sell subscriptions, write questions for game banks, and develop and design their website, ifiveeducation.com. The partners intended to launch the website in early February 2010 because they believed that that was the best time for sales in the

education industry. Because of several issues, however, including an apparent personality conflict between Beierling and Urbain, the website launch was delayed and the partnership broke down. The partners had several communications and met in person at least once, during which time Beierling told Urbain that Urbain was no longer a partner in the venture. Urbain felt that she had been ousted from the partnership and was surprised when Beierling cut off her access to a partnership e-mail account and discontinued her website administration privileges. Beierling and Clinesmith dissolved the partnership and commenced a successor partnership, consisting of only Beierling and Clinesmith, which launched the website within weeks. Despite e-mail blasts and other targeted marketing, the partnership sold exactly one unit for a total of $69.99.

Plaintiff filed the instant action against defendants, alleging breach of the partnership agreement (count I), breach of fiduciary duty (count II), breach of their duty to render information (count IV), improper dissolution of the partnership (count VI), civil conspiracy (count VII), and concert of action (count VIII) and requesting an accounting (count V).[2] The trial court granted defendants' motion for summary disposition on all of plaintiff's claims. Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). The trial court granted summary disposition on plaintiff's civil-conspiracy and

---

[2] Plaintiff also alleged innocent misrepresentation (count III), but on appeal she does not challenge the trial court's dismissal of that claim.

concert-of-action claims pursuant to MCR 2.116(C)(8). "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "[T]he motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Id*. The trial court granted summary disposition on plaintiff's remaining claims pursuant to MCR 2.116(C)(10). A motion under subrule (C)(10) tests the factual sufficiency of a complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Id*. "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). Further, we review de novo issues involving statutory interpretation. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

III. LEGAL ANALYSIS

A. BREACH OF THE PARTNERSHIP AGREEMENT

The UPA defines a partnership as "an association of 2 or more persons . . . to carry on as co-owners a business for profit[.]" MCL 449.6. Pursuant to the UPA, "[t]he dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." MCL 449.29. The dissolution of a partnership may occur by the acts of the

partners, by operation of law, or by decree of the trial court. See MCL 449.31 and MCL 449.32. Because a partner's right to dissolve the partnership is "inseparably incident to every partnership," there can be no indissoluble partnership. *Atha v Atha*, 303 Mich 611, 614; 6 NW2d 897 (1942) (quotation marks and citation omitted).

Plaintiff argues that defendants' decision to discontinue the partnership and oust her was wrongful absent the consent of all partners pursuant to MCL 449.18(h). Plaintiff also asserts that discontinuing the partnership was an act that made it impossible to carry on the ordinary business of the partnership, which was required to be authorized by all partners according to MCL 449.9(3)(c). Plaintiff's arguments fail to acknowledge the section of the UPA that sets forth circumstances under which a partner may dissolve a partnership.

The UPA specifies that

> [d]issolution is caused:
>
> (1) Without violation of the agreement between the partners:
>
> * * *
>
> (b) By the express will of any partner when no definite term or particular undertaking is specified[.] [MCL 449.31(1)(b).]

Plaintiff admitted in her first amended complaint that the partners did not specify a definite term for the partnership and, similarly, did not specify a particular undertaking. Plaintiff maintained that the partners agreed "[t]o carry on the partnership business indefinitely." Plaintiff also maintained that the partners agreed "[t]o work together to create, design, launch,

fund, market, and make changes and improvements, as necessary, to the website, or other websites they may develop[.]" Therefore, because there was no specific term set forth in the partnership agreement, which was open-ended about the partnership's undertakings with regard to developing websites then and in the future, the partnership could be dissolved by the express will of any partner pursuant to the UPA. MCL 449.31(1)(b); *Rinke v Rinke*, 330 Mich 615, 623-624; 48 NW2d 201 (1951). Accordingly, neither Clinesmith nor Beierling breached the partnership agreement when they dissolved the partnership, and the trial court properly granted summary disposition for defendants on plaintiff's claim alleging breach of the partnership agreement.

With respect to plaintiff's argument that she is entitled to damages in any event as a result of the dissolution, we acknowledge that the UPA seeks to make partners whole economically. *Gilroy v Conway*, 151 Mich App 628, 637; 391 NW2d 419 (1986). MCL 449.18(a) states in part: "Each partner shall be repaid his or her contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied." Therefore, on dissolution of the partnership, plaintiff was entitled to be repaid her capital contribution and to share equally in all profits. As the trial court correctly determined, however, "[p]laintiff did not make a capital contribution nor was there a profit to be shared." Plaintiff has not established otherwise on appeal and, accordingly, is not entitled to damages.

B. BREACH OF FIDUCIARY DUTY

Plaintiff next argues that defendants acted in bad faith, both leading up to and after the discontinuation

of the partnership, when they failed to disclose their intent to discontinue the partnership while at the same time allowing plaintiff to continue to perform partnership work for which she would reap no rewards.

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. Partners are held to a standard stricter than the morals of the marketplace and their fiduciary duties should be broadly construed, "connoting not mere honesty but the punctilio of honor most sensitive." The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. Thus, disclosure to one or several partners does not fulfill this duty as to every other partner. [*Band v Livonia Assoc*, 176 Mich App 95, 113-114; 439 NW2d 285 (1989) (citations omitted).]

In *Gilroy*, 151 Mich App at 637, this Court clearly articulated that the fiduciary duty between partners arises only from the partnership agreement:

> If it were to be assumed that a partner's breach of his fiduciary duty or appropriation of partnership equipment and business contracts to his own use and profit are torts, it is clear that the duty breached arises from the partnership contract. One acquires the property interest of a cotenant in partnership only by the contractual creation of a partnership; one becomes a fiduciary in partnership only by the contractual undertaking to become a partner. There is no tortious conduct here existing independent of the breach of the partnership contract.

The *Gilroy* Court further stated, "[A] partner [cannot] maintain an action in tort against a partner who by arbitrary or bad faith breach of the partnership contract has caused the termination of the partnership."

Id. at 637 n 6. Because the fiduciary relationship between plaintiff and defendants arose only by virtue of the parties' partnership agreement, the trial court properly determined that "the dissolution of the partnership cannot form the basis for a breach of fiduciary duty." Therefore, plaintiff's claim fails as a matter of law,[3] and summary disposition was appropriate.

Plaintiff also maintains that defendants breached their fiduciary duty to her when, after discontinuing the partnership, they formed a successor partnership with the same name and converted all partnership assets to the new partnership, thus depriving plaintiff of those assets. Under MCL 449.21(1), partners are held accountable as fiduciaries, and "[e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property[.]" The record clearly indicates that the partnership had no physical assets other than a computer that Clinesmith purchased to perform partnership accounting and the website generated no income with the exception of that from one subscription sale in the amount of $69.99. It is also undisputed that the partnership had an outstanding loan to Clinesmith in the amount of at least $10,000, which plaintiff admits was to be repaid before any profits were to be distributed.

Plaintiff also contends that defendants breached their fiduciary duty to her when they refused to compensate her with an hourly wage for her contributions

---

[3] Although the trial court indicated that it granted summary disposition for defendants on plaintiff's breach of fiduciary duty claim pursuant to MCR 2.116(C)(10), it also opined that plaintiff's allegations failed to state a claim as a matter of law.

to the partnership. Plaintiff, however, overlooks MCL 449.18(f), which plainly states, "A partner is not entitled to remuneration for acting in the partnership business . . . ." As an equal partner, plaintiff would have been entitled to 1/3 of the partnership's profits, MCL 449.18(a), but there were no profits to distribute. Plaintiff unequivocally testified at her deposition that she understood that none of the partners would be paid until the enterprise began to "make money." Because the record clearly indicates that the partnership never made a profit to distribute, plaintiff is not entitled to damages.

C. BREACH OF THE DUTY TO RENDER INFORMATION

Plaintiff next argues that defendants breached their duty to render information to her when they failed to inform her that they wanted her out of the partnership and instead continued to allow her to perform partnership work for which she would not be compensated. MCL 449.20 imposes a duty on partners to "render on demand true and full information of all things affecting the partnership to any partner . . . ." MCL 449.20 "has been broadly interpreted as imposing a duty to disclose all known information that is significant and material to the affairs or property of the partnership." *Band*, 176 Mich App at 113.

With regard to plaintiff's status in the partnership immediately before she was ousted, the record indicates that defendants did not conceal the fact that they had decided to remove plaintiff from the partnership. Deposition testimony from all three partners revealed that the partners discussed the fact that Beierling no longer wanted to work with plaintiff and wanted her out of the partnership. In fact, the partners exchanged several communications on the topic over the course of a few

days, including a series of e-mails, phone calls, and at least one in-person meeting, before Beierling terminated plaintiff's access to her partnership e-mail account and her website administration privileges. Thus, the record reveals that defendants did not breach their duty to render information with regard to plaintiff's status in the partnership.

Plaintiff also contends that defendants breached their duty to render information when they failed to provide her with information that she requested concerning the financial status of the partnership at the time of its dissolution. Specifically, plaintiff argues that her cause of action for violation of MCL 449.20 existed at the time of her ousting from the partnership and that defendants should not receive credit for the fact that they eventually provided all partnership information, financial and otherwise, to her as a part of the discovery process. Plaintiff, however, fails to identify the "significant and material" partnership information that she demanded from defendants but did not receive at the time that she was ousted. Plaintiff also fails to explain how the circumstances would have differed and fails to indicate the damages that she suffered as a result of defendants' alleged violation of MCL 449.20. Because plaintiff has not articulated exactly how defendants breached their duty to render information, or provided evidence to support her claim, the trial court properly granted summary disposition on plaintiff's claim alleging a breach of the duty to render information.

D. ACCOUNTING

Plaintiff next contends that she requested an accounting of the partnership, which was not performed at the time of her request. Under MCL 449.22(a), (b), and (d), a partner has the right to a formal accounting

of partnership affairs "[i]f he is wrongfully excluded from the partnership business or possession of its property by his copartners," "[i]f the right exists under the terms of any agreement," or "[w]henever other circumstances render it just and reasonable." It appears from the facts of this case that it was "just and reasonable" for plaintiff to request a formal accounting of partnership affairs at the time of her departure from the partnership. It is undisputed that defendants eventually provided plaintiff a full accounting of the business. Plaintiff takes issue with the timing of the disclosure, however, arguing that defendants should not receive credit for the fact that they ultimately provided the accounting as part of the discovery process.

We agree with plaintiff that defendants should have provided her a formal accounting of partnership affairs pursuant to MCL 449.22 within a reasonable time after the partnership dissolved and that litigation should not have been necessary for plaintiff to obtain the accounting. Plaintiff fails, however, to demonstrate that she was in any way damaged by the breach because the partnership was not profitable. Again, the UPA aims to make an aggrieved partner economically whole. *Gilroy*, 151 Mich App at 637. Despite plaintiff's efforts, there were no partnership assets to partition or profits to share. Notably, in her first amended complaint, plaintiff sought an order compelling an accounting and an award of "money damages in the amount found due by the accounting[.]" Because the partnership had no profits to distribute, the trial court properly granted summary disposition on plaintiff's claim seeking an accounting.

E. DISSOLUTION OF PARTNERSHIP (WINDING-UP)

Plaintiff next asserts that she had a right to account for her interests in the partnership on the date of its

dissolution. MCL 449.40 sets forth rules for distributing partnership property upon dissolution of a partnership. In general, MCL 449.40(b) provides that creditors should be paid first, then monies owed to partners for liabilities other than for capital and profits, followed by distribution of capital and, finally, profits to partners. Valuation should be made at the time of dissolution, and the winding-up of partnership affairs entails gathering the assets, paying and settling debts, and distributing any net surplus to parties entitled to it. *Wanderski v Nowakowski*, 331 Mich 202, 209-210; 49 NW2d 139 (1951).

Under MCL 449.37, "partners who have not wrongfully dissolved the partnership . . . [have] the right to wind up the partnership affairs[.]" Thus, defendants should have afforded plaintiff an opportunity to be involved in the winding-up of partnership affairs. The record reveals that plaintiff had no input whatsoever in the windup process because Beierling and Clinesmith took sole control of all partnership affairs, including the launch of the website and partnership finances.

Clinesmith, the partner responsible for accounting duties, testified with regard to winding up partnership affairs that she "personally look[ed] at the financials and recognized that there [were] only expenses. There were no profits." She testified:

> At that time there had not even been a sale. I looked at the fact that we had a website, that we had domain names, we had some games that were created, and in my estimation the value was less than the $10,000 that I had spent so far on the company, so I assumed the assets.

It appears from Clinesmith's testimony that she attempted to marshal partnership assets, value the assets at the time of dissolution, and distribute those assets.

Unfortunately, there was no surplus of assets over and above the $10,000 loan from Clinesmith.

Undoubtedly, defendants did not allow plaintiff to engage in any of the activities necessary to properly wind up the partnership. However, plaintiff has again failed to show that she was damaged. Plaintiff testified that she was aware of the $10,000 capital loan that Clinesmith had made to the partnership and that the loan was to be repaid before any partnership assets or profits would be distributed to the partners. This approach was consistent with MCL 449.40(b). While it would have been prudent to have a valuation of the partnership's website and other intangibles calculated at the time of partnership's dissolution, doing so would have been a formidable task considering that the website had not yet launched. In any event, it appears that the market set the value of the business after the website's launch when only one sale was generated despite extensive targeted marketing to industry professionals. While plaintiff claims that she was a "co-owner" of partnership property, the record reveals that there were no assets or profits to distribute to her. Accordingly, the trial court properly granted summary disposition for defendants on plaintiff's dissolution-of-partnership claim.

F. CIVIL CONSPIRACY AND CONCERT OF ACTION

Finally, plaintiff contends that because the trial court erred by dismissing her tort claim of breach of fiduciary duty, it also erred by dismissing her claims of civil conspiracy and concert of action. This Court has defined a civil conspiracy as "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org*

for Patients & Providers v Auto Club Ins Ass'n, 257 Mich App 365, 384; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005) (quotation marks and citation omitted). In addition, to establish a concert-of-action claim, a plaintiff must prove "that all defendants acted tortiously pursuant to a common design" that caused harm to the plaintiff. *Abel v Eli Lilly & Co*, 418 Mich 311, 338; 343 NW2d 164 (1984). For both civil conspiracy and concert of action, the plaintiff must establish some underlying tortious conduct. *Holliday v McKeiver*, 156 Mich App 214, 217-219; 401 NW2d 278 (1986); *Rencsok v Rencsok*, 46 Mich App 250, 252; 207 NW2d 910 (1973). In this case, the trial court correctly opined, "Both claims are not actionable torts, but rather require a separate tort before liability can attach . . . ."

"[A] partner [cannot] maintain an action in tort against a partner who by arbitrary or bad faith breach of the partnership contract has caused the termination of the partnership." *Gilroy*, 151 Mich App at 637 n 6. Because plaintiff's civil-conspiracy and concert-of-action claims are based on her claims related to the dissolution of the partnership and those claims arose only from the partnership agreement and therefore sound in contract rather than tort, plaintiff has failed to allege a separate actionable tort. Given that plaintiff has not established that defendants committed an underlying tort, she cannot sustain her claims of concert of action and civil conspiracy. Accordingly, the trial court properly granted summary disposition on those claims.

IV. CONCLUSION

Having found no error requiring reversal, we affirm the trial court's order granting summary disposition for defendants.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

DONOFRIO, P.J., and MARKEY and OWENS, JJ., concurred.

LENAWEE COUNTY v WAGLEY

Docket No. 311255. Submitted April 2, 2013, at Detroit. Decided May 21, 2013, at 9:10 a.m. Leave to appeal sought.

Lenawee County initiated a project to expand and modify the Lenawee County Airport, including the lengthening of a runway, and ultimately brought separate condemnation actions in the Lenawee Circuit Court under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*., against five parcels of property, including the residence owned by David and Barbara Wagley in which Bank of Lenawee and Pavillion Mortgage also had an interest. Federal Aviation Authority (FAA) standards require a runway protection zone (RPZ), and because the properties were in the RPZ, the county sought an avigation easement to permit unimpeded flight over the properties. The easement prohibited certain structures, obstructions, and activities on the properties. Two interlocutory appeals ensued. In the first, the county challenged the court's summary ruling that FAA regulations precluded residential uses within RPZs, resulting in a total taking of the properties as a matter of law. The Court of Appeals, SAWYER, P.J., and FITZGERALD and DONOFRIO, JJ., reversed in an unpublished opinion per curiam, issued March 22, 2007 (Docket Nos. 268819, 268820, 268821, 268822, and 268823) (*Wagley I*), holding that an avigation easement approved by the FAA is an acceptable alternative to complete acquisition of the property and that information submitted by the county demonstrated that the FAA had approved the easement. The trial court had erred by determining that a total taking was required under FAA regulations as a matter of law, but the Court of Appeals held that a condemning agency is required to pay just compensation for the whole parcel of property if acquiring only a portion of it would destroy the practical value or utility of the remainder and reserved for the jury's determination whether the defendants had suffered a total taking. Following discovery, the parties stipulated that no party would elicit testimony from the FAA. The parties then disagreed about the role FAA publications would play at trial, leading to the second interlocutory appeal. On appeal, the county objected to the exclusion of four evidentiary items and contended that the trial court should have excluded an appraisal that was predi-

cated on the assumption that location of the properties in the RPZ prohibited residential use. The Court of Appeals, MURPHY, C.J., and JANSEN and OWENS, JJ., held in an unpublished opinion per curiam, issued December 20, 2011 (Docket Nos. 302533, 302534, 302535, 302537, and 302538) (*Wagley II*), that under the law of the case doctrine, it would be improper to allow the jury to hear testimony regarding an appraisal that was predicated on purported FAA regulations prohibiting residency in an RPZ and that the trial court had erred by denying the county's motion to exclude that portion of the appraisal. The Court of Appeals also held that the parties' stipulation precluding any party from eliciting testimony from the FAA governed the remaining evidentiary issues and affirmed the trial court's rulings on those issues. At the trial that followed, the FAA was referred to numerous times. With respect to the Wagleys, the jury found that the county's acquisition of the easement destroyed the practical value or the utility of the Wagleys' property and determined just compensation as $470,000. The trial court, William E. Collette, J., sitting by assignment, entered a judgment accordingly, including statutory interest under MCL 213.65 of the UCPA and an additional $117,500 under MCL 213.23. The county appealed that judgment.

The Court of Appeals *held*:

1. Under the law of the case doctrine, a ruling by an appellate court on a particular issue binds that court and all lower tribunals with respect to the issue. If an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions the appellate court determined will not be determined differently on a subsequent appeal in the same case when the facts remain materially the same. The doctrine applies only to issues actually decided, either implicitly or explicitly, in the prior appeal. *Wagley I* and *II* barred (1) evidence predicated on an assumption that FAA regulations required a total taking or precluded homes in the RPZ and (2) evidence contravening the parties' stipulation excluding testimony from the FAA. They did not bar all references to the FAA or exclude the admission or use of FAA regulations. It would have been impractical to have tried this case without referring to any of the regulations, recommendations, circulars, and statements governing runways and RPZs. *Wagley I* prohibited the Wagleys from asserting a legally incorrect argument (that the FAA mandated a total taking of their property) but did not address evidence regarding the practicability of removing homes or the dangers attendant to home occupancy in an RPZ. Whether the

practical value or the utility of the remainder of the property was in fact destroyed was a question to be determined by the finder of fact and included in the verdict.

2. The trial court did not err by denying the county's request that the court take judicial notice that the FAA did in fact approve the easements, letting the houses remain. That the FAA had approved the easement was squarely before the jury from the outset. The evidence presented by both sides presumed that the FAA had approved the entire project, including the avigation easement.

3. The county asserted that the trial court incorrectly permitted the Wagleys to structure their total-taking claim around their residence's presence in the RPZ rather than the diminution of value resulting from the avigation easement and that the trial court incorrectly ruled that the taking occurred when the Wagleys' property was placed in the RPZ. The trial court did not err by permitting the jury to award damages for placement of the home in the RPZ. The jury instructions left no room for doubt that the jury's task was to determine whether the practical value of the remainder of the property was destroyed or diminished in value, and the jury verdict form reiterated that the easement rather than the RPZ governed the jury's decision.

4. The county argued that because it lacked any responsibility for the dimensions of the RPZ (attributing that duty to the FAA alone), the evidentiary references to the RPZ called into question the propriety of state court jurisdiction. The county initiated this action in the state circuit court under the auspices of state law, however, and did not seek removal of the action to federal court. A party is bound by its pleadings, and it is not permissible to litigate issues or claims that were not raised in the complaint. Because the county initiated this action in the state circuit court and sought a determination of just compensation, it could not later imply that it was not a proper party on which to impose damages.

5. The trial court erred by permitting two defense expert witnesses to opine regarding when a taking occurs. The opinion of an expert may not extend to the creation of new legal definitions and standards or to legal conclusions. Moreover, an expert witness may not testify regarding a question of law because it is the exclusive responsibility of the trial court to find and interpret the law. Despite the admission of this improper testimony, however, the county could not demonstrate that the error resulted in undue prejudice or affected the outcome of the jury's verdict. Ultimately, the parties agreed about the date on which the property was to be valued. Testimony by the experts about when the taking was

effectuated was completely irrelevant to this determination. Furthermore, the trial court's jury instructions were proper, and jurors are presumed to follow their instructions.

6. The county argued that the trial court erred by permitting a defense expert witness to testify regarding the effect of the airport and easement on the marketability of the Wagleys' property and the disclosures required in real estate transactions without first conducting a hearing in accordance with *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993). The purpose of a *Daubert* hearing is to filter out unreliable expert evidence. MRE 702 requires trial courts to act as gatekeepers and exclude that testimony. While *Daubert* hearings are required when dealing with expert scientific opinions in an effort to ensure the reliability of the foundation for the opinion, when expert testimony on nonscientific matters is involved, the *Daubert* factors may be pertinent or the relevant reliability concerns may focus on personal knowledge or experience. The gatekeeping inquiry is context-specific and must be tied to the factors of a particular case. The expert did not offer scientific expert testimony; rather, his testimony constituted other specialized knowledge under MRE 702, and in that context the factors enumerated in *Daubert* could not readily be applied to measure the testimony's reliability. The expert sufficiently explained how his experience led to his opinions, and he acknowledged that his testimony constituted opinion based on his experience. The trial court did not err by refusing to conduct a *Daubert* hearing.

7. The trial court did not err by permitting a defense witness to testify that the easement permitted pilots to fly three feet above the Wagleys' roof. That testimony was premised, in part, on the county's answer to interrogatories. The county initiated the discussion of heights through its questioning of its own witnesses. The respective expert witnesses offered conflicting opinions and interpretations regarding the effect of the easement. Disagreements pertaining to an expert witness's interpretation of the facts are relevant to the weight of that testimony, not its admissibility.

8. MCL 213.65 provides for the computation of interest on a just compensation award from the date of the filing of the complaint to the date that payment is tendered. An owner remaining in possession after the date that the complaint is filed, however, waives the interest for the period of the possession. Defense counsel requested that interest be computed from November 21, 2007, the date that the trial court entered an order allowing the county to take possession of the easement. The county argued that the Wagleys were only entitled to statutory

interest from the date on which the county took possession of the entire property and that because the Wagleys retained possession of the property, regardless of whether they used it, and lost only the right to use the airspace beyond a certain height, they were not entitled to interest. The legislative intent behind the UCPA is to place property owners in as good a position as they were before the taking. In general, interest on condemnation awards begins to accumulate on the date of judgment. When there has been a taking of property during the pendency of the proceedings, however, interest is allowed from the date of taking but does not begin to run until the condemnor has possession of the property. The county's taking of the avigation easement did not permanently deprive the Wagleys of the entirety of their property, but the trial court's November 21, 2007, order did immediately and permanently deprive the Wagleys of any possession or use the property actually taken, i.e., the airspace above the parcel. The Wagleys' right to interest under the statute began to run as of their loss of use and right to possess the airspace on that date.

9. The trial court's order provided that if the county elected to take title to the property, it had to pay the Wagleys an additional $117,500 pursuant to MCL 213.23. When the county filed its complaint to condemn the Wagleys' property, MCL 213.23 authorized the taking. The Legislature subsequently amended MCL 213.23 to add subsection (5), which provides that if the property taken consists of an individual's principal residence, the amount of compensation must be no less than 125 percent of the property's fair market value. Statutes are presumed to operate prospectively unless the contrary intent is clearly manifested, particularly if retroactive application would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions. An exception to the general rule exists if a statute is remedial or procedural in nature. A statute is remedial when it corrects an existing oversight in the law, redresses an existing grievance, introduces regulations conducive to the public good, or intends to reform or extend existing rights. MCL 213.23(5) created a new right. It also imposed a converse duty on the condemning agency to remit an enhanced award. The potential for damages arose when the county filed this condemnation action, not when the taking was actually allowed. The trial court's order enhancing the damages award must be reversed.

Affirmed in part, reversed in part, and remanded.

K. F. KELLY, J., concurring in part and dissenting in part, agreed fully with the majority's analysis but concluded that the Wagleys remained in possession of the property and therefore waived any

statutory interest. Under MCL 213.57, title to the property automatically vested in the county as of the date it filed the condemnation complaint. The trial court, however, had to take action for possession of the property to pass to the county. MCL 213.59 provides that the court must fix the time and terms for surrender of possession of the property to the condemning agency. The county possessed the rights acquired through the avigation easement since November 21, 2007. While imposition of the easement interfered with the Wagleys' use and enjoyment of the property, it did not permanently deprive them of any possession or use of their residence. Although the jury determined that the easement destroyed the practical value or utility of the remainder of the property, that is not the equivalent of a deprivation of possession and use during the proceedings. Accordingly, Judge KELLY would have reversed that portion of the trial court's order awarding interest under MCL 213.65.

1. WITNESSES — EXPERT WITNESSES — LEGAL MATTERS.

The opinion of an expert witness may not extend to the creation of new legal definitions and standards or to legal conclusions, nor may an expert witness testify regarding a question of law because it is the exclusive responsibility of the trial court to find and interpret the law.

2. WITNESSES — EXPERT WITNESSES — TESTIMONY ON NONSCIENTIFIC MATTERS — *DAUBERT* HEARINGS.

The purpose of a hearing under *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993), is to filter out unreliable expert evidence, and MRE 702 requires trial courts to act as gatekeepers and exclude that testimony; while *Daubert* hearings are required when dealing with expert scientific opinions in an effort to ensure the reliability of the foundation for the opinion, when expert testimony on nonscientific matters is involved, the *Daubert* factors may be pertinent or the relevant reliability concerns may focus on personal knowledge or experience; the gatekeeping inquiry is context-specific and must be tied to the factors of a particular case; in the context of an expert witness whose testimony constitutes other specialized knowledge rather than scientific expert testimony, the factors enumerated in *Daubert* cannot readily be applied to measure the testimony's reliability.

3. EMINENT DOMAIN — JUST COMPENSATION — AIRSPACE — AVIGATION EASEMENTS — INTEREST ON AWARD.

MCL 213.65 provides for the computation of interest on a just compensation award in a condemnation case from the date the

complaint is filed to the date that payment is tendered; an owner remaining in possession after the date that the complaint is filed, however, waives the interest for the period of the possession; an order establishing an avigation easement, which prohibits certain structures, obstructions, and activities on a property to permit unimpeded flight over it, does not permanently deprive the owner of the entirety of the property, but does immediately and permanently deprive the owner of any possession or use the property actually taken (the airspace above the property), and the right to interest under the statute begins to run as of the date of that order.

Strauss & Strauss, PLLC (by *Gary David Strauss*), for Lenawee County.

Clark Hill PLC (by *Stephon B. Bagne*) and *Whitker & Benz, P.C.* (by *Bruce H. Benz*), for David and Barbara Wagley.

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

GLEICHER, J. In this condemnation dispute, a jury awarded defendants, David Wagley, Barbara Wagley, Bank of Lenawee, and Pavillion Mortgage, $470,000 as just compensation for an avigation easement over the Wagleys' residential property, plus interest, costs, and fees.[1] Plaintiff, Lenawee County, appeals as of right, raising numerous challenges to evidentiary rulings, the jury instructions, and the trial court's posttrial supplementary damages award. We affirm the trial court's evidentiary and instructional rulings. We also affirm the court's award of statutory interest on the just

---

[1] "Avigation" refers to "aerial navigation." *The Random House Dictionary of the English Language, Second Edition Unabridged* (1987). An avigation easement permits unimpeded aircraft flights over the servient estate. *Lenawee Co v Wagley*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket Nos. 302533, 302534, 302535, 302537, and 302538), p 3 n 1, quoting Black's Law Dictionary (7th ed), p 527.

compensation award. We reverse, however, the trial court's order enhancing the damages award in the event the county decides to take the entirety of the Wagleys' property because this would require retroactive application of a statute creating substantive rights. We remand for correction of the judgment accordingly.

I. UNDERLYING FACTS AND PROCEEDINGS

This case arises from the county's decision to expand and modify the Lenawee County Airport. The project began in approximately 1994 and evolved over several years. The 2003 revisions increased the length of Runway 23 from 4,000 to 5,000 feet and shifted the runway's location. The additional length permitted larger corporate aircraft to regularly operate at the airport and generally enhanced aviation safety.

David and Barbara Wagley own a four-bedroom home on a 1.3-acre lot abutting the airport. Bank of Lenawee and Pavillion Mortgage each have an interest in the property as well.[2] The Wagleys purchased the home in 2001, before Runway 23 was lengthened. The new runway is actually 532 feet farther from the Wagleys' property than the prior runway. But due to the runway lengthening, a larger area on the ground and in the air must remain free of obstructions.

Federal Aviation Authority (FAA) standards mandate the creation of a runway protection zone (RPZ) "begin-[ning] 200 feet beyond the end of the area useable for takeoff or landing," maintained to "enhance the protection of people and property on the ground."[3] Pursuant

---

[2] For ease of reference, we will refer to the collective defendants simply as "the Wagleys."

[3] FAA Policy and Procedures Memorandum, Airports Division, No. 5300.1B, issued February 5, 1999, ¶¶ 2(j) and 3(b).

to the 2003 airport layout plan, the FAA determined that the Wagleys' home was within the RPZ. Although the parties disputed whether the home had always been within the RPZ, the county did not seek an avigation easement until 2005, when it filed this condemnation action under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. With its complaint, the county filed a declaration of taking estimating the just compensation due the Wagleys as $47,500.

The avigation easement described in the declaration of taking permits the county "to keep the airspace above [certain] heights . . . clear and free" of obstructions including fences, trees, and buildings. The easement also governs activities on the land, prohibiting "any ground structures, natural growth, storage of equipment, vehicles or aircraft, flammable material storage facilities, or activities which encourage the congregation of people in the [RPZ] . . . ." Attendant to the easement, the county prohibited the creation of "electrical interference with radio communication between" the airport and aircraft and activities "mak[ing] it difficult for fliers to distinguish between airport lights and others" or resulting in glare in fliers' eyes or "otherwise . . . endanger[ing] the landing, taking-off or maneuvering of aircraft[.]" Further, the easement forecloses on the encumbered land "the construction of new residences . . . or places of public assembly, such as churches, schools, office buildings, shopping centers, and stadiums."

Two interlocutory appeals brought the parties to this Court before trial commenced. In the first, the county challenged the trial court's summary ruling that FAA regulations precluded residential uses within RPZs, resulting in a total taking of the Wagleys' property as a matter of law. This Court reversed, holding that an

avigation easement approved by the FAA is an "acceptable alternative" to complete acquisition of the property. *Lenawee Co v Wagley*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket Nos. 268819, 268820, 268821, 268822, and 268823) (*Wagley I*), p 5. Documentary information submitted by the county satisfied this Court that the FAA had approved the avigation easement. *Id*. at 6. Thus, "the trial court erred in determining that a total taking was required under FAA regulations 'as a matter of law.' " *Id*. Nevertheless, this Court observed that "[a] condemning agency is required to pay just compensation for the whole parcel of property if acquiring only a portion of it would destroy the practical value or utility of the remainder." *Id*. at 7, citing MCL 213.54(1) and M Civ JI 90.18. We specifically reserved for a jury's determination whether the Wagleys "suffered a total taking — that is, whether the practical value or utility of the remainder of the parcels was destroyed — is a disputed question of fact . . . ." *Id*. at 8.

Extensive discovery ensued. In October 2008, the parties stipulated to the entry of an order reciting, "neither party shall illicit [sic] testimony from the [FAA] or the Michigan Department of Transportation Bureau of Aeronautics [DTBA]." After this order entered, the parties vigorously disagreed about the role FAA publications would play at the trial, leading to their return to this Court. See *Lenawee Co v Wagley*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket Nos. 302533, 302534, 302535, 302537, and 302538) (*Wagley II*).

Wagley II concerned the county's objection to the trial court's exclusion of four evidentiary items: an unsigned letter to United States Senator Carl Levin authored by FAA representative Christopher Blum; an affidavit ex-

ecuted by FAA manager Irene Porter addressing FAA regulations, policies, and procedures; a study conducted by Daniel P. McMillen regarding the effect of avigation easements around Chicago's O'Hare Airport; and portions of an appraisal that analyzed the effect of avigation easements at the Grand Haven Airport in Michigan. *Id*. at 8. The county further contended that the trial court should have excluded an appraisal prepared by David E. Burgoyne, the Wagleys' expert witness, setting forth an evaluation "predicated on the assumption that residential occupancy . . . was prohibited after the taking due to [the] location in the RPZ." *Id*. at 9.[4]

This Court held that the trial court had erred by denying the county's motion to exclude the portion of Burgoyne's appraisal "predicated on the assumption that FAA regulations prohibit residential use," *id*. at 10, and affirmed the other evidentiary decisions. With respect to the Burgoyne appraisal, this Court emphasized that "[i]t is entirely improper, under the law of the case doctrine, to allow the jury to hear testimony regarding an appraisal predicated on purported FAA regulations that prohibit residency in the RPZ." *Id*. at 12. We held that the parties' stipulation precluding the elicitation of testimony from the FAA or the DTBA governed the remaining evidentiary issues and affirmed the trial court's in limine rulings. *Id*. at 13.

Trial began on June 4, 2012, and ended two days later. In his opening statement, counsel for the county introduced the avigation easement concept by specifically referring to the FAA:

---

[4] This Court explained that Burgoyne had prepared three appraisals, one addressing market value before the taking, one addressing market value after the taking assuming continued occupancy, and the third addressing market value after the taking assuming that residential use was prohibited by the FAA. *Wagley II*, unpub op at 9.

> What an avigation easement is, it limits, in this case, growth of trees above a certain height that the FAA finds for safe clearance. . . .
>
> And as you'll hear from our witnesses here, the FAA . . . controls all aspects of flight in this country. It's amazing how many rules there are for pilots, but thank God this is a very safe industry. There's lots of rules they've got to follow.
>
> Now, the main purpose of the easement we took here and really the only proactive or the only thing we did was to cut down the trees that might go above these elevations. Now, the easement language here is a form document from [the Michigan Department of Transportation] and the FAA, it's a form document that's generally used in most all easements across the country.

Counsel then described the history of the airport's runway renovations and discussed the function of an RPZ concept, again making referring to the FAA.

The county presented as its first witness Stephanie Ward, manager of aviation planning for Mead & Hunt, "a consulting engineering company." The county had contracted with Mead & Hunt to develop and implement the airport expansion, and Ward worked directly on the project. Ward explained that the Wagley avigation easement was necessary to comply with FAA regulations requiring clear aircraft "approach slopes," generally defined as the places where aircraft typically fly. She likened the approach slope to a roadway: "[T]he approach slope area is where you're typically going to be driving, for example, the paved surfaces of the roadway." In contrast, the "approach surface" is more akin to the "road right-of-way," which must be "clear of signs, clear of trees, those types of things. So that way if you deviate from that area it's going to be clear of obstructions." According to Ward, the FAA generously defines the required clearance for approach slopes to

avoid obstructions "so that if a plane were to operate below the typical approach, they're not going to run into anything." Ward explained that the county acquired the avigation easement "to make sure especially with the change in the approach slope that we had the ability to control obstructions as they continued to shoot up into that approach area . . . ." She opined that the project "helped increase the safety of the Wagley property" and that the runway relocation "made it safer . . . because we were moving it farther away, giving aircraft more length to work with, and increasing the amount of safety area closer to the approach and to the properties."

During cross-examination, Ward acknowledged that the FAA recommends "whenever possible" that an airport acquire and clear all obstructions from the RPZ "if practicable." When obtaining ownership of the property is deemed "impracticable," Ward agreed that avigation easements should be obtained to control the height of structures and vegetation in a RPZ. Although the county objected to this line of questioning, the trial court permitted it to continue because it focused on Ward's opinions regarding the safety of the Wagley home given its placement within the RPZ.

Counsel for the Wagleys then confronted Ward with the following excerpt from an environmental assessment conducted in conjunction with the 1999 plan revisions:

> "Problem: At this time the airport does not meet all the FAA -- all FAA and RPZ standards. Currently there are incompatible land uses in the RPZ such as homes and there are numerous penetrations of the approach surfaces such as trees and parts of buildings."

Without objection, Ward conceded that "the final environmental assessment was deeming the existence of

houses in the RPZ to be a problem that needed to be rectified[.]" Many transcript pages later, the following colloquy ensued, also without objection by the county:

> *Q*. And everybody knows what [RPZs] should be, there should be no houses in the [RPZs], that's what should happen, right?
>
> *A*. It's the FAA design criteria, so yes.
>
> * * *
>
> *Q*. Do you believe that incompatible uses within the RPZ include homes?
>
> *A*. Yes.

Yet again without objection Ward conceded that the FAA "recommends that whenever possible the entire RPZ be owned by the airport and clear of all obstructions if practicable[.]"

At the conclusion of Ward's testimony, the county requested that the trial court take judicial notice that the FAA had approved the planned runway expansion. The trial court refused to do so, relying in part on this Court's opinions and the parties' previous stipulation.

The Wagleys' trial evidence focused on the contention that their home was unsafe because of its inclusion in the RPZ and therefore a total taking had occurred. Several witnesses testifying on the Wagleys' behalf described the RPZ as the area in which most aviation accidents took place and opined that homes were incompatible with an RPZ. Pilot Carl Byers, one of the Wagleys' experts, disputed the county's claim that the airport was safer because of the runway alteration:

> If all they had done was take the same size of runway designed for the same size of aircraft and move it further from the houses, then I could potentially see where that could be considered a safer condition. But that's not what

> happened. They moved it 500 feet further away, but then they also made the runway larger, they designed it for larger aircraft flying for lower approach minimums, faster speeds. . . . So just moving the threshold away from the houses they negated that by making it a much bigger -- a runway attracts much larger, faster aircraft.

Byers opined that the existence of homes within the RPZ endangered residents and increased the likelihood of accidents. He represented that had his engineering consulting company been involved in this project it would have refused to "sign off" if houses remained in the RPZ. Similarly, engineer Jerald Seale expressed that when practicable, an airport should acquire all property within the RPZ. David Burgoyne, the Wagleys' principal appraiser, summarized that based on his evaluation of the available expert reports regarding the aviation issues presented in the case, "it's better if the property's acquired in fee and the houses are removed." In Burgoyne's view, the avigation easement destroyed the practical value and utility of the Wagleys' home.

The jury found that the county's "acquisition of the easement destroyed the practical value or utility of the Wagley property" and determined just compensation to be $470,000.

II. ANALYSIS

A. EVIDENTIARY ISSUES AND JUDICIAL NOTICE

The county raises 10 issues on appeal. The principal thrust of several arguments is that contrary to the law of the case, the trial court "repeatedly permitted [the Wagleys] to introduce testimony, that according to FAA regulations, the [c]ounty should have taken the house due to its location in the RPZ." The trial court compounded this error, the county asserts, by refusing to take judicial notice of this Court's prior ruling that the

FAA approved the avigation easement over the Wagleys' property and by permitting testimony that placement of the Wagleys' home within the RPZ was unsafe. The county further complains that despite this Court's rulings in *Wagley I* and *Wagley II*, the trial court admitted a number of documents authored or generated by the FAA that were attached to Ward's report.

Whether the trial court followed this Court's rulings on remand presents a question subject to de novo review. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). "Similarly, this Court reviews de novo the determination whether the law-of-the-case doctrine applies and to what extent it applies." *Id*. Judicial notice is discretionary, MRE 201(c), and we review for an abuse of that discretion a trial court's decision whether to take judicial notice, *Freed v Salas*, 286 Mich App 300, 341; 780 NW2d 844 (2009). "An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes." *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011).

"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 132; 762 NW2d 178 (2009) (quotation marks and citation omitted). "[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Id*. (quotation marks and citation omitted; alteration in original). The doctrine is applicable "only to issues actually decided, either implicitly or explicitly, in the

prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

We begin by reviewing the holdings in *Wagley I* and *Wagley II* that form the law of the case. In *Wagley I*, this Court held that as a matter of law, FAA regulations did not require fee simple ownership of all property within an RPZ. *Wagley I*, unpub op at 5. Thus, an avigation easement did not necessarily result in a total taking. *Id*. at 8. In *Wagley II*, this Court considered evidentiary issues concerning FAA requirements. First, this Court ruled that the parties' stipulation prohibiting testimony from the FAA or the DTBA precluded the introduction of various written statements made by FAA employees. *Wagley II*, unpub op at 13-14. Second, we reiterated *Wagley I*'s ban on testimony or evidence representing that FAA regulations prohibited residential use of property in the RPZ. *Id*. at 10.

Thus, in its prior opinions, this Court barred (1) evidence predicated on an assumption that FAA regulations required a total taking or precluded homes in the RPZ and (2) evidence contravening the parties' stipulation excluding "testimony" from the FAA. This Court's opinions did not bar all reference to the FAA or exclude the admission or use of FAA regulations. In its brief on appeal, the county correctly observes that

> the parties have loosely referred to FAA documents as "regulations." . . . In actuality, most all of the documents are FAA Advisory Circulars which "[p]rovide[] guidance such as methods, procedures, and practices acceptable to the [FAA] Administrator for complying with regulations and grant requirements. . . . They do not create or change

> a regulatory requirement." FAA Order 1320.46C. [All but third alteration in original.][5]

And without question, both sides used FAA documents to suit their own purposes. During her direct examination, Ward testified that the size and shape of the RPZ were "predicated on FAA design criteria . . . ." She explained that when the county opted to build a longer runway, the FAA changed the size and shape of the RPZ. Those FAA-mandated changes, Ward continued, had to be accommodated in the airport's layout and design, and the newly created RPZ engulfed the entire Wagley property.

References to FAA recommendations continued during Ward's cross-examination:

> *Q.* The FAA recommends that whenever possible the entire RPZ be owned by the airport and clear of all obstructions if practicable?
>
> *A.* Yes.
>
> *Q.* Where ownership is impracticable, avigation easements are recommended to obtain the right to maintain the height of structures and vegetations [sic] within the RPZ footprint?
>
> *A.* Yes.
>
> *Q.* Now, you say that they recommend where it's practicable that they own the RPZ and they use avigation easements where it's impracticable, correct?
>
> *A.* Correct.
>
> *Q.* And when I deposed you, you did not --
>
> *Mr. Strauss*:[6] Your Honor, I would just place an objection on the record with that. These issues of determination

---

[5] For example, we note that the parties stipulated to the admission of exhibit M, an FAA "Advisory Circular" concerning "hazardous wildlife attractants on or near airports."

[6] Gary D. Strauss served as the county's trial counsel.

are made solely by the FAA and that determination has already been made and I don't believe it's a part of this case anymore, that determining -- that determination has been made, it's certainly their decision to make and they've made it and it's the law of the case.

The Court: Well, I don't think we're talking about -- they're not involved in this discussion. This is her opinion. She's your expert that said these things should be done. Didn't she?

* * *

Mr. Strauss: Um, with all due respect, yes, Your Honor. It's not her decision to make. I think that's been her testimony throughout. It's the FAA's decision, it's their game, we go to them and say is it fine.

* * *

Mr. Strauss: And they said yes. And that was the subject of -- of --

The Court: Okay. But this is a cross-examination of her and her determinations and the things that you had her testify to as to why this is reasonable and not reasonable. So I think he can ask her this in the context of it's not -- not to do with the FAA, it's her decision.

The county has not identified any testimony or evidence introduced by the Wagleys suggesting that the FAA *required* the county to obtain fee simple ownership of the Wagley property. Rather, both sides quarreled about whether the FAA recommended to airport planners that homes be moved outside the RPZ, despite that the FAA permitted their presence.

Moreover, the excerpted portions of the testimony illustrate that it would have been impractical for the parties to have tried this case in an FAA vacuum, without reference to any of the regulations, recommendations, circulars, and statements governing runways

and RPZs. Although this Court's ruling in *Wagley I* prohibited the Wagleys from asserting a legally incorrect argument—that the FAA mandated a total taking of their property—our opinion did not address evidence regarding the practicability of removing homes or the dangers attendant to home occupancy in an RPZ. To the contrary, this Court specifically envisioned that "whether the practical value or utility of the remainder of the parcel of property is in fact destroyed is a question to be determined by the finder of fact and included in the verdict." *Wagley I*, unpub op at 7, citing MCL 213.54(1).

Nor did the trial court err by denying the county's request that it "take judicial notice that the FAA in fact did approve the easements in this case, letting the houses remain." That the FAA had approved the easement was squarely before the jury from the outset. On redirect examination just before making this request, counsel for the county established that the FAA would not have approved the funding for the airport expansion if it had believed that FAA requirements had been disregarded:

> *Q*. Now, I believe some questions were asked about whether the county commissioners made any decisions . . . regarding . . . whether or not to acquire properties [in] fee, the whole property within the [RPZ]. Do you recall that question?
>
> *A*. Yes.
>
> *Q*. . . . Did the county commissioners have any input into that final decision?
>
> *A*. A recommendation was made. I mean they're the final acceptors of the grant, so they were agreed. . . .
>
> *Q*. But what is the role of the FAA with regard to that? Did the FAA make the decision, funding decisions as to whether we've complied with their requirements?

A. Yeah, the FAA and the [DTBA] wouldn't issue a grant if they didn't support that decision.

Q. And just based, of course, on your experience, which is all you can do, your professional experience, does the FAA, would they approve of this approach and the situation at the airport if they believed it was unsafe?

A. No, they would not of.

While the testimony of both sides' witnesses frequently blurred the distinction between an RPZ and an avigation easement, the Wagleys never challenged that the FAA had approved the project, including the easement. The evidence presented by both sides presumed that the FAA had approved the entire project, including the avigation easement.[7]

Moreover, given this Court's opinion in *Wagley II*, the trial court did not abuse its discretion by refusing to take judicial notice of the FAA's approval of the avigation easement. In *Wagley II*, we highlighted that the parties' stipulation precluded them from eliciting FAA testimony. Specifically, this Court upheld the exclusion of two documents (the Blum letter and the Porter affidavit) that apparently represented that the FAA had approved the easement. The trial court expressed that "any reference to the FAA decisions and all of that was to stay out of this case," quoting aloud the following language from *Wagley II*:

In our view, after this Court's earlier opinion, the five cases should have come down to having a jury determine just compensation based on a diminution of value as caused by a property being encumbered by an avigation easement,

---

[7] The county also challenged the trial court's "refusal" to give a supplemental instruction to the jury on this issue when the panel submitted a question during deliberations. Yet the parties discussed the instruction with the court, and neither objected when the court chose the instruction's content.

> with the jury still having the ability to determine that a total taking effectively occurred as caused by an easement, *but not based on FAA regulations*. [*Wagley II*, unpub op at 13 (emphasis added).]

While judicial notice of the FAA's approval of the easement probably would not have contravened the law of the case, in light of our opinions we cannot fault the trial court for hewing a narrower course. Accordingly, we reject as legally and factually unsound the county's argument that the trial court permitted the Wagleys to introduce evidence contravening the law of the case.

B. WHETHER THE WAGLEYS IMPROPERLY BASED THEIR CLAIM ON PLACEMENT IN THE RPZ

In somewhat related claims, the county asserts that the trial court incorrectly permitted the Wagleys to structure their total-taking claim around their presence in the RPZ rather than the diminution of value resulting from the avigation easement.

During the redirect examination of defense witness Searles, the following colloquy ensued:

> *Q*. Let's go back to the 1994 airport layout plan. If they had intended for the houses to be in the RPZ ultimately in 1994 . . . , that's when they would have had to pay them for the just compensation that we're here talking about today?
>
> *A*. That is correct.
>
> *Mr. Strauss*: I'm going to object. Calls for a legal conclusion, Your Honor. I'd ask that that answer be stricken. As far as the determination of just compensation from the feds, I don't know -- it's a legal conclusion.

Following the trial court's request that defendants' counsel repeat the question before ruling on the county's objection, the disagreement continued:

Mr. Bagne:[8] The question -- the gist of the question was if the ultimate intention . . . of the 1994 airport layout plan that houses would be ultimately remaining in the RPZ, that's when they would have to pay just compensation for acquiring those rights.

The Court: So you mean that day or that time period?

Mr. Bagne: Yes.

The Court: I think this has been asked of other people as well, Counsel, in a different way.

Mr. Strauss: Um --

The Court: That if you put something in -- I think the question goes to the fact that if you rezone something so they can't do something but you don't bother to tell them about it, technically that's the time of the taking. I think [that is] what he's getting at, isn't it, Mr. Bagne?

Mr. Bagne: Well, the gist of it, Your Honor, and Miss Ward testified that they would have had to buy property rights at that time.

The Court: Sure. She's already said something like that.

Mr. Strauss: May I respond, Your Honor?

The Court: Sure.

Mr. Strauss: Okay. That -- it's just not true. It's a legal conclusion. It's not true. The federal government designates [RPZs] in the state where the airport cannot designate them.

The Court: I didn't say that.

Mr. Strauss: Ultimately -- so it would not be -- it would not be a taking. And if it was a taking, you would have to sue inverse against the federal government.

The Court: Your own witness testified to this. Does that make any difference to you? He's simply following up on

---

[8] Stephon B. Bagne served as trial counsel, along with Bruce H. Benz, for the collective defendants.

that. It's already in the record, Counsel. Thank you. For whatever it's worth, I'm not sure how much if anything, but she did say that.[9]

By Mr. Bagne:

Q. If you -- if you're going to put -- if an airport that you're working for is going to put somebody in a RPZ, do they have to acquire property rights?

A. Yes.

Q. And when they acquire those property rights either -- that's the point in time where the property owner has a right to be -- receive whatever just compensation they're entitled to receive under whatever law that is?

A. Yes, sir.

Q. So you can't just go put somebody in a RPZ and then come back later and say we're not going to pay you for it because it was in the plans from before?

A. That is correct.

The county contends that during this exchange the trial court incorrectly "ruled" that the taking occurred when the Wagleys' property was placed in the RPZ. Without citing specific transcript excerpts, the county

---

[9] The testimony by Ward that the trial court referred to occurred during cross-examination:

Q. So you're saying that property owners that would be chucked in a RPZ wouldn't know it, nobody would tell them about it, and [they] wouldn't get paid any just compensation at that point in time --

A. Happens all the time.

Q. -- until such time as you come to obtain the appropriate property rights through the project?

A. Correct. When we find an obstruction.

Q. And when you obtain those property rights, that's when they get paid for being in the RPZ?

A. Correct.

further alleges that the trial court generally permitted the Wagleys "to present irrelevant evidence and allowed the jury to second guess the FAA and circumvent the exclusive federal process."

We have previously acknowledged that the witnesses' testimony frequently blurred the distinction between an RPZ and an avigation easement. While the easement and the RPZ are separate legal concepts, the evidence supported that the FAA required the county to obtain an avigation easement precisely because the Wagleys' property was in the RPZ. Thus, the RPZ created the need for the easement, and the easement included the land and airspace contained within the RPZ. Given the interrelationship between the avigation easement and the RPZ, the experts' use of the terms somewhat interchangeably is not surprising.

Despite the occasionally imprecise language, we find no merit to the county's claim that the trial court permitted the jury to award damages for placement of the home in the RPZ. The trial court instructed the jury that

> the county has acquired through this condemnation proceeding certain limited rights in the Wagleys' land. The rights being acquired are as follows: The right to obtain and preserve for the use and benefit of the public a right of free and unobstructed flight for aircraft landing upon, taking off from, or maneuvering about the airport;
>
> An easement and right-of-way for the benefit of the general public at large for the free, unobstructed passage of aircraft, by whomever owned or operated, in and through the air space over and across those parts of the Wagleys' lands in the air space that lays above the heights described and depicted in the -- in the tables that you saw as exhibits.

The trial court read to the jury the entire description of the avigation easement, and taken as a whole, the

instructions left no room for doubt that the jury's task was to determine whether the practical value of the remainder of the property was destroyed or diminished in value. In addition, the jury verdict form reiterated that the easement rather than the RPZ governed the jury's decision:

> **Question 1**: Do you believe that the acquisition of the easement destroyed the practical value or utility of the Wagley's [sic] property? Circle one: YES NO
>
> If the answer is "YES", how much Just Compensation must Lenawee County pay the Wagleys for the acquisition of the easement? Your verdict must be between $470,000 and $570,000. __________.
>
> If you answered Question 1 as "NO", then answer Question 2.
>
> **Question 2**: How much Just Compensation must Lenawee County pay the Wagleys for the acquisition of the easement? You may select any number between $50,535 and $540,000: __________.[10]

Because juries are presumed to understand and follow their instructions, *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993), the county cannot demonstrate that the references to the RPZ throughout the trial testimony improperly influenced the jury's deliberations or its ultimate verdict.

The county further suggests that because it lacks any responsibility for the dimensions of the RPZ (attributing that duty to the FAA alone), the Wagleys' evidentiary references to the RPZ called into question the propriety of state court jurisdiction. The county initiated this action in the state circuit court under the auspices of state law and did not, at any point in the

---

[10] The county stipulated to the instructions provided to the jury and approved the verdict form and the exhibits sent back with the jury for their deliberations.

proceedings, seek removal of the action to federal court. In accordance with the UCPA, and specifically MCL 213.55, a governmental agency is required to tender a good-faith offer to acquire private property before initiating litigation. This Court has specifically ruled "that the tendering of a good-faith offer is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action." *In re Acquisition of Land for the Central Indus Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989). This Court confirmed that the county met this necessary condition. *Wagley I*, unpub op at 3. Because the county initiated this action in the state circuit court and sought a determination of just compensation, it cannot now imply that it is not a proper party for the imposition of damages. A party is "bound by [its] pleadings," *Joy Oil Co v Fruehauf Trailer Co*, 319 Mich 277, 280; 29 NW2d 691 (1947), and it is not permissible to litigate issues or claims that were not raised in the complaint, *Belobradich v Sarnsethsiri*, 131 Mich App 241, 246; 346 NW2d 83 (1983).

C. THE TESTIMONY OF SEARLE AND BYERS

Next, the county contends that the trial court erred by permitting defense witnesses Searle and Byers "to give their opinions of what they believe the FAA should have done," and by allowing Searle to testify "that the [c]ounty would have to pay just compensation in 1994 if the [c]ounty intended for the house to be located in the RPZ."[11]

The county correctly asserts that the trial court erred by permitting Searle and Ward to opine regarding when a taking occurs. "[T]he opinion of an expert may not

---

[11] The county never filed a motion to exclude testimony by Byers and raised no objections during his testimony, thus forfeiting this issue with regard to Byers.

extend to the creation of new legal definitions and standards and to legal conclusions." *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122; 559 NW2d 54 (1996). Additionally, "[a]n expert witness . . . may not give testimony regarding a question of law, because it is the exclusive responsibility of the trial court to find and interpret the law." *Id*. at 123. Despite the admission of this improper testimony, however, the county cannot demonstrate prejudice. Ultimately, the parties agreed to the date on which the property was to be valued. Testimony by the experts of when the taking was effectuated was completely irrelevant to this determination. Furthermore, the trial court instructed the jury, "In this case the market value of this property both before and after the taking must be determined as of July 25th, 2005, and not at any earlier or later date." Because jurors are presumed to follow their instructions, *Bordeaux*, 203 Mich App at 164, the county is unable to demonstrate that any error by the trial court in admitting Searle's testimony resulted in undue prejudice or affected the outcome of the jury's verdict.

D. McVEIGH'S APPRAISAL

The county next asserts that the trial court erred by permitting defense expert Franklin McVeigh to testify without first conducting a hearing in accordance with *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). McVeigh testified as a Realtor regarding the effect of the airport and easement on the marketability of the Wagleys' property and the disclosures required in real estate transactions. This Court reviews for an abuse of discretion the "qualification of a witness as an expert and the admissibility of the testimony of the witness . . . ." *Surman v Surman*, 277 Mich App 287, 304-305; 745 NW2d 802 (2007).

Similarly, this Court reviews for an abuse of discretion a trial court's decision whether to conduct a *Daubert* hearing. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). An abuse of discretion occurs when a circuit court chooses a result that falls outside the range of reasonable and principled outcomes. *Carlson*, 293 Mich App at 205.

MRE 702 "requires trial judges to act as gatekeepers who must exclude unreliable expert testimony." Staff Comment to 2004 Amendment of MRE 702, citing *Daubert* and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The purpose of a *Daubert* hearing is to filter out unreliable expert evidence. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 139; 732 NW2d 578 (2007). In *Chapin*, this Court explained:

> [S]cience is, at its heart, itself an ongoing search for truth, with new discoveries occurring daily, and with regular disagreements between even the most respected members of any given field. A *Daubert*-type hearing of this kind is *not* a judicial search for truth. The courts are unlikely to be capable of achieving a degree of scientific knowledge that scientists cannot. An evidentiary hearing under MRE 702 . . . is merely a *threshold* inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science. The courts are not in the business of resolving scientific disputes. The only proper role of a trial court at a *Daubert* hearing is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation. [*Id.*]

"The Supreme Court has held that the principles articulated in *Daubert* . . . apply to 'all expert testimony,' although the lower courts have flexibility in the

application of the factors, because it may not make sense to apply some of the *Daubert* factors . . . .” *Thomas v City of Chattanooga*, 398 F3d 426, 431 (CA 6, 2005) (citation omitted). While *Daubert* hearings are required when dealing with expert *scientific* opinions in an effort to ensure the reliability of the foundation for the opinion, “where non-scientific expert testimony is involved, ‘the *[Daubert]* factors may be pertinent,’ or ‘the relevant reliability concerns may focus upon personal knowledge or experience.’ ” *Surles v Greyhound Lines, Inc*, 474 F3d 288, 295 (CA 6, 2007) (citations omitted). “The gatekeeping inquiry is context-specific and ‘must be tied to the factors of a particular case.’ ” *Id*., quoting *Kumho Tire*, 526 US at 150.

McVeigh’s videotaped deposition testimony was played for the jury over the county’s objections asserting the need for a *Daubert* hearing. McVeigh did not offer “scientific” expert testimony; rather, his testimony constituted “other specialized knowledge.” MRE 702; see *Surles*, 474 F3d at 295. “In this context, the factors enumerated in *Daubert* cannot readily be applied to measure the reliability of such testimony.” *Surles*, 474 F3d at 295, citing *Kumho Tire*, 526 US at 150.

McVeigh’s testimony was limited to the marketability of the property and the necessity for disclosures when attempting to sell the Wagleys’ property. The Wagleys explored in detail McVeigh’s employment history, education, experience, and professional associations as a realtor to provide a foundation for the opinions rendered. Through their questioning, the Wagleys established the basis for McVeigh’s proffered testimony and expertise and its direct relationship to the facts of the case. Our review of the deposition transcript demonstrates that McVeigh sufficiently ex-

plained how his experience led to his opinions. The county emphasized during cross-examination that McVeigh's conclusions comprised opinions and were not premised on professional literature or studies. Given the nature of the testimony elicited and the clear acknowledgement by McVeigh that his testimony constituted opinion based on his experience, the trial court did not err by refusing to conduct a *Daubert* hearing before admitting McVeigh's testimony.

The county's assertion of error premised on the Wagleys' alleged failure to comply with MCR 2.315(F)(1) is disingenuous. The county was aware that the videotape of the deposition would be played for the jury, stipulated that portions would be muted, and did not object to the presentation of the deposition testimony to the jury on this basis. Accordingly, the county has failed to demonstrate the existence of plain error affecting its substantial rights. See *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008).

E. BURGOYNE'S TESTIMONY

Next, the county contends the trial court erred by permitting defense witness Burgoyne to testify that the easement permitted pilots to fly three feet above the Wagleys' roof.

An issue must have been raised before and addressed and decided by the trial court to be deemed preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). The county failed to preserve this issue for review by objecting to this evidence. Generally, a trial court's decision regarding the admissibility of testimony is reviewed by this Court for an abuse of discretion. *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). This Court reviews unpreserved evidentiary issues, however,

for "plain error affecting [a party's] substantial rights." *Wolford*, 279 Mich App at 637.

The county asserts that navigable airspace is defined by the FAA and was not contingent on the easement because the FAA permits pilots to maintain any altitude necessary for landing or takeoff. In her direct testimony, Ward initially addressed the possible height of obstructions affected by the easement. Ward noted that before the easement the Wagleys' chimney constituted "a slight penetration" in the approach area and that "[b]ecause of the change in the elevations it went from -- the allowable height shifted to exactly the -- the chimney is the controlling feature of the property." Ward acknowledged that the easement and airport authority could not "control where a pilot flies." She further testified that the "FAA has defined a point of clearance, if you will, that they want to have where there's nothing penetrating above that so that if a plane were to operate below the typical approach, they're not going to run into anything."

Similarly, another witness for the county, James Wise, testified as follows:

> *Q*. The [FAA] regulations, . . . what do they state with regards to the heights of the plane that are permissible when it's landing or taking off at an airport?
>
> *A*. Any altitude that's necessary to safely get the airplane into the air or back onto the ground.

On cross-examination, Andrew Chamberlain, the county's appraiser, opined in response to an exhibit:

> *Q*. Do you know what the height is . . . relative to the top of the Wagley's [sic] house after the taking?
>
> *A*. Within a few feet.
>
> *Q*. And how many approximately feet would that be?
>
> *A*. Less than ten.

The county cites as objectionable Burgoyne's testimony that the easement permitted aircraft to fly three feet above the Wagleys' home. Burgoyne asserted that his testimony, in part, was premised on the county's answers to interrogatories as follows:

> *Q*. Now, you referenced interrogatory answers that says [sic] it's two feet when your [sic] -- above the house, when you had it three feet in your report. Is that Interrogatory 18 and 19?
>
> *A*. Yes. Interrogatory 18 says:
>
> "What is the lowest point of the avigation easement as it passes over defendants' residence."
>
> Their answer is two feet.
>
> And 19 says:
>
> "What's the lowest point of the avigation easement when it passes over the chimney?"
>
> And the answer is zero feet. I was worried about Santa Claus.

The county did not object to this testimony.

We find it ironic that the county now contends that testimony or evidence pertaining to the height of the easement over the Wagleys' property is irrelevant because it is the FAA that controls where pilots fly, while otherwise protesting the admission of any evidence even hinting at FAA rules. That observation aside, the county indisputably initiated the discussion of heights through its questioning of Ward and Wise. Chamberlain, the county's own expert, opined that flights could come within 10 feet of the Wagleys' roof. The respective experts offered conflicting opinions and interpretations regarding the effect of the easement. Disagreements pertaining to an expert witness's interpretation of the facts are relevant to the weight of that testimony and not its admissibility. *Surman*, 277 Mich App at 309. We find no error.

F. INTEREST

The county challenges the trial court's award of interest on the just compensation award to the Wagleys pursuant to MCL 213.65 of the UCPA. In general, we review de novo an interest award. *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002). We also review de novo issues of statutory interpretation. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011).

MCL 213.65 provides for the computation of interest on a just-compensation award as follows:

> (1) The court shall award interest on the judgment amount or part of the amount from the date of the filing of the complaint to the date that payment of the amount or part of the amount is tendered. However, if a portion of the judgment is attributable to damages incurred after the date of surrender of possession, the court shall award interest on that portion of the judgment from the date the damage is incurred.
>
> (2) Interest shall be computed at the interest rate applicable to a federal income tax deficiency or penalty. *However, an owner remaining in possession after the date that the complaint is filed waives the interest for the period of the possession.*
>
> (3) If it is determined that a de facto acquisition occurred at a date earlier than the date of filing the complaint, interest awarded under this section shall be calculated from the earlier date. [Emphasis added.]

At a July 2, 2012 posttrial hearing, defense counsel sought interest on the $470,000 just compensation award, which award represented the property's value as affected by the county's possession of the easement. Counsel noted that the court had entered an order on November 21, 2007, allowing the county to take possession of the easement and therefore interest should be

computed from that date forward. The county responded that the Wagleys were only entitled to statutory interest from the date on which the county took possession of the entire property. As that had not occurred, the county asserted that the Wagleys were entitled to no interest. The trial court retorted that there was no evidence that the Wagleys "lived in the house" after the imposition of the easement. It then ordered:

> The Court will order interest from November 21st, 2007, which was the possession date. I believe the [Wagleys'] position is correct . . . that the actual interest of the property as determined by the jury, the full amount of it was from that date and the mere fact that someone may have been there one or all of these people or others -- of course, you can't live there because you can't have people congregate there. Who knows. But anyway, so that would be the date and that's an issue that the higher courts can resolve. So it will run from that date.

Although inarticulately stated, the trial court's ruling seemed to be that the imposition of the easement on November 21, 2007, amounted to a de facto taking of the entire property because the inability of people to congregate on the land rendered it uninhabitable. As noted by the trial court at the hearing, there is absolutely no record information regarding whether the Wagleys remained in residence.

The county continues to argue that the Wagleys were entitled to no interest on the just compensation award because they retained possession of the residential property, whether they used it or not, losing only the right to use the airspace beyond a certain height. While we do not agree with the trial court's reasoning in awarding interest, the county's theory also does not comport with the plain language of MCL 213.65.

"The legislative intent behind the [UCPA] is to 'place the owner of the property in as good a position as was occupied before the taking.' " *Escanaba & L S R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 815; 402 NW2d 505 (1986), quoting *Detroit v Michael's Prescriptions*, 143 Mich App 808, 811; 373 NW2d 219 (1985). "The public must not be enriched at the property owners' expense. But neither should property owners be enriched at the public's expense." *Miller Bros v Dep't of Natural Resources*, 203 Mich App 674, 685; 513 NW2d 217 (1994), citing *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). Provisions within the UCPA provide for damages beyond a property owner's actual loss, such as the award of statutory interest, to compensate for the inconvenience experienced on the public's behalf. "In general, case law has equated condemnation awards with all other types of judgments on which interest begins to accumulate on the date of judgment. Where, however, there has been a taking of property during the pendency of the proceedings, interest is allowed from the date of taking." *In re Lansing Urban Renewal (Lansing v Wery)*, 68 Mich App 158, 166; 242 NW2d 51 (1976) (citation omitted). "[I]nterest does not begin to run until the condemnor has possession of the property . . . ." *Detroit v J Cusmano & Son, Inc*, 184 Mich App 507, 516; 459 NW2d 3 (1989).

The county relies on two cases in support of its contention that the condemning agency's "possession" of the property must amount to a complete taking. In *Dep't of Transp v Jorissen*, 146 Mich App 207; 379 NW2d 424 (1985), the plaintiff took the entirety of the defendants' land. The defendants had previously harvested fruit for a profit from trees on the property and had platted the land to sell as a subdivision. The defendants attempted to collect interest on the just compensation award from the date on which the plain-

tiff filed its complaint to take the property rather than the date on which the plaintiff actually took over possession from the defendants. *Id.* at 210-211. The defendants claimed that the "plaintiff's actions constituted a de facto taking" because the defendants "could not sell the property and received no benefits from the land" after the plaintiff filed its condemnation complaint. *Id*. at 211-212.

This Court rejected the defendant property owners' arguments, noting that a condemning agency cannot take possession of another's property until a court orders the landowner to surrender possession. *Id*. at 213. "Until that time, the owner of the property retains possession of the property." *Id*. And during the time the property owners retain possession of the land, they "waive[] their right to interest on the judgment for that period." *Id*.

The *Jorissen* Court also rejected the defendant landowners' challenge that they did not actually "remain in possession" of the property in the period after the complaint was filed but before the order transferring possession was entered. *Id*. at 214. This Court held:

> This argument confuses the right of possession with the notion of actual presence on the land. Defendants could not, by their temporary absence, deprive themselves of possession of the land. Defendants had the right to occupy and use the premises. They were in possession. . . .
>
> * * *
>
> The term "property" includes, in addition to title and possession, "the rights of acquisition and control, the right to make any legitimate use or disposal of the thing owned, such as to pledge it for a debt, or to sell or transfer it". Until May 15, 1981, defendants were free to enter the premises and use the property.

> We conclude that defendants may have interest on the judgment only from May 15, 1981, when they were ordered to surrender possession to plaintiff. [*Id.* at 214-215 (citations omitted).]

In *Dep't of Transp v Pichalski*, 168 Mich App 712, 715-717; 425 NW2d 145 (1988), the plaintiff eventually took the entirety of three lots owned by three separate defendants. In the beginning, however, the plaintiff took only the front 60 feet of each lot abutting Ford Road. *Id*. The plaintiff challenged the trial court's decision to award statutory interest to the defendants for the time "they remained in possession" of the front portions of their lots. *Id*. at 722. This Court noted that the defendants were not entitled to any interest in relation to the back portions of their lots because the plaintiff did not take possession of that portion of the property until the conclusion of the just compensation proceeding. This Court approved the trial court's award of interest connected to the front portions of those lots, but only because of the date on which the defendants actually ceded possession to the plaintiff. *Id*. at 723-724. The county focuses its argument here on the fact that the Department of Transportation took actual possession of the land in *Pichalski*. Yet we find more instructive that the *Pichalski* Court approved an approach by which the property was divided and interest was awarded when only a portion, rather than the entirety, of the property was taken.

The current case is more akin to *Pichalski* than *Jorissen* in that the county did not take the entirety of the Wagleys' property and yet the trial court awarded interest under MCL 213.65. We affirm that decision. As noted by the partial dissent, the county's taking through the avigation easement did not permanently deprive the Wagleys of the entirety of their property. The circuit court's November 21, 2007 order did, how-

ever, immediately and permanently deprive the Wagleys "of any possession or use" of the property actually taken—the airspace above the parcel. See *Charles Murphy MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). In this way, this case is also similar to *State Hwy Comm v Great Lakes Express Co*, 50 Mich App 170, 172-173; 213 NW2d 239 (1973), in which the plaintiff condemned an easement across the defendant's property. No one questioned that the easement was a taking that divested the owners of possession and use of at least a portion of the property. This Court held that interest began to accumulate as of the date of the "defendant's loss of the use of its property . . . ." *Id*. at 183-184. The Wagleys' right to interest under the statute also began to run as of the date of their loss of use and right to possess the airspace above the property—November 21, 2007.

G. HYPOTHETICAL AWARD OF 125 PERCENT OF THE PROPERTY'S VALUE IN THE EVENT OF A COMPLETE TAKING

In the trial court's judgment setting the amount of just compensation for the taking of the avigation easement, the court made the following ruling regarding additional damages:

> IT IS FURTHER ORDERED that unless an appeal is taken, pursuant to MCL 213.54(1) [the county] shall file a notice with the Court indicating whether it elects to receive title and possession of the remainder of the parcel within thirty-five (35) days of the entry of this Judgment. If an appeal occurs, [the county] shall make its election within 35 days of an order remanding the matter to the trial court. The lack of any notice shall be deemed the waiver of such an election. If [the county] elects to take title, issues relating to this election and possession of the Subject Property shall be addressed by further order of the Court. *If* [*the county*] *elects to take title*, [*the county*] *shall pay* [*the Wagleys*] *an additional $117,500 pursuant to MCL 213.23*. [Emphasis added.]

On July 25, 2005, when the county filed its complaint to condemn the Wagleys' property, MCL 213.23 provided in full:

> Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act. [MCL 213.23, as amended by 1966 PA 351.]

On September 21, 2006, two months before the trial court granted the county's request to take the easement, the Legislature enacted 2006 PA 367 and 2006 PA 368, adding several provisions to the statute, including subsection (5), which provides:

> If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking *shall be not less than 125% of that property's fair market value*, in addition to any other reimbursement allowed by law. In order to be eligible for reimbursement under this subsection, *the individual's principal residential structure must be actually taken* or the amount of the individual's private property taken leaves less property contiguous to the individual's principal residential structure than the minimum lot size if the local governing unit has implemented a minimum lot size by zoning ordinance. [Emphasis added.]

This provision was effective December 23, 2006, one month after the entry of the court's order. The trial

court's award of additional funds in the event the county decided to take the entirety of the subject property was based on the mandate of subsection (5) that the condemning agency pay the residential property owner 125 percent of the property's fair market value. The question is the propriety of this award because subsection (5) was enacted *after* the complaint was filed.

Whether a statute applies retroactively presents a question of statutory construction that we consider de novo. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). "Under Michigan law, the general rule of statutory construction is that a new or amended statute applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect." *Seaton v Wayne Co Prosecutor (On Second Remand)*, 233 Mich App 313, 316; 590 NW2d 598 (1998).

> In determining whether a statute should be applied retroactively or prospectively only, "[t]he primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle." Moreover, "statutes are presumed to operate prospectively unless the contrary intent is clearly manifested." This is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions. [*Frank W Lynch & Co*, 463 Mich at 583 (citations omitted).]

"However, an exception to the general rule exists where a statute is remedial or procedural in nature." *Seaton*, 233 Mich App at 317. A statute is remedial in nature when it corrects an existing oversight in the law, redresses an existing grievance, introduces regulations conducive to the public good, or intends to reform or extend existing rights. *Tobin v Providence Hosp*, 244

Mich App 626, 665; 624 NW2d 548 (2001). " 'The same connotation [as remedial in nature] is given to those statutes or amendments which apply to procedural matters rather than to substantive rights.' " *Id.*, quoting *Rookledge v Garwood*, 340 Mich 444, 453; 65 NW2d 785 (1954) (emphasis omitted). In *Rookledge*, 340 Mich at 453, our Supreme Court quoted favorably the following passage from 50 Am Jur, Statutes, § 15, pp 33-34, which elucidates the meaning of remedial and procedural statutes:

> "Legislation which has been regarded as remedial in its nature includes statutes which abridge superfluities of former laws, remedying defects therein, or mischiefs thereof implying an intention to reform or extend existing rights, and having for their purpose the promotion of justice and the advancement of public welfare and of important and beneficial public objects, such as the protection of the health, morals, and safety of society, or of the public generally. Another common use of the term 'remedial statute' is to distinguish it from a statute conferring a substantive right, and to apply it to acts relating to the remedy, to rules of practice or courses of procedure, or to the means employed to enforce a right or redress an injury. It applies to a statute giving a party a remedy where he had none or a different one before."

"The ultimate purpose of the [UCPA] is to ensure the guarantee of just compensation found in Const 1963, art 10, § 2, which provides, 'Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law.' " *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 576; 711 NW2d 453 (2006). MCL 213.23(5) created a new right in achieving this purpose—the right to an enhanced just compensation award that did not exist before. It also imposed a converse duty on the condemning agency to remit an enhanced award. Although subsection (5) is

distinguishable from a statute conferring a substantive right because it relates to the remedy available under the UCPA, *Rookledge*, 340 Mich at 453, the amendment creates new obligations, which counsels against retroactive application. Irrespective of whether a statute qualifies as procedural or otherwise remedial, a court may not retroactively apply the statute if this application would abrogate or impair vested rights, create new obligations, or "attach[] new disabilities regarding transactions or considerations that have already occurred." *Grew v Knox*, 265 Mich App 333, 339; 694 NW2d 772 (2005); see also *Frank W Lynch*, 463 Mich at 585 ("[W]e have rejected the notion that a statute significantly affecting a party's rights should be applied retroactively merely because it can also be characterized in a sense as 'remedial.' ").

Further, although "the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively," *id*. at 584, the Legislature did not do so in MCL 213.23. See *Johnson v Pastoriza*, 491 Mich 417, 432; 818 NW2d 279 (2012) ("Had the Legislature intended that 2005 PA 270 apply retroactively, the Legislature could readily have provided that '[t]his amendatory act applies to a cause of action arising on or after [the date of the last prior amendment].' "). While the Legislature gave the amendatory acts adding subsection (5) immediate effect, this does not suggest an intent to make the addition retroactively applicable, *id*. at 430, particularly given the fact that the acts themselves have an internal effective date that is three months later. " '[P]roviding a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only.' " *Id*. at 432 (citations omitted).

The Wagleys imply that retroactive application of MCL 213.23(5) is proper because the right to the damages awarded did not vest until after the amendment was enacted despite that the complaint predated the legislative action. This argument is misguided. The potential for damages arose when the county filed this condemnation action, not when the taking was actually allowed. Moreover, the enhanced just compensation award is a damages award and not a right to costs or judgment interest that is " 'governed by the law as it exists at the time of the judgment which terminates the action . . . .' " *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 534; 164 NW2d 19 (1969).

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

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

K. F. KELLY, J. (*concurring in part and dissenting in part*). Aside from the issue of statutory interest, I fully agree with the majority's well-written and thorough analysis of this difficult and complex case. However, I believe David and Barbara Wagley remained in possession of the property and therefore waived any statutory interest. I would, therefore, reverse that portion of the trial court's order awarding statutory interest pursuant to MCL 213.65.

"The goal of statutory interpretation is to discern and give effect to the intent of the Legislature. To that end, the first step in determining legislative intent is the language of the statute. If the statutory language is unambiguous, then the Legislature's intent is clear and judicial construction is neither necessary nor permit-

ted." *Barclae v Zarb*, 300 Mich App 455, 466-467; 834 NW2d 100 (2013) (citations omitted).

MCL 213.65 provides, in relevant part:

> (1) The court shall award interest on the judgment amount or part of the amount from the date of the filing of the complaint to the date that payment of the amount or part of the amount is tendered. . . .
>
> (2) . . . However, an owner remaining in possession after the date that the complaint is filed waives the interest for the period of the possession. [MCL 213.65(1) and (2).]

A plain reading of the statute and the particular facts of this case reveal that the trial court erred by awarding statutory interest given that the Wagleys clearly remained in possession of the property.

It is true that, pursuant to MCL 213.57(1), title to the property vested in plaintiff as of the date of the filing of the complaint for condemnation. However, although *title* automatically vested in plaintiff at the time the complaint was filed, the trial court had to take action in order for *possession* of the property to pass to plaintiff. MCL 213.59(1) provides that "the court shall fix the time and terms for surrender of possession of the property to the agency . . . ."

The difference between title and possession is highlighted by this Court's decision in *Dep't of Transp v Jorissen*, 146 Mich App 207, 213-214; 379 NW2d 424 (1985):[1]

> MCL 213.59(1) provides that after the agency has fulfilled certain requirements the trial court shall fix the time and terms for the surrender of possession of the property to the agency. [MCL 213.59(2) and (3)] govern the procedures regarding the granting of interim possession to the agency.

---

[1] The *Jorissen* Court interpreted an earlier version of MCL 213.65, as enacted by 1980 PA 87, but the earlier version was substantially similar.

> The Legislature contemplated that the owner of the property would remain in possession until the trial court ordered surrender of possession or interim possession. Until that time, the owner of the property retains possession of the property. An agency may not obtain possession absent an order of surrender of possession or interim possession.
>
> In this case, [although title vested in plaintiff on January 9, 1981, when it filed the complaint] the trial court ordered defendants to surrender possession of the property to plaintiff on or before May 15, 1981. There was no order of interim possession. Plaintiff did not obtain possession of the property until May 15. Since defendants remained in possession of the property until May 15, defendants waived their right to interest on the judgment for that period. MCL 213.65. If defendants were not "in possession", *id*., until May 15, then the surrender of possession ordered by the court was without meaning and had no effect. [Citation omitted.]

Here, like in *Jorissen*, there was no interim order awarding possession. And although there is no record evidence that the Wagleys actually continued to occupy or use the property, such an inquiry is not dispositive of whether a party remains in possession of the property:

> We reject defendants' argument that they did not remain in possession of the land because they were in Florida and received no income or use of the land after the complaint was filed. This argument confuses the right of possession with the notion of actual presence of the land. Defendants could not, by their temporary absence, deprive themselves of possession of the land. Defendants had the right to occupy and use the premises. They were in possession. That the land produced no income during the relevant period resulted from its vacant state and the change of seasons. More importantly, there is no connection between defendants' failure to obtain such income and the fact whether they were in possession or not. Surely a person may possess land which is not income-producing.

> One may also be in possession of land the income from which is for some reason being received by another. In the instant case, the dispositive fact is that defendants asked for and were granted the right of possession until May 15, 1981. Since the statute allows interest to run from the date of possession, that is the date from which interest runs.
>
> * * *
>
> The term "property" includes, in addition to title and possession, "the rights of acquisition and control, the right to make any legitimate use or disposal of the thing owned, such as to pledge it for a debt, or to sell or transfer it". Until May 15, 1981, defendants were free to enter the premises and use the property. [*Id*. at 214-215 (citations omitted).]

It is undisputed that plaintiff has possessed the rights acquired through the avigation easement since the date of the trial court's order, November 21, 2007. While evidence existed that imposition of the easement interfered with the Wagleys' use and enjoyment of the property, it did not "permanently deprive[] [them] of any possession or use of" their residence. See *Charles Murphy, MD, PC, v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). Although the final judgment indicated that the jury had determined "that the practical value or utility of the remainder of the Subject Property has been destroyed by the taking [of the easement],"[2] this is

---

[2] MCL 213.54(1) provides:

> If the acquisition of a portion of a parcel of property actually needed by an agency would destroy the practical value or utility of the remainder of that parcel, the agency shall pay just compensation for the whole parcel. The agency may elect whether to receive title and possession of the remainder of the parcel. The question as to whether the practical value or utility of the remainder of the parcel of property is in fact destroyed shall be determined by the court or jury and incorporated in its verdict.

"[T]he 'acquisition of a portion of' any given property would relate to the county's acquisition of an avigation easement interest from the property

not the equivalent of a deprivation of possession and use during the pendency of these proceedings, thus rendering unavailing defendants' assertion of entitlement to interest pursuant to MCL 213.65. Such an outcome is consistent with the intent and purpose underlying the concept of just compensation. "The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense." *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999) (quotation marks and citations omitted).

I would reverse the trial court's award of statutory interest.

---

owner." *Lenawee Co v Wagley*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket Nos. 302533, 302534, 302535, 302537, and 302538), p 4 n 2.

PEOPLE v MALINOWSKI

Docket No. 311020. Submitted May 15, 2013, at Lansing. Decided May 23, 2013, at 9:00 a.m.

David M. Malinowski pleaded guilty in the Livingston Circuit Court, Michael P. Hatty, J., to a charge of assault with intent to rob while armed. He was sentenced consistent with the terms of a plea agreement to one year in jail and three years' probation. The order of probation stated that defendant was prohibited from using alcohol. Defendant thereafter admitted using alcohol and pleaded guilty of a probation violation. The court accepted the plea and ordered defendant's probation to continue with additional terms, including that defendant serve 30 days in jail and that, upon his release, he wear an alcohol tether (an electronic monitoring device to detect the use of alcohol) for six months and complete a substance abuse program. The Court of Appeals granted the prosecution's application for leave to appeal in which the prosecution contended that the trial court erred by failing to sentence defendant within the legislative sentencing guidelines applicable to his original conviction and by failing to articulate a substantial and compelling reason for departing from the sentencing guidelines range.

The Court of Appeals *held*:

1. A trial court must articulate on the record a substantial and compelling reason for any departure from the legislative sentencing guidelines. The reason for a departure must be objective and verifiable. The articulation of additional substantial and compelling reasons is not required when the record confirms that the sentence was imposed as part of a valid plea agreement.

2. MCR 6.445(G) provides that, if a court finds that a probationer has violated a condition of probation, or if a probationer pleads guilty of such a violation, the court may continue the person's probation, modify the conditions of probation, extend the probation period, or revoke the person's probation and impose a sentence of incarceration. The trial court did not abuse its discretion by continuing defendant's probation with additional terms, as permitted by MCR 6.445(G). In addition, defendant's original

sentence imposing probation complied with MCL 769.34(3) and did not violate the legislative sentencing guidelines.

3. The holding in *People v Hendrick*, 472 Mich 555 (2005), that the legislative sentencing guidelines apply to a sentence imposed after a probation violation, is not applicable when probation is continued, modified, or extended pursuant to MCR 6.445(G).

Affirmed.

1. SENTENCES — SENTENCING GUIDELINES — PLEA AGREEMENTS — DEPARTURES FROM GUIDELINES.

MCL 769.34(3) provides that a trial court must articulate on the record a substantial and compelling reason for any departure made from the legislative sentencing guidelines; the reasons for a particular departure must be objective and verifiable; the requirements of the statute are satisfied when the record confirms that the sentence was imposed as part of a valid plea agreement and the articulation of additional substantial and compelling reasons by the trial court is not required.

2. SENTENCES — PROBATION — VIOLATIONS OF CONDITIONS OF PROBATION.

A court, if the court finds that a probationer has violated a condition of probation, or if a probationer pleads guilty of a violation, may continue the probationer's probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration (MCR 6.445[G]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *David L. Morse*, Prosecuting Attorney, and *William J. Vailliencourt, Jr.*, Assistant Prosecuting Attorney, for the people.

Law Offices of Suzanna Kostovski (by *Suzanna Kostovski*) for defendant.

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM. The prosecution appeals by leave granted the trial court's order continuing defendant's probation after defendant pleaded guilty of violating the terms of his probation by consuming alcohol. Because the trial court did not revoke defendant's proba-

tion, it was not required to resentence defendant pursuant to the legislative sentencing guidelines and, therefore, we affirm.

In April 2010, defendant pleaded guilty to a charge of assault with intent to rob while armed, MCL 750.89, and in May 2010, he was sentenced to one year in jail and three years' probation. Defendant's probation order prohibited the use of alcohol. This sentence was the result of a plea agreement between the prosecution and defendant that the trial court accepted at sentencing. At the sentencing hearing, the prosecutor acknowledged that the imposed sentence was a downward departure from the legislative sentencing guidelines, but noted that a plea agreement constitutes a substantial and compelling reason for a downward departure.

On June 14, 2012, defendant admitted using alcohol and pleaded guilty of a probation violation. Immediately after his plea, the trial court ordered defendant's probation continued with additional terms. Specifically, the trial court ordered that defendant serve 30 days in jail and that, upon his release, he was to wear an alcohol tether (an electronic monitoring device to detect the use of alcohol) for six months and complete a substance abuse treatment program. On June 22, 2012, an amended order of probation setting forth the added conditions was entered by the trial court.

On appeal, the prosecution argues that after accepting defendant's admission that he violated his probation, the trial court erred by failing to sentence defendant within the legislative sentencing guidelines applicable to his original conviction. In addition, the prosecution notes that the trial court did not articulate any substantial and compelling reason to justify its

downward departure from the sentencing guidelines range, and maintains that there is no such reason present in this case.

We review for an abuse of discretion a trial court's decision to set terms of probation. *People v Zujko*, 282 Mich App 520, 521; 765 NW2d 897 (2009). We also review for an abuse of discretion the trial court's imposition of a sentence. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). We review for clear error a trial court's reasons for a departure from the legislative sentencing guidelines, but we review for an abuse of discretion whether the reasons given for departure are substantial and compelling. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). We review de novo questions of law. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

If the sentence of a trial court is within the appropriate sentencing guidelines range, this Court must affirm that sentence unless the trial court erred by scoring the guidelines or relied on inaccurate information when determining the defendant's sentence. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). If a sentence is not within the sentencing guidelines range, this Court must determine whether the trial court articulated a substantial and compelling reason to justify its departure from the guidelines range. *Id*. at 261-262. Pursuant to MCL 769.34(3),[1] a trial court must

---

[1] MCL 769.34(3) provides: "A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure."

articulate on the record a "substantial and compelling reason" for any departure made from the legislative sentencing guidelines. The reasons for a particular departure must be objective and verifiable. *Smith*, 482 Mich at 299; *Babcock*, 469 Mich at 257-258. In *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005), our Supreme Court held that the requirements of MCL 769.34(3) were satisfied "when the record confirms that the sentence was imposed as part of a valid plea agreement." The Court further explained, "[u]nder such circumstances, the statute does not require the specific articulation of additional 'substantial and compelling' reasons by the sentencing court." *Id*. Further, with respect to probation violation sanctions, MCR 6.445(G) provides: "If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration."

In this case, as permitted by MCR 6.445(G), defendant was not resentenced because his probation was not revoked. Instead, defendant's probation was continued with modifications as permitted by MCR 6.445(G) and an amended order of probation was entered. On these facts, the prosecution's argument that resentencing within the guidelines range was required is unavailing because it fails to apprehend the difference between a probation violation that results in a revocation and resentencing, and one that does not. The trial court did not abuse its discretion by continuing defendant's probation with additional terms because MCR 6.445(G) specifically permits such action. Moreover, defendant's original sentence imposing probation complied with MCL 769.34(3) and, thus, did not violate the legislative sentencing guidelines. *Wiley*, 472 Mich at 154.

Nevertheless, the prosecution argues that this case is controlled by the holding in *People v Hendrick*, 472 Mich 555; 697 NW2d 511 (2005). In *Hendrick*, the Court held that the legislative sentencing guidelines apply to a sentence imposed after a probation violation. *Id*. at 557. The prosecution argues that this holding has general applicability to all sanctions imposed following a finding that a defendant has violated probation. However, *Hendrick* is factually distinguishable from this case because in *Hendrick* the defendant's probation was revoked and the defendant was resentenced. This fact is significant because the plain language of MCR 6.445(G) uses the word "or" to distinguish revocation of probation and imposition of a new sentence of incarceration, as was the case in *Hendrick*, from continuation, modification, and extension of probation, as is the case here. *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011) (noting that the disjunctive term "or" indicates a choice between two alternatives.) Further, in *Hendrick*, the Court specifically stated in its holding that the legislative sentencing guidelines apply to the defendant's sentence "even if the sentence follows the imposition and *revocation* of probation," 472 Mich at 557 (emphasis added), but did not address whether the legislative sentencing guidelines are applicable to a continuance, modification, or extension of probation after a violation. Consequently, we conclude that the holding in *Hendrick* is not applicable when probation is continued, modified, or extended pursuant to MCR 6.445(G).

Affirmed.

HOEKSTRA, P.J., and TALBOT and WILDER, JJ., concurred.

PEOPLE v RIVERA

Docket No. 309570. Submitted May 15, 2013, at Detroit. Decided May 23, 2013, at 9:05 a.m.

John A. Rivera was arrested on March 12, 2011, on charges of larceny in a building, felonious assault, domestic assault, and malicious destruction of personal property less than $200. A complaint and warrant were authorized on March 23, 2011. Subsequently, the Michigan Department of Corrections (MDOC) detained defendant on unrelated charges, and he remained incarcerated. On April 21, 2011, MDOC sent a notice to the 33rd District Court that informed the court that defendant was currently incarcerated, noted that defendant may have a charge pending or be a felony suspect in the court's jurisdiction, and sought disposition of any referenced pending charge. The district court received the notice on April 27, 2011. There is no evidence that the prosecuting attorney ever received such notice. Defendant was arraigned in the district court on January 10, 2012, waived a preliminary examination, and was bound over to the Wayne Circuit Court. Defendant was arraigned in the circuit court on February 9, 2012, and pleaded not guilty. Defendant moved on March 2, 2012, to dismiss the charges, claiming that his constitutional right to a speedy trial had been violated. The circuit court, James R. Chylinski, J., held on March 14, 2012, that the motion must be granted on the basis of the prosecution's violation of the 180-day rule of MCL 780.131(1). The prosecution appealed.

The Court of Appeals *held*:

1. The circuit court erred when it granted defendant's motion on the basis of the 180-day rule. The clear language of MCL 780.131(1) provides that MDOC must send written notice, by certified mail, to the prosecutor in order for the 180-day rule to apply. Because MDOC did not send the notice to the prosecutor, the 180-day rule did not apply. The circuit court erred by holding that the rule had been violated.

2. Defendant cannot prove that his right to a speedy trial was violated because he presented no evidence of prejudice. Prejudice cannot be presumed because the time that elapsed from defendant's arrest until dismissal of the charges was less than 18 months.

Reversed and remanded.

1. CONSTITUTIONAL LAW — CRIMINAL LAW — SPEEDY TRIAL.

The United States and Michigan Constitutions and Michigan statutory law guarantee criminal defendants a speedy trial without reference to a fixed number of days (US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1).

2. CONSTITUTIONAL LAW — CRIMINAL LAW — SPEEDY TRIAL — PREJUDICE.

The determination whether as accused's right to a speedy trial has been violated depends on consideration of the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant; prejudice is presumed and the prosecution must show that no injury occurred when the delay is more than 18 months; prejudice may not be presumed and the defendant must prove that he or she suffered prejudice when the delay is less than 18 months; the time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research Training and Appeals, and *Madonna Georges Blanchard*, Assistant Prosecuting Attorney, for the people.

Law Offices of Robert J Boyd III, P.C. (by *Robert J Boyd III*), for defendant.

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM. The prosecution appeals by right the trial court's order dismissing the charges of larceny in a building, MCL 750.360, two counts of felonious assault, MCL 750.82, domestic assault, MCL 750.81(2), and malicious destruction of personal property less than $200, MCL 750.377a (1)(d). We reverse and remand for further proceedings.

Defendant was arrested for the charges in this case on March 12, 2011; a complaint and warrant were authorized on March 23, 2011. Subsequently, the Michi-

gan Department of Corrections (MDOC) detained defendant on unrelated charges, and he remained incarcerated. On April 21, 2011, MDOC sent a notice to the 33rd District Court, explaining that defendant

> is currently serving a sentence with the Michigan Department of Corrections. Information received from the Pre Sentence Investigation indicates he may have a pending charge or is a felony suspect in your jurisdiction. We are seeking disposition of above referenced PENDING CHARGE as it may have a bearing on subjects placement and classification within our department.

Although the district court received this notice on April 27, 2011, there is no evidence in the record that the prosecutor ever received it.

Defendant was arraigned in the district court on the instant charges on January 10, 2012; defendant waived his right to a preliminary examination and was bound over to circuit court. Defendant was arraigned in circuit court on February 9, 2012, and he pleaded not guilty. On March 2, 2012, defendant moved to dismiss the charges, claiming that his constitutional right to a speedy trial had been violated.[1] On March 14, 2012, the trial court held a hearing on defendant's motion. Defendant did not present an oral argument; he simply rested on his written motion. The prosecution briefly mentioned that a certified letter must be sent to the prosecutor's office to trigger the 180-day rule. The trial court responded to the prosecution's argument:

> So, if, if I wanted to notify the Prosecutor's Office of something, if I came there personally, and I told them, and brought them all kinds of documents, and served them, and they stamped it, received, everything else, I would not be in compliance, because it wasn't a certified letter?

---

[1] Defendant never argued that the 180-day rule of MCL 780.131(1) was violated, but the circuit court decided his motion on this basis.

The prosecution responded: "Yes, but the statute's specific." Ultimately, the trial court ruled that "there's sufficient documentation in this case that [defendant] made the request[.] . . . It is over [180] days. I am gonna grant the defendant's motion to dismiss."

This appeal raises two issues. First, did the trial court err when it dismissed the charges against defendant on the basis of a violation of the 180-day rule. Second, was defendant's right to a speedy trial violated by the prosecution's failure to prosecute defendant for nearly 10½ months.

This case involves statutory interpretation, which we review de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). First, we examine whether the trial court erred by granting defendant's motion to dismiss on the basis of the 180-day rule. We conclude that the trial court erred when it granted defendant's motion on the basis of the 180-day rule.

MCL 780.131(1) provides:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, *the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.* The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner.

> *The written notice and statement shall be delivered by certified mail.* [Emphases added.]

The primary purpose of a court when construing a statute is to discern and give effect to the Legislature's intent. *Williams*, 475 Mich at 250. When statutory language is clear, this Court presumes that " 'the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.' " *Id.*, quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

The clear language of MCL 780.131(1) provides that MDOC must send written notice, by certified mail, *to the prosecutor* to trigger the 180-day requirement. MCL 780.131(1). Our Supreme Court has held that the 180-day rule's statutory requirements "expressly provide[]" that notice must be sent to the prosecuting attorney. *Williams*, 475 Mich at 256. In *Williams*, MDOC sent "several communications" regarding the defendant's incarceration. *Id*. at 255. For example, notice was sent to the Detroit Police Department and an investigator assigned to the defendant's case. *Id*. The Supreme Court reasoned that "[a]lthough investigating police officers may and do cooperate with the prosecutor, they are not part of the prosecutor's office." *Id*. at 255-256. Ultimately, the Court decided the defendant's 180-day rule argument on the basis of the fact that MDOC had sent notice directly to the prosecutor. *Id*. at 256. Here, although MDOC sent a notice to the district court, it did not send, by certified mail, a notice to the prosecuting attorney. Thus, the 180-day rule was never triggered, so it could not have been violated; consequently, the trial court erred by reaching this conclusion.

The prosecution also argues, even though the circuit court did not decide this issue, that defendant cannot

prove that his right to a speedy trial was violated. Whether defendant was denied the right to a speedy trial is a constitutional law question that is reviewed de novo. *Williams*, 475 Mich at 250. We conclude that because defendant presented no evidence of prejudice, defendant cannot prove that his right to a speedy trial was violated.

Aside from the 180-day rule, a defendant's right to a speedy trial is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. "[T]he federal and state constitutions and Michigan statutory law guarantee criminal defendants a speedy trial without reference to a fixed number of days." *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). "In contrast to the 180-day rule, a defendant's right to a speedy trial is not violated after a fixed number of days." *Williams*, 475 Mich at 261. The right to a speedy trial is codified at MCL 768.1, which provides that "persons charged with crime are entitled to and shall have a speedy trial" and that the case be brought to "a final determination without delay except as may be necessary to secure to the accused a fair and impartial trial." Whether an accused's right to a speedy trial is violated depends on consideration of four factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Williams*, 475 Mich at 261-262. When the delay is more than 18 months, prejudice is presumed, and the prosecution must show that no injury occurred. *Id*. at 262. When the delay is less than 18 months, the defendant must prove that he or she suffered prejudice. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *Williams*, 475 Mich at 261.

In this case, defendant was arrested on March 12, 2011, and arraigned on the charges in the circuit court on February 9, 2012. The circuit court dismissed the charges on March 14, 2012. Because the time that elapsed from defendant's arrest until dismissal of the charges was less than 18 months, prejudice cannot be presumed. *Williams*, 475 Mich at 262. Accordingly, defendant is required to prove prejudice by the delay. *Id*. At no time has defendant specifically argued how the delay caused him prejudice. In both the trial court and on appeal, defendant has not explained how he suffered prejudice. He has only offered a general statement that being in prison on unrelated charges for 10 months caused prejudice. In sum, there is no basis for this Court to conclude that defendant was denied his right to a speedy trial.

We reverse and remand for further proceedings. We do not retain jurisdiction.

DONOFRIO, P.J., and MARKEY and OWENS, JJ., concurred.

PEOPLE v NIX

Docket No. 311102. Submitted May 16, 2013, at Petoskey. Decided May 23, 2013, at 9:10 a.m. Leave to appeal sought.

Paul W. Nix was convicted by a jury in the Grand Traverse Circuit Court, Thomas G. Power, J., of two counts of second-degree child abuse and one count of third-degree fleeing and eluding a police officer. The charges stemmed from a high-speed vehicle chase and subsequent crash of defendant's vehicle that took place after a sheriff's deputy approached defendant's vehicle to investigate the vehicle's expired license plate tag and defendant drove the vehicle away because he feared that there was an outstanding warrant for his arrest. The child-abuse counts were based on the fact that defendant's infant son and four-year-old stepson were in his vehicle at the time of the chase and were not restrained by seatbelts or legally mandated child safety seats. Defendant appealed.

The Court of Appeals *held*:

1. The subsection of the statute prohibiting second-degree child abuse that provides that a person is guilty of second-degree child abuse if the person knowingly or intentionally commits an act "likely" to cause serious physical or mental harm to a child regardless of whether harm results, MCL 750.136b(3)(b), requires evidence that the person's act could probably result in serious harm to the child, regardless of whether the harm actually occurs. The prosecution presented sufficient evidence in this case from which the jury could determine beyond a reasonable doubt that defendant's acts could probably have resulted in serious harm to his children.

2. The trial court, in scoring offense variable (OV) 13, MCL 777.43 (continuing pattern of criminal behavior), properly considered defendant's commission of an act of felonious assault three days before the sentencing offenses even though defendant had pleaded guilty of a different offense and the felonious assault charge had been dismissed. In scoring OV 13, all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction. A sentencing court is free to consider charges that were earlier

dismissed if there is a preponderance of the evidence supporting that the offense took place. It follows that a court may consider the charges against a defendant that were dismissed as a result of a plea agreement in scoring OV 13. The trial court acted within its discretion by determining that defendant had committed an act of felonious assault three days before the sentencing offenses and by using that assault in scoring OV 13.

3. There is no support in the record for defendant's assertion that he did not waive his right to a circuit court arraignment. In any event, a showing of prejudice is required to merit relief for a failure to hold a circuit court arraignment. Defendant has not established prejudice.

Affirmed.

1. CHILD ABUSE — SECOND-DEGREE CHILD ABUSE — LIKELY TO CAUSE HARM — PROBABLY RESULT IN HARM.

A person is guilty of second-degree child abuse if the person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results; the evidence required for a conviction must show that the defendant's act could probably result in serious harm to a child, regardless of whether the harm actually occurs (MCL 750.136b[3][b]).

2. SENTENCES — OFFENSE VARIABLE 13 — PLEA AGREEMENTS — DISMISSED CHARGES.

All crimes within a five-year period, including the sentencing offense, shall be counted in scoring offense variable 13 (continuing pattern of criminal behavior) regardless of whether the offense resulted in a conviction; a court may consider for such purposes charges against the defendant that were dismissed as a result of a plea agreement; the court may consider charges that were earlier dismissed if there is a preponderance of the evidence supporting that the offense took place (MCL 777.43[2][a]).

3. CRIMINAL LAW — ARRAIGNMENTS — CIRCUIT COURTS — FAILURE TO HOLD ARRAIGNMENTS.

A showing of prejudice is required to merit relief for the failure to hold a circuit court arraignment (MCR 6.113[A]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Robert A. Cooney*, Prosecuting Attorney, and *Meagan E. Hanna*, Assistant Prosecuting Attorney, for the people.

Michael A. Faraone, P.C. (by *Michael A. Faraone*), for defendant.

Paul W. Nix *in propria persona*.

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

PER CURIAM. A jury convicted defendant, Paul William Nix, of two counts of second-degree child abuse in violation of MCL 750.136b(3)(b), and one count of third-degree fleeing and eluding a police officer in violation of MCL 257.602a(3)(a). Defendant's convictions stem from a high-speed chase with several deputies instigated by defendant's flight. Defendant's infant son and four-year-old stepson were in the vehicle at the time and were not restrained by either seatbelts or legally mandated child safety seats. See MCL 257.710d.

Defendant contends that the prosecution presented insufficient evidence that the high-speed chase was "likely to cause serious physical or mental harm to a child." The prosecution successfully established that such harm could probably occur based on evidence regarding the nature of this incident. Defendant also argues that the trial court erroneously assigned 25 points for offense variable (OV) 13, MCL 777.43 (continuing pattern of criminal behavior), based on a felonious assault charge that was dismissed in an earlier criminal matter. MCL 777.43(2)(a), however, specifically permits a court to consider "all crimes within a 5-year period . . . regardless of whether the offense resulted in a conviction." Finally, defendant challenges his trial counsel's failure to address the fact that the circuit court did not conduct an arraignment on the information. The

record demonstrates that defendant waived his arraignment. Moreover, defendant had full notice of the charges against him and cannot establish the requisite prejudice to warrant relief. We affirm defendant's convictions and sentences.

I. BACKGROUND

In the early morning hours of June 1, 2011, defendant, his wife, and their two children were sitting in a Chevy Blazer in a city park. A patrolling Grand Traverse County sheriff's deputy attempted to approach the vehicle because its license plate bore expired tags. Defendant drove away because he feared that there was an outstanding warrant for his arrest based on an armed altercation he had engaged in three days before.

Defendant raced through a maze of streets, taking many twists and turns, with several patrol cars joining the pursuit. During the 24-mile chase, defendant reached speeds of up to 100 miles an hour, crossed the centerline, and disregarded traffic signals and signs. Defendant veered to avoid "stop sticks" a deputy had placed in his path and drove off the roadway and into a private yard. Defendant attempted to "ram" a patrol car that attempted to "box in" the Blazer and nearly caused "a devastating accident." Defendant led the deputies through two downtown areas and past civilian vehicles unlucky enough to be on the road.

Ultimately, defendant drove into Benzie County and to the Crystal Mountain Resort. Defendant drove his vehicle up a hill and crashed into the resort's large "Alpine Slide." Defendant escaped on foot and was not captured that night. Defendant's wife and children also fled on foot but were discovered shortly thereafter. The deputies searched the vehicle and found no child safety

seats for the two small children. One week later, an Arkansas state trooper arrested defendant while he attempted to escape to Mexico with his wife and their children.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecution presented insufficient evidence that his actions were likely to cause serious harm to his child passengers in support of the second-degree child abuse charges. When examining a challenge to the sufficiency of the evidence, we must review the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecutor proved the elements of the charged offense beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Statutory interpretation questions are also generally reviewed de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). The goal of statutory interpretation is to discern the Legislature's intent based on the statutory language. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

Defendant was convicted of second-degree child abuse under MCL 750.136b(3), which provides, in relevant part:

> (3) A person is guilty of child abuse in the second degree if any of the following apply:
>
> * * *

(b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.[1]

A. INTERPRETATION OF THE SECOND-DEGREE CHILD ABUSE STATUTE

Defendant contends that his act of engaging in a high-speed chase with the police with his young children unrestrained in his vehicle was not "likely" to cause harm to the children as required to establish a violation of MCL 750.136b(3)(b).

There is no binding precedent defining the term "likely" in this statute. In *Moll v Abbott Laboratories*, 444 Mich 1, 22; 506 NW2d 816 (1993), the Supreme Court defined the word "likely" (as used in the phrase "likely cause" of an injury) by quoting Black's Law Dictionary (6th ed), p 925 (citations omitted): " 'Probable. . . . Likely is a word of general usage and common understanding, broadly defined as of such nature or so circumstantial as to make something probable and having better chance of existing or occurring than not.' " *Moll*, 444 Mich at 22, compared the term "likely" to the term "possible" which "connotes a lesser standard of information needed to provide knowledge of causation." Again quoting Black's Law Dictionary, p 1166, the *Moll* Court defined the lower "possibility" standard as: " 'Capable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen or not; contrasted with impossible.' "

---

[1] Amendments of the statute that took effect on July 1, 2012, altered the punishments for first-and second-degree child abuse and had no effect on the provisions at issue in this case. 2012 PA 194.

Moll's interpretation is consistent with the definition of "likely" in various lay dictionaries. See MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language . . . ."). *Webster's New Universal Unabridged Dictionary* (Deluxe 2d ed), p 1048, defines "likely" as "probably" and "seeming as if it would happen or make happen; reasonably to be expected; apparently destined." *Random House Webster's Unabridged Dictionary* (2d ed), p 1114, similarly defines "likely" as "probably or apparently destined." *Random House Webster's* also includes an instructive usage note stating that one need not qualify the term "likely" with words such as "very" or "quite." *Id*. *The American Heritage Dictionary of the English Language* (1969), p 757, defines "likely" as "[h]aving, expressing, or exhibiting an inclination or probability; apt" and "[p]robably."

Treating the terms "likely" and "probably" as synonymous is also consistent with precedent defining the term "likely" in relation to second-degree murder. In *People v Goecke*, 457 Mich 442, 448-450; 579 NW2d 868 (1998), defendant Goecke was charged with second-degree murder for driving in an extremely dangerous manner while intoxicated and causing the death of the driver of a car with which his vehicle collided. To establish the malice necessary to prove the murder charge, the prosecutor had to show either "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful *disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm*." *Id*. at 464 (emphasis added). The Supreme Court described the " 'likelihood' " of harm necessary to infer malice as " 'a plain and strong likelihood' " and " 'a high probability . . . .' " *Id*. at 466-467 (citations omitted).

Based on *Moll*, *Goecke*, and the dictionary definitions of the term "likely," we hold that MCL 750.136b(3)(b) requires evidence that a defendant's act could *probably* result in serious harm to the child, regardless of whether the harm actually occurs.

B. APPLICATION

The prosecution presented sufficient evidence from which the jury could determine beyond a reasonable doubt that defendant's acts could probably have resulted in serious harm to his young children. Defendant fled from law enforcement personnel with two small children unrestrained in his car. Defendant led the police on a 24-mile chase, reaching speeds of 100 miles an hour. Defendant went off the road, took curves at dangerous speeds, crossed the centerline, and ignored all stop and yield signs along the route. According to the pursuing deputies, defendant's actions likely could have resulted in a collision. The pursuit ended when defendant crashed his vehicle into a large slide erected at the Crystal Mountain Resort.

The prosecutor also presented testimony from sheriff deputies that defendant's speed and manner of driving were dangerous and likely carried a high risk of potential harm. One deputy testified that if defendant had "push[ed]" his speeds any higher on the curves, he "[m]ost likely" would have "crash[ed]" the vehicle. Another testified that defendant nearly caused "a devastating accident" while trying to avoid being "boxed in" by the patrol vehicles. Even defendant's wife admitted that defendant's actions were "maybe likely to injure" the children. This evidence sufficed for the jury to infer the probability of danger to the child victims. We may not interfere with the

jury's assessment of the evidence. *People v Ortiz*, 249 Mich App 297, 302; 642 NW2d 417 (2002).[2]

Defendant presents statistical data regarding the likelihood of harm and injury arising from police chases. Defendant did not present this information in the lower court, however, and may not now expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

Defendant also asserts that his convictions should not stand in light of the tiered format of MCL 750.136b. Defendant complains that third-degree child abuse carries a lesser penalty than second-degree but requires the prosecutor to prove that an actual injury occurred, while no actual injury is required to be proved for a second-degree conviction. The Legislature wrote the statute in this manner and we may not disregard its plain language. See *Greene v A P Prod, Ltd*, 475 Mich 502, 515; 717 NW2d 855 (2006) ("The rule must and should be that a court applies the statute as written.").

III. SCORING OF OV 13

Defendant challenges the assignment of 25 points for OV 13. MCL 777.43 governs the scoring of OV 13, in relevant part, as follows:

> (1) [OV] 13 is continuing pattern of criminal behavior. Score [OV] 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *

[2] For examples of other acts of dangerous driving deemed to carry a likelihood of harm to others see *Goecke*, 457 Mich 442.

> (c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person .... 25 points
>
> * * *
>
> (2) All of the following apply to scoring [OV] 13:
>
> (a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

We review the interpretation and application of the legislative sentencing guidelines de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). When scoring the guideline variables, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). We must uphold a score if there is any supporting evidence. *Hornsby*, 251 Mich App at 468.

Defendant committed two crimes against a person—second-degree child abuse. MCL 777.16g(1). The Department of Corrections recommended assessing 25 points for OV 13 because defendant committed an act of felonious assault in violation of MCL 750.82 three days before the current offenses. Felonious assault is also a crime against a person. MCL 777.16d. Defendant was arrested and charged with felonious assault but pleaded guilty of possession of a firearm by a felon, MCL 750.224f (a public safety offense), after the victim refused to testify. Defendant objected to the use of this

prior act in scoring OV 13 because his ultimate conviction was for a crime that is not a crime against a person.

The trial court properly considered defendant's commission of an act of felonious assault even though defendant pleaded guilty of a different offense. In scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a); *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). A sentencing court is free to consider charges that were earlier dismissed, *People v Earl*, 297 Mich App 104, 110-111; 822 NW2d 271 (2012), if there is a preponderance of the evidence supporting that the offense took place. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). It follows that a court may consider the charges against a defendant dismissed as a result of a plea agreement in scoring OV 13.

To perpetrate a felonious assault, a defendant must commit "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). A defendant commits an assault when he or she takes some "unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). At trial for the current offenses, defendant admitted that he had fled from the deputy because three days earlier he had aimed a rifle at his cousin following an argument. The trial court also relied on the victim's statement in the presentence investigation report (PSIR) related to the earlier felonious assault charge that defendant had aimed a rifle at him.[3] The

[3] A court may rely on the contents of a PSIR in calculating the guidelines. *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993). This

court therefore acted within its discretion by determining that defendant had committed an act of felonious assault three days before the sentencing offenses and using that assault to score OV 13.

Moreover, it was not "fundamentally unfair" to consider the dismissed felonious assault charge. Defendant takes this language from *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009), out of context. In *McGraw*, the court assessed 10 points for OV 9 because there were two individuals placed in danger during the defendant's act of fleeing and eluding the police after the underlying breaking and entering was committed. The prosecutor had agreed to the dismissal of the fleeing and eluding charge, however, in brokering the defendant's plea agreement for the breaking and entering charge. *McGraw*, 484 Mich at 122-123. The Supreme Court's conclusion that it would be fundamentally unfair to count the fleeing and eluding offense against the defendant in scoring the sentencing offense was based on the Court's conclusion that OV 9 is an "offense-specific" variable and "only conduct relating to the offense may be taken into consideration when scoring" it. *Id*. at 124, 126 (quotation marks and citation omitted). *McGraw* specifically provides that if a particular OV allows the court to look beyond the sentencing offense, it may do so. *Id*. at 126, citing *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008). By its plain language OV 13 allows the court to look beyond the sentencing offense.

IV. ASSISTANCE OF COUNSEL/ARRAIGNMENT

In a pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defen-

information could be considered despite that it was otherwise hearsay because "[t]he rules [of evidence] other than those with respect to privileges do not apply in . . . [p]roceedings for . . . sentencing . . . ." MRE 1101(b)(3).

dant contends that his trial counsel deficiently failed to take action when the circuit court failed to arraign defendant on the information. Defendant failed to preserve this issue by requesting a new trial or an evidentiary hearing and our review is therefore limited to plain error on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different. *Id*.

Following defendant's arrest, he was arraigned by use of two-way interactive video technology in the district court as required by MCR 6.104 and MCR 6.006(A). A preliminary examination was then conducted in the district court and defendant was bound over as a fourth-offense habitual offender on two counts of second-degree child abuse and one count of fleeing and eluding. After the preliminary examination, the circuit court was required to conduct an arraignment on the information at which the court would notify defendant of the charges against him and allow him to enter a plea. MCR 6.113(B). This circuit court arraignment could also be held in the district court if the county has instituted such procedures. MCR 6.111(A).

It is clear from the record that defendant was never arraigned in the circuit court, nor was the circuit court's arraignment conducted in the district court pursuant to MCR 6.111(A). However, defendant has submitted to this Court a document signed by his

attorney in which defendant waived his right to a circuit court arraignment, stated that he had been notified of the charges listed in the information, and indicated that he pleaded not guilty. Although defendant complains that he did not agree to this waiver, there is no record support for this assertion.

In any event, defendant has not established prejudice. A showing of prejudice is required to merit relief for the failure to hold a circuit court arraignment. MCR 6.113(A). "The purpose of an arraignment is to provide formal notice of the charge against the accused." *People v Waclawski*, 286 Mich App 634, 704; 780 NW2d 321 (2009). Defendant had notice of the charges against him because he had access to the information and he was present at the preliminary examination at which he was bound over for trial on the charges. Although defendant claims ignorance of the fourth-offense habitual offender enhancement, a sentencing enhancement notice was included in the information. See *id*. at 706 ("The information duly notifies a defendant of the charges instituted against the defendant . . . .").

Another purpose of the arraignment is to allow the defendant to enter a plea on the charges. *People v Manning*, 243 Mich App 615, 624; 624 NW2d 746 (2000); MCR 6.113(B). "After trial on the merits want of plea does not render a conviction invalid." *People v Weeks*, 165 Mich 362, 364; 130 NW 697 (1911).

Affirmed.

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

ANGELUCCI v DART PROPERTIES INCORPORATED

Docket No. 305688. Submitted to conflict panel February 11, 2013, at Lansing. Decided May 23, 2013, at 9:15 am.

Domenico Angelucci filed an action against Dart Properties Incorporated; Oak Hill II; Dart Properties II, LLC; Beth Albrough; and others in the Oakland Circuit Court, seeking a temporary restraining order enjoining plaintiff's eviction and asserting claims of negligence, violation of the Michigan Notary Public Act, MCL 55.261 *et seq*., violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, intentional infliction of emotional distress, and unlawful interference with a possessory interest. The case arose from a dispute regarding whether plaintiff had paid his April 2011 rent on the property he leased from Oak Hill in Macomb County. Defendants moved for a change of venue to Macomb County, arguing that because the joined causes of action included a tort claim, venue was not determined by the general rule governing joined causes of action set forth in MCL 600.1641(1), which provides that venue is proper in any county in which either cause of action could have been brought, but by the exception set forth in MCL 600.1641(2), which provides that the venue rules for tort actions set forth in MCL 600.1629 must be used instead. The circuit court, Daniel Patrick O'Brien, J., granted defendants' motion. Plaintiff appealed by leave granted, arguing that under *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90 (2007), the exception in MCL 600.1641(2) applied only to those tort actions that sought damages for personal injury, property damage, or wrongful death. The Court of Appeals, FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ., reversed on this basis, but stated that if it had not been bound by MCR 7.215(J)(1) to follow *Provider Creditors*, it would have affirmed. 298 Mich App 592 (2012). A special panel of the Court of Appeals was convened to resolve the conflict, and the portion of the opinion pertaining to MCL 600.1641(2) was vacated. 298 Mich App 802 (2012).

After consideration by the special panel, the Court of Appeals *held*:

When multiple causes of action are joined and include a tort claim, MCL 600.1641(2) governs venue regardless of whether the claiming party seeks damages for personal injury, property damage, or wrongful death. Under the last-antecedent rule, the phrase "personal injury, property damage, or wrongful death" in that provision modifies only the clause "another legal theory seeking damages" and does not modify the word "tort." Accordingly, *Provider Creditors Comm* was overruled.

Affirmed.

ACTIONS — VENUE — JOINDER — TORTS.

When multiple causes of action are joined and include a tort claim, venue must be determined under the rules applicable to tort actions as provided in MCL 600.1629 regardless of whether the claiming party seeks damages for personal injury, property damage, or wrongful death (MCL 600.1641[2]).

Law Offices of Daniel C. Flint, P.C. (by *Daniel C. Flint*), for Domenico Angelucci.

Galloway and Collens PLLC (by *T. Scott Galloway* and *Colleen E. Tower*) for Dart Properties Incorporated; Oak Hill II; Dart Properties II, LLC; Beth Albrough; and others.

Before: RIORDAN, P.J., and JANSEN, OWENS, BECKERING, STEPHENS, SHAPIRO, and BOONSTRA, JJ.

PER CURIAM. Pursuant to MCR 7.215(J), this Court convened a special panel to resolve the conflict between the prior opinion in this case, *Angelucci v Dart Props, Inc*, 298 Mich App 592; 828 NW2d 724 (2012), vacated in part *Angelucci v Dart Props, Inc*, 298 Mich App 802 (2012), and *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 94; 738 NW2d 770 (2007). The issue that we must decide concerns the interpretation of MCL 600.1641(2), which governs venue when causes of action are joined and include a cause of action "based on tort or another legal theory

seeking damages for personal injury, property damage, or wrongful death[.]" We agree generally with the analysis of the prior opinion in this case and now overrule *Provider Creditors Comm*, which held that MCL 600.1641(2) does not apply if the causes of action joined include a tort claim for which the claiming party does not seek damages for personal injury, property damage, or wrongful death. See *Provider Creditors Comm*, 275 Mich App at 96.

I. APPLICABLE STATUTES

MCL 600.1641 provides:

> (1) Except as provided in subsection (2), if causes of action are joined, whether properly or not, venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change as provided by court rule.
>
> (2) If more than 1 cause of action is pleaded in the complaint or added by amendment at any time during the action and 1 of the causes of action is based on *tort or another legal theory seeking damages for personal injury, property damage, or wrongful death*, venue shall be determined under the rules applicable to actions in tort as provided in [MCL 600.1629]. [Emphasis added.]

MCL 600.1629 provides in relevant part:

> (1) . . . [I]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:
>
> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (*i*) The defendant resides, has a place of business, or conducts business in that county.
>
> (*ii*) The corporate registered office of a defendant is located in that county.

(b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:

(*i*) The plaintiff resides, has a place of business, or conducts business in that county.

(*ii*) The corporate registered office of a plaintiff is located in that county.

(c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which both of the following apply is a county in which to file and try the action:

(*i*) The plaintiff resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.

(*ii*) The defendant resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.

(d) If a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under [MCL 600.1621 or MCL 600.1627] is a county in which to file and try an action.

II. RELEVANT FACTS

The underlying facts are set forth at length in the original opinion in this case. Briefly, plaintiff, purportedly on behalf of himself "and all others similarly situated," brought an action in Oakland County, where defendant Beth Albrough resided and where defendant Dart Properties[1] allegedly owned or managed apartment complexes. Plaintiff asserted causes of action for negligence, violation of the Michigan Notary Public Act,

---

[1] As noted in the original opinion in this case, "at the time that plaintiff's cause of action arose defendant Dart Properties Incorporated had merged with defendant Dart Properties II, LLC." *Angelucci*, 298 Mich App at 596 n 2.

MCL 55.261 *et seq*., violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, intentional infliction of emotional distress, and unlawful interference with a possessory interest. Plaintiff sought a temporary restraining order enjoining an eviction. Although the claims included torts, plaintiff took the position that the exception in MCL 600.1641(2) did not apply because he was not seeking damages "for personal injury, property damage, or wrongful death." Accordingly, plaintiff argued that MCL 600.1641(1) applied and that venue was proper in Oakland County under MCL 600.1621(a)[2] because a defendant resided, had a place of business, or conducted business there. However, the trial court ruled that venue was proper in Macomb County pursuant to MCL 600.1629(1)(b)(*i*) because plaintiff resided there and presumably because the property plaintiff leased was located there.

In the original opinion in this case, this Court explained that the trial court's determination that venue should be changed from Oakland County to Macomb County was erroneous since *Provider Creditors Comm* compelled a different result. However, this Court disagreed with the holding in *Provider Creditors Comm* and invoked the conflict resolution procedure set forth in MCR 7.215(J).

---

[2] MCL 600.1621 provides in part:

> Except for actions provided for in [MCL 600.1605, MCL 600.1611, MCL 600.1615, and MCL 600.1629], venue is determined as follows:
>
> (a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.

III. ANALYSIS

In *Provider Creditors Comm*, the plaintiff, an assignee of a nonprofit corporation and health maintenance organization (HMO) that had its principal place of business in Wayne County before its liquidation, sued United American Health Care Corporation (UAHC), with whom the HMO had a management agreement, as well as UAHC's subsidiary company. Individual directors and officers of UAHC and individual trustees of the HMO were added in an amended complaint. The suit was commenced in Ingham County even though UAHC's principal place of business was in Wayne County, the management agreement was executed in Wayne County, UAHC and its officers and directors performed their duties in Wayne County, and most of the members of the plaintiff assignee did business in Wayne County. There were 23 counts to the complaint, mostly in tort and contract. This Court concluded that venue should be determined based on MCL 600.1641(1), stating:

> The phrase "personal injury" is not defined in chapter 16 of the Revised Judicature Act, the chapter containing MCL 600.1641. However, "personal injury" is defined in chapter 63:
>
> "As used in this chapter:
>
> * * *
>
> (b) 'Personal injury' means bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm. [MCL 600.6301.]"
>
> Although personal injury as defined in MCL 600.6301 expressly applies only to chapter 63 of the RJA, we conclude that this definition of "personal injury" best reflects the plain meaning of the phrase as it is used in MCL 600.1641. Applying that definition here, it is clear from

> plaintiff's pleadings that plaintiff does not seek damages for "bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm." MCL 600.6301(b). Therefore, plaintiff is not "seeking damages for personal injury . . . ." MCL 600.1641(2). Further, plaintiff's pleadings do not support the conclusion that plaintiff seeks damages for property damage or wrongful death. Therefore, MCL 600.1641(2) does not control venue for this action. [*Provider Creditors Comm*, 275 Mich App at 95-96.]

This Court went on to conclude that venue should be determined pursuant to MCL 600.1641(1). *Id*. at 97.

As the original opinion in this case points out,

> [t]his Court's interpretation in *Provider Creditors Comm* failed to accord any significance to the word "tort," thus rendering it nugatory. . . .
>
> [T]he phrase "personal injury, property damage, or wrongful death" modifies only the clause "another legal theory seeking damages" and does not modify the word "tort." "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." *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009). Following this rule, the phrase "personal injury, property damage, or wrongful death" modifies only the immediately preceding clause: "or another legal theory seeking damages." Nothing in the statute indicates that the Legislature intended another interpretation. [298 Mich App at 599-600 (emphasis in original).]

This analysis is supported by the presumption that the Legislature "know[s] the rules of grammar" and the tenet that "statutory language must be read within its grammatical context unless something else was clearly intended[.]" *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 315; 683 NW2d 148 (2004). The last

antecedent rule has been recognized as a grammatical rule of construction. See *People v Small*, 467 Mich 259, 263; 650 NW2d 328 (2002). Our analysis also is supported by our decision in *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 323; 661 NW2d 248 (2003), in which the identical statutory language was interpreted, albeit in a different statutory context, in the manner in which we interpret it today, and by our Supreme Court's decision in *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 620, 623, 625; 752 NW2d 37 (2008), which, in answering a different question under MCL 600.1629, assumed our interpretation of this language to be correct.

Plaintiff now argues that the Legislature's intent was contrary to that determined by applying the above rules of statutory construction. Specifically, plaintiff maintains that if the Legislature had intended that MCL 600.1629 apply to all tort actions, regardless of joinder, it would not have needed to include subsection (2) of MCL 600.1641, but could simply have written subsection (1) to provide: "[F]or cases involving more than one cause of action, unless MCL 600.1629 applies, venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried." However, this language would have created instant ambiguity because MCL 600.1629 applies to "an action," not a situation in which there are multiple causes of action. Therefore, there would have been no clear direction regarding what venue provision applies when a cause of action is joined with a cause of action "based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death." Moreover, that the Legislature could have used an alternative construction to accomplish its purpose is not an indication that the construction it chose was contrary to the intent expressed. Further, if

the Legislature's intent is contrary to what is expressed in the statute, it is incumbent upon it to enact legislation using language that properly expresses that intent.

We concur with the analysis in the prior opinion in this case, as set forth earlier. Thus, we conclude that MCL 600.1641(2) applies if one of the causes of action pleaded in a multiple cause of action complaint is based on tort, regardless of whether damages sought are for personal injury, property damage, or wrongful death. Accordingly, we affirm the trial court's order changing venue to Macomb County.

Affirmed.

RIORDAN, P.J., and JANSEN, OWENS, BECKERING, STEPHENS, SHAPIRO, and BOONSTRA, JJ., concurred.

PEOPLE v CUNNINGHAM (AFTER REMAND)

Docket No. 309277. Submitted April 9, 2013, at Grand Rapids. Decided May 28, 2013, at 9:00 a.m. Leave to appeal sought.

Frederick L. Cunningham pleaded guilty in the Allegan Circuit Court, Margaret Z. Bakker, J., of obtaining a controlled substance by fraud. He was sentenced to one to four years' imprisonment, $1,000 in court costs, and other costs and fines. Defendant appealed, alleging that the $1,000 in court costs was not reasonable for felony cases in Allegan County. The Court of Appeals remanded the matter to the trial court to determine, in light of *People v Sanders*, 296 Mich App 710 (2012), the reasonable costs for felony cases in the Allegan Circuit Court. *People v Cunningham*, unpublished order of the Court of Appeals, entered October 2, 2012 (Docket No. 309277). On remand, the trial court eventually held that there was a reasonable relationship between the $1,000 imposed and the actual costs incurred, which the evidence showed to be $1,238.48.

After remand, the Court of Appeals *held*:

Sanders held that MCL 769.1k does not preclude a sentencing court from considering overhead costs when determining the amount of costs to impose. *Sanders* also established that a sentencing court need not calculate particularized court costs in every criminal case and may impose reasonable costs against an offender without separately calculating the particular costs of the offender's case. No error warranting reversal occurred in the sentencing court's assessment of costs.

Affirmed.

SHAPIRO, J., dissenting, noted that the Court in *People v Sanders*, 296 Mich App 710 (2012), essentially ignored the holding in *People v Dilworth*, 291 Mich App 399 (2011), by which it was bound. Both *Sanders* and *Dilworth* allowed for the assessment of the costs of prosecuting a convicted criminal defendant. *Dilworth* held that such costs are limited to those specifically incurred because of the individual case, not a share of the overall cost of having courts and prosecutors. *Sanders* held that costs of the court may include the general costs of maintaining the judicial branch of government. *Sanders* also concluded that it need not follow the

holding in *People v Teasdale*, 335 Mich 1 (1952), that an assessment of costs against a convicted defendant excludes expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law, on the basis of an erroneous assertion that the language of the statute involved in *Teasdale* barred maintenance and overhead costs. The costs of operating the government itself must be borne by all Michigan residents, not just those who run afoul of the law. The Court of Appeals majority should have followed *Dilworth*.

COSTS — COURT COSTS — FELONY COSTS.

Court costs imposed under MCL 769.1k(1)(b)(*ii*) need not be calculated separately in each individual case but there must be a reasonable relationship between the costs imposed and the actual costs incurred by a trial court; a trial court may consider its overhead costs in determining the court costs.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Frederick L. Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne M. Yantus*) for defendant.

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

O'CONNELL, J.

AFTER REMAND

This matter returns to us following our remand to the sentencing court to determine in light of *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), whether the $1,000 in court costs imposed as part of defendant's sentence was reasonable for felony cases in the Allegan Circuit Court. *People v Cunningham*, unpublished order of the Court of Appeals, entered Octo-

ber 2, 2012 (Docket No. 309277). We conclude that the prosecution established a sufficient factual basis for the amount of costs imposed and accordingly affirm.

Defendant's sentence arose from his guilty plea to a charge of obtaining a controlled substance by fraud, MCL 333.7407(1)(c). He was sentenced to one to four years' imprisonment and $1,000 in court costs, as well as other costs and fees. In keeping with our remand order, the sentencing court held a hearing and received evidence that the average actual court cost for criminal cases in the Allegan Circuit Court is $1,238.48. On the basis of that figure, the sentencing court held that there was a reasonable relationship between the $1,000 in imposed court costs and the actual costs incurred. Defendant does not challenge that finding on appeal.

Instead, defendant contends that the sentencing court erred by (1) including in its calculation the expenses associated with maintaining governmental agencies and (2) failing to calculate the particular costs incurred in this case. We disagree with both of defendant's contentions.

The controlling law establishes that a sentencing court may consider overhead costs when determining the reasonableness of a court-costs figure. In this case, the sentencing court imposed costs under MCL 769.1k, which provides, in relevant part:

> (1) If a defendant enters a plea of guilty . . . both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in section 1j [MCL 769.1j] of this chapter.
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine.

(*ii*) Any cost in addition to the minimum state cost set forth in subdivision (a).

(*iii*) The expenses of providing legal assistance to the defendant.

(*iv*) Any assessment authorized by law.

(*v*) Reimbursement under section 1f [MCL 769.1f] of this chapter.

In *People v Sanders*, 296 Mich App 710, this Court determined that the statute does not preclude a sentencing court from considering overhead costs when determining the amount of costs to impose. *Id*. at 714. The *Sanders* decision thus confirms that the sentencing court in this case properly considered indirect expenses in determining whether the amount designated as court costs was reasonable.

Sanders also establishes that a sentencing court need not calculate particularized court costs in every criminal case. In the initial *Sanders* opinion, 296 Mich App at 711, this Court held that MCL 769.1k(1)(b)(*ii*) allows a sentencing court to impose reasonable costs against an offender without separately calculating the particular costs of the offender's case. In the subsequent opinion affirming the assessment of $1,000 in costs, the Court explained the flaw in the alternate, particularized approach that defendant espouses in this case:

> [W]e would be hesitant to uphold an approach that would take into account whether the case was resolved by a plea or by a trial. If we embraced defendant's argument that costs should be less in a case resolved by a plea that only took "25 minutes of court time" rather than by a trial, there would be a realistic concern that we would be penalizing a defendant for going to trial rather than pleading guilty. That is, a system where greater costs were imposed on a defendant who went to trial rather than plead guilty or nolo contendere would create a financial incentive for a defendant to plead rather than face the possibility of

> even greater court costs being imposed for exercising his or her constitutional right to a trial. [*People v Sanders (After Remand)*, 298 Mich App 105, 108; 825 NW2d 376 (2012).]

In sum, we find no error warranting reversal in the sentencing court's assessment of costs in this case.

Affirmed.

FITZGERALD, P.J., concurred with O'CONNELL, J.

SHAPIRO, J. (*dissenting*). The majority follows *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012). I would instead follow *People v Dilworth*, 291 Mich App 399; 804 NW2d 788 (2011), a case that had previously decided this question, but which *Sanders* failed to follow.

In *People v Dilworth*, our Court considered whether "overhead" charges, i.e., the costs of operating a court system regardless of the filing of the single case at issue, could be assessed as court costs incurred in prosecuting the defendant. We held that such an assessment was improper:

> When authorized, the costs of prosecution imposed "must bear some reasonable relation to the expenses actually incurred in the prosecution." *People v Wallace*, 245 Mich 310, 314; 222 NW 698 (1929). Furthermore, *these costs may not include "expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public, irrespective of specific violations of the law."* *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 (1952). (some emphasis added). [*Dilworth*, 291 Mich App at 401].

Dilworth went on to distinguish between "appropriate charges, such as expert witness fees" which are incurred on a case-by-case basis as opposed to "impermissible charges, such as . . . wages, which were set by a

board of supervisors pursuant to a statute and independent of any particular defendant's case . . . ."

In *Sanders*, this Court addressed the same question under MCL 769.1k, which allows, but does not require, a sentencing court to assess "[a]ny cost in addition to the minimum state cost" of $68.00 if the defendant is convicted of a felony. Directly contrary to *Dilworth*, *Sanders* held that "overhead" costs may be imposed as long as they bear a "reasonable relationship between the costs imposed and the actual costs incurred by the trial court." *Sanders*, 296 Mich App at 714. The *Sanders* Court remanded the case to the trial court, which calculated the overall expenses incurred by the county in operating the circuit court, reduced it by the percentage of civil cases, and then assessed an amount equivalent to the remaining overall expenses divided by the number of criminal dispositions annually. The trial court assessed costs against the defendant on the basis of funds allocated by the county for building use, maintenance and insurance, salaries and fringe benefits of court employees, phones, copying, mailing, and the courthouse gym. After remand, the *Sanders* panel approved this approach. *People v Sanders (After Remand)*, 298 Mich App 105; 825 NW2d 376 (2012).

Sanders essentially ignored the holding in *Dilworth* by which it was bound. Both cases allowed for the assessment of the costs of prosecuting a convicted criminal defendant. *Dilworth* held that such costs are limited to those specifically incurred because of the individual case, not a "share" of the overall cost of having courts and prosecutors. *Sanders* concluded that costs of the court may include the general costs of maintaining the judicial branch of government.

The *Sanders* panel also rejected a holding of the Michigan Supreme Court. It concluded that it need not follow

Teasdale, 335 Mich at 6, which held that an assessment of costs against a convicted defendant "excludes expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law."[1] *Sanders* sidestepped *Teasdale* in two ways. First, *Sanders* noted that *Teasdale* could be ignored because it was decided "decades" ago although there has been no intervening decision overruling or even criticizing *Teasdale*. Second, *Sanders* suggested that *Teasdale* rested its conclusion on statutory language that barred an assessment of such maintenance costs. This assertion is simply not true. The statute considered in *Teasdale* did not contain any language excluding maintenance or overhead costs. In fact, the language of the statute applicable in *Teasdale* was extraordinarily broad, providing that in imposing costs, the court

> shall not be confined to or governed by the laws or rules governing the taxation of costs in ordinary criminal procedure, but may summarily tax and determine such costs without regard to the items ordinarily included in taxing costs in criminal cases and may include therein *all such expenses, direct and indirect*, as the public has been or may be put to in connection with the apprehension, examination, trial and probationary oversight . . . . [1931 PA 308, § 17373(3); 1948 CL 771.3(3) (emphasis added)].

Thus, *Teasdale*'s bar against costs for the overall operation of the courts was set out in the context of a statute that was far more consistent with such assessments than were the later amendments, which now control and which were likely a codification of the *Teasdale* holding.

---

[1] The *Sanders* panel also failed to address other cases predating *Dilworth*, but consistent with it. See, e.g., *People v Newton*, 257 Mich App 61, 68-69; 665 NW2d 504 (2003); *People v Crigler*, 244 Mich App 420, 427; 625 NW2d 424 (2001); *People of Ypsilanti v Kircher*, 429 Mich 876 (1987).

Convicted felons have committed crimes and we punish them for doing so. They may be fined, incarcerated, or placed under other forms of supervision and restrictions upon their conduct. However, they remain citizens of our state. Whatever their conduct, they do not constitute a special class upon whom the courts may assess higher taxes or fees to pay for the expense necessary to maintain the constitutionally required operations of government. As held in *Dilworth* and *Teasdale*, if a particular case requires a court to incur specific costs, then those costs may be assessed. However, the costs of operating the government itself is borne by all Michigan residents not merely or particularly by those that run afoul of the law.

POWER v DEPARTMENT OF TREASURY

Docket No. 309773. Submitted April 4, 2013, at Lansing. Decided April 9, 2013. Approved for publication May 28, 2013, at 9:05 a.m.

Allan Warner held a lot lease for property near Charlevoix, Michigan, that had a house on it. The lease was superseded by a license agreement that allowed him to use and occupy the property for $175 a year. The Chicago Summer Resort Company was the property's owner of record. The license agreement explicitly stated that it did not grant any legal or equitable interest in or title to the lot. Taxes were billed to the corporation as the record owner, and an accounting firm collected all the bills and provided individual invoices to members for the taxes attributable to each member's individual property. Following an audit, the Department of Treasury denied a principal residence exemption under MCL 211.7cc because under MCL 211.7dd(b), a corporation is not a person for purposes of defining an "owner" eligible for the exemption. Warner appealed that determination to the department, contending that he was a lessee of the property, that he owned a dwelling on the leased land, and that he was therefore an owner eligible for the exemption. Following an informal conference, the department upheld the denial. Warner then appealed the decision in the small claims division of the Tax Tribunal. The hearing officer found that petitioner was not the owner of the property and had not submitted any documents showing him to be the owner of record. The hearing officer further found that the lease and license agreements indicated that they conveyed to Warner the right to use and occupy the lot and that the owner of the real estate was the corporation. Finally, the hearing officer found that Warner had not shown any evidence of ownership of the building. The hearing officer concluded that Warner had failed to prove that the property qualified for the exemption. The tribunal accepted the hearing officer's findings and proposed opinion. Warner appealed. Following Warner's death, William A. Power, III (the personal representative of Warner's estate), was substituted as appellant.

The Court of Appeals *held*:

1. The taxpayer has the burden of showing entitlement to an exemption. MCL 211.7cc(1) provides that a principal residence is

exempt from a local school district taxes if an owner of the principal residence claims the exemption, which under MCL 211.7cc(2) an owner may do by filing an affidavit stating that the property is owned and occupied as a principal residence by that owner. Additionally, MCL 211.7dd(c) defines "principal residence" as the portion of a dwelling or unit that is owned and occupied by an owner of the dwelling or unit. Thus, while occupancy is a necessary condition for claiming the exemption, it is not sufficient. A person seeking the exemption must also prove ownership. Warner provided no evidence that he had an ownership interest in either the lot or the dwelling house. The tribunal's holding that Warner did not carry his burden was supported by substantial evidence and was not based on an error of law. The tribunal therefore properly dismissed Warner's appeal.

2. Under MCL 211.7dd(a)(*iv*), the definition of "owner" includes a person who owns or is purchasing a dwelling on leased land. Warner argued that a homeowner's policy on the property demonstrated that he was the owner. A homeowner's policy insuring a dwelling, however, does not render that person an owner as defined in MCL 211.7dd(a) because coverage under those policies can be based on a possessory interest as well as an ownership interest. Moreover, Warner was merely described as the "named insured" of the policy. Nothing in the document indicated that Warner actually owned or was purchasing the house.

Affirmed.

Young, Graham, Elsenheimer & Wendling, P.C. (by *Harry K. Golski* and *Eugene W. Smith*) for William A. Power, III.

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

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM. Petitioner appeals the final opinion and judgment issued by the Michigan Tax Tribunal (the Tribunal) on March 29, 2012. The Tribunal adopted the proposed opinion of the hearing officer and dismissed

petitioner's appeal of respondent's denial of the principal residence tax exemption (PRE), MCL 211.7cc, for tax years 2005, 2006, 2007, and 2008, finding that petitioner had not proved that he was an "owner" of the property at issue. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS AND PROCEDURE

This case concerns property held in the name of the Chicago Summer Resort Company, a Michigan corporation (the corporation). The corporation is the owner of record of property near Charlevoix, Michigan. The property at issue is a residential property that contains at least one house. The parties do not dispute that petitioner occupied the property. The bylaws of the corporation indicate that a person may only acquire a "right to occupy a Site or any other property owned by the corporation" by becoming a shareholder of the corporation.

From 2002 to 2007, petitioner held a "lot lease" for the real property identified as "building lot 2" at the cost of $175 a year. As of January 1, 2008, this lease was superseded by a license agreement, granting petitioner a license to use and occupy the property for $175 a year. The license agreement explicitly stated that it did not grant any legal or equitable interest in or title in or to the lot.

Taxes were billed to the corporation as the record owner of the property. An accounting firm collected all the bills sent to the corporation and provided individual invoices to members for the taxes attributable to each member's respective individual property, share of the common area, and boat slip if applicable.

In 2008, following an exemption audit, respondent denied a PRE for the 2005 through 2008 tax years

because a corporation is not a "person" for purposes of defining an "owner" eligible for a PRE. MCL 211.7dd(a) and (b). Petitioner appealed that determination, contending that he was a "lessee" of the parcel in question, that he owned a "dwelling" on the leased land, and that he was therefore an "owner" eligible for the PRE. Following an informal conference, respondent upheld the denial.

Petitioner then appealed the decision to the Tribunal's small claims division. Petitioner presented evidence and testimony related to his occupancy of the property. In support of his contention that he owned the property, petitioner cited his lease and license agreements, as well as the testimony of Edwina Powell (petitioner's stepdaughter) and Kevin Christman, who testified about how his accounting firm handled the corporation's taxes. Petitioner did not provide any evidence of his ownership of shares in the corporation.

The hearing officer found that petitioner was not the owner of the property and had not submitted any documents showing him to be the owner of record. The hearing officer further found that the lease and license agreements indicated that they conveyed to petitioner the right to use and occupy the lot and that the owner of the real estate was the corporation. Finally, the hearing officer found that petitioner did not show any evidence of ownership of the building. The hearing officer thus concluded that petitioner had failed to prove by a preponderance of the evidence that the property was qualified to receive the PRE. The Tribunal accepted the hearing officer's findings and proposed opinion.

II. STANDARD OF REVIEW

Absent fraud, our review of Tribunal decisions is "limited to determining whether [the Tribunal] erred in

applying the law or adopted a wrong legal principle." *VanderWerp v Plainfield Charter Twp.*, 278 Mich App 624, 627; 752 NW2d 479 (2008). To the extent that our review requires the interpretation and application of a statute, that review is de novo. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). However, "statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority." *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008).

In *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 388-389; 576 NW2d 667 (1998), this Court stated:

> While this Court is bound by the Tax Tribunal's factual determinations and may properly consider only questions of law under [Const 1963, art 6, § 28], a Tax Tribunal decision that is not supported by competent, material, and substantial evidence on the whole record is an "error of law" within the meaning of Const 1963, art 6, § 28. *Oldenburg v Dryden Twp*, 198 Mich App 696, 698; 499 NW2d 416 (1993); *Kern v Pontiac Twp*, 93 Mich App 612, 620; 287 NW2d 603 (1979). Substantial evidence must be more than a scintilla of the evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). "Substantial" means evidence that a reasonable mind would accept as sufficient to support the conclusion. *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1994).

III. ANALYSIS

Petitioner argues that the Tribunal erred by concluding that he did not own the house located on the leased property. We disagree.

Michigan's principal residence exemption is also known as the "homestead exemption" and is governed

by MCL 211.7cc and MCL 211.7dd of the General Property Tax Act (GPTA), MCL 211.1 *et seq*. *Drew v Cass Co*, 299 Mich App 495, 500; 830 NW2d 832 (2013). MCL 211.7cc(1) provides in relevant part:

> A principal residence is exempt from the tax levied by a local school district for school operating purposes to the extent provided under section 1211 of the revised school code, 1976 PA 451, MCL 380.1211, if an owner of that principal residence claims an exemption as provided in this section.

Aside from certain exceptions, MCL 211.7cc(2) provides that an owner of property may claim this exemption by filing an affidavit stating that "the property is owned and occupied as a principal residence by that owner of the property . . . ." Additionally, "principal residence" is defined as including only "that portion of a dwelling or unit . . . that is owned and occupied by an owner of the dwelling or unit." MCL 211.7dd(c). Thus, while occupancy is a necessary condition for claiming a PRE, it is not sufficient; petitioner was also required to prove ownership. See *VanderWerp*, 278 Mich App at 630.

Petitioner states incorrectly that the Tribunal erred by finding that his proof of ownership was not sufficient because it was not proved by a "deed" or "instrument of conveyance." In fact the Tribunal found that petitioner had not submitted "*any* documents which show he is the owner of record for the subject property" and "did not show *any* evidence of ownership of the building" on the lot for which the corporation was the owner of record. (Emphasis added.) These findings are supported by substantial evidence. The lease agreement provided by petitioner does not purport to convey the land to petitioner or any building to petitioner; in fact, it requires the leaseholder to seek corporation approval to make any changes to the premises and restricts peti-

tioner from conveying the property or assigning his leasehold interest. The licensing agreement goes further and explicitly states that it does not grant to petitioner any legal or equitable ownership interest in or title in or to the lot. Petitioner never produced his shares in the corporation or any other document purporting to demonstrate ownership of the lot.[1] Thus, the Tribunal did not err by determining that petitioner did not demonstrate ownership of the lot, especially in the face of the fact that the corporation was the owner of record.

As the Tribunal noted, petitioner's only hope for a PRE lay in MCL 211.7dd(a)(*iv*), which provides a definition of "owner" as "[a] person who owns or is purchasing a dwelling on leased land." This, in fact, was the basis of petitioner's initial appeal to respondent. However, petitioner simply provided no evidence that he owned or was purchasing his dwelling. Petitioner claims to have submitted a declaration sheet from Liberty Mutual Insurance Company for a homeowner's policy covering the house on the lot at issue. However, while that document does appear in the record on appeal in this Court, it does not appear in the list of exhibits offered before the Tribunal. Enlargement of the record on appeal is generally not permitted. *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011). Moreover, even if the Tribunal had considered

[1] Even if petitioner had provided evidence of ownership of shares in the corporation, that evidence, absent any specific language indicating ownership of specific property by petitioner, would not have sufficed to demonstrate that petitioner had an ownership interest in the land to which the corporation held title. "A corporation is a legal entity distinct from its shareholders, even though all of the stock is held by a single individual." *Bill Kettlewell Excavating, Inc v St. Clair Co Health Dep't*, 187 Mich App 633, 639; 468 NW2d 326 (1991). Thus, ownership of corporate property is vested in the corporation itself and not the shareholders. *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950).

this evidence, the mere fact that someone has a homeowner's policy insuring a dwelling does not render that person an owner under MCL 211.7dd(a). In fact, petitioner is merely described as the "named insured" of this policy. Such policies may provide coverage based on a possessory interest as well as an ownership interest. See, e.g., *Heniser v Frankenmuth Mut Ins Co*, 201 Mich App 70, 72-73; 506 NW2d 247 (1993). In any event, nothing in that document, even if it had been provided to the Tribunal, indicates that petitioner actually owns or is purchasing the dwelling house on the lot at issue. Additionally, evidence showing that all taxes were billed to the corporation and then apportioned to individual shareholders cuts against any claim by petitioner that he owns the dwelling house at issue because it supports the conclusion that all the property at issue was owned by the corporation, not petitioner. See *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950).[2]

In sum, petitioner simply provided no evidence that he had an ownership interest in either the lot or the dwelling house. The taxpayer has the burden of showing entitlement to the exemption. *Andrie, Inc v Dep't of Treasury*, 296 Mich App 355, 365; 819 NW2d 920 (2012). The Tribunal's holding that petitioner did not carry this burden was supported by substantial evidence and was not based on an error of law. *Great Lakes*, 227 Mich App at 388-389. The Tribunal therefore properly dismissed petitioner's appeal.

Affirmed.

BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ., concurred.

[2] The testimony of petitioner's stepdaughter, and Christman also did not establish that petitioner was an owner of the dwelling.

SAL-MAR ROYAL VILLAGE, LLC v MACOMB COUNTY TREASURER

Docket No. 308659. Submitted May 14, 2013, at Detroit. Decided May 30, 2013, at 9:00 a.m. Leave to appeal sought.

Sal-Mar Royal Village, LLC, filed a complaint for a writ of mandamus against the Macomb County Treasurer, requesting that he be required to accept funds that plaintiff had tendered as payment in full for a three-year period of property taxes in accordance with a consent judgment entered by the Michigan Tax Tribunal (MTT). In 2007, plaintiff had filed an appeal of its property-tax assessment by Macomb Township in the MTT, and because plaintiff did not pay taxes while the appeal was pending, it incurred substantial interest on the delinquent taxes. Ultimately, plaintiff entered into a stipulation with the township that reduced the property's value and waived any penalty and interest that would be due from either party if the applicable taxes or refunds were paid. These terms were incorporated into the consent judgment entered by the MTT. Following the entry of judgment, defendant, as a representative of Macomb County, issued plaintiff a revised tax bill for 2007 through 2010, but refused to recognize the waiver-of-interest provision in the consent judgment and billed plaintiff for interest of $127,971.29. Plaintiff paid the taxes, but did not pay the interest. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10), arguing that defendant was bound by the consent judgment as the township's privy. Defendant moved for summary disposition pursuant to MCR 2.116(C)(4), (C)(8), and (C)(10), arguing that because it was not a party to the MTT case, it could not be bound by the decision. Defendant also argued that the MTT lacked the statutory authority to accept the parties' stipulation waiving the interest. The trial court, David F. Viviano, J., denied plaintiff's motion for summary disposition and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by granting defendant's motion for summary disposition and dismissing the writ of mandamus. The county and the township, acting as the county's trustee, shared the same interest in the MTT litigation, which was to ensure that

property was assessed and taxes were collected, and they worked together to collect property taxes. Therefore, the consent judgment between plaintiff and the township bound defendant as the township's privy. The fact that the taxes at issue were owed to the county rather than the township did not give the entities different interests in the litigation. Although no statutory provision specifically allowed the MTT to waive interest on delinquent taxes, MCL 205.732(b) and (c) give the MTT general powers to grant relief that it deems necessary in matters over which it may acquire jurisdiction. Similarly, no statutory provision prevented the county from waiving the requirement to charge interest on delinquent taxes under MCL 211.78a(3). Because plaintiff had a clear legal right to performance of the judgment, defendant had a clear legal duty to perform, the act was ministerial, and plaintiff had no adequate remedy other than to have the consent judgment enforced against defendant, plaintiff's request for a writ of mandamus should have been granted.

2. The parties' stipulation clearly stated that the agreement was to waive interest on the delinquent taxes, contrary to defendant's argument that the parties agreed to waive only interest on the judgment.

Reversed.

TAXATION — TAX TRIBUNAL DECISIONS — CONSENT JUDGMENTS — GOVERNMENTAL ENTITIES — PRIVITY.

A county may be bound by a consent judgment entered by the Tax Tribunal between a taxpayer and a township if the township had an interest in the litigation as a trustee for the county.

Hoffert & Associates, P.C. (by *David B. Marmon*), for plaintiff.

Frank Krycia, Macomb County Assistant Corporation Counsel, for defendant.

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM. Plaintiff appeals as of right a circuit court order that granted defendant's motion for summary disposition and denied plaintiff's motion for summary disposition, thereby dismissing plaintiff's complaint for a writ of mandamus against defendant. We

reverse and hold that plaintiff's request for a writ of mandamus should have been granted.

Plaintiff's complaint for a writ of mandamus requested that defendant be ordered to accept plaintiff's tendered funds as payment in full for three years of property taxes in accordance with a consent judgment entered by the Michigan Tax Tribunal (MTT). Plaintiff alleged that in 2007, it filed a property tax appeal against Macomb Township in the MTT and did not pay its property taxes during the pendency of the appeal. As a result, plaintiff incurred substantial interest on the delinquent taxes. According to plaintiff, it entered into a stipulation with the township that reduced the true cash value, assessed value, and taxable value on the property. In addition, plaintiff alleged that the parties agreed to waive any penalty and interest due from either party if all applicable taxes or refunds were paid. These terms were incorporated into the consent judgment entered by the MTT. Following the entry of judgment, defendant, as representative of Macomb County, issued plaintiff a revised tax bill for 2007 through 2010, but refused to recognize the waiver-of-interest provision in the consent judgment and billed plaintiff for interest of $127,971.29. Plaintiff paid the taxes, but not the interest.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) (failure to state a valid defense) and (C)(10) (no genuine issue of material fact), arguing that defendant was bound by the consent judgment as the township's privy. Plaintiff argued that it was entitled to a writ of mandamus against defendant because there was no alternative remedy and defendant had a clear, mandatory, and nondiscretionary duty to perform. Likewise, defendant moved for summary disposition pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdic-

tion), (C)(8) (failure to state a claim), and (C)(10), arguing that because it was not a party to the MTT case, it could not be bound by the decision. In addition, defendant argued that there was no statutory provision that allowed the waiver of interest on delinquent taxes; thus, the MTT did not have the authority to accept the parties' stipulation waiving the interest. The trial court denied plaintiff's motion for summary disposition and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). In doing so, the trial court ruled that the consent judgment only applied to the parties of the MTT appeal: plaintiff and the township.

First, plaintiff argues that the trial court erred by granting defendant's motion for summary disposition and dismissing the writ of mandamus because the consent judgment between plaintiff and the township binds defendant as the township's privy. We agree.

Plaintiff may seek equitable relief, such as a writ of mandamus, to enforce the MTT's order. See *Wikman v City of Novi*, 413 Mich 617, 648; 322 NW2d 103 (1982).

> [A] writ of mandamus is an extraordinary remedy and will only be issued where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. [*Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008).]

A trial court's ultimate decision regarding a request for mandamus is reviewed for an abuse of discretion, but the first two elements required for issuance of a writ of mandamus are questions of law that we review de novo. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012).

Likewise, a trial court's decision regarding a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In this case, the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), but it considered documents outside the pleadings. Therefore, we review the trial court's decision under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

When reviewing a motion pursuant to MCR 2.116(C)(10), summary disposition may be granted if the evidence establishes that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). A genuine issue of material facts exists when reasonable minds could differ on an issue after viewing all the documentary evidence in a light most favorable to the nonmoving party. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, we must review the record in the same manner as the trial court, and our review is limited to the evidence presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009).

The first and second elements required for issuance of a writ of mandamus require us to determine whether plaintiff has a clear legal right to performance and whether defendant has a clear legal duty to perform. This determination hinges on whether the consent judgment entered by the MTT between plaintiff and the township binds the county.

Michigan courts have "long held that a judgment or decree is conclusive as to all persons in privity with the parties to the former action." *Knowlton v Port Huron*,

355 Mich 448, 454; 94 NW2d 824 (1959). Accordingly, a consent judgment binds those in privity with the parties who contracted the judgment.

In *Baraga Co v State Tax Comm*, 243 Mich App 452; 622 NW2d 109 (2000), rev'd 466 Mich 264 (2002), this Court stated that "[p]rivity between a party and a non-party requires both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Id*. at 456 (quotation marks and citation omitted). However, our Supreme Court reversed this Court's judgment and criticized this Court for applying "a definition of privity that originated in cases involving *private* parties" to a case involving governmental units. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). Instead, our Supreme Court relied on a definition from Corpus Juris Secundum to determine whether privity existed between the state and a local government:

> "A state may be bound by a judgment for or against a public officer, or agency, but only with respect to a matter concerning which he or the agency is authorized to represent it, and it is not bound by a judgment to which a subordinate political subdivision was a party in the absence of a showing that such political body had an interest in the litigation as a trustee for the state." [*Id*. at 270, quoting 50 CJS, § 869, Judgments, p 443.]

Our Supreme Court stated that "there may be circumstances under which the state may be bound by a judgment to which a subordinate political division was a party and the state was not, such as when the subordinate political subdivision is found to have been acting as a trustee for the state." *Id*. at 270-271.

However, two years later, our Supreme Court applied the private-party definition of privity to a case in which

a taxpayer and a school district were suing the state. *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004). The Court, quoting its decision in *Baraga Co*, defined "privity" as follows:

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a substantial identity of interests and a working functional relationship in which the interests of the nonparty are presented and protected by the party in the litigation. [*Id*. at 122 (quotation marks and citations omitted).]

Thus, while this definition of privity may not be "routinely applied to governmental agencies," under *Adair*, the Court seems to suggest it is not improper to apply it in cases involving governmental agencies. See *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005).

Although the definition of privity our Supreme Court used in *Baraga Co* applied to a situation involving the state and a local government, the general principle can be applied to this case—namely, that the state would not be bound by a judgment to which a subordinate political subdivision was a party unless that subdivision had an interest in the litigation as a trustee for the state. Thus, it would follow that the consent judgment between plaintiff and the township would not bind the county unless the township, as the subordinate political subdivision, had an interest in the litigation as a trustee for the county. The township had authority to represent the county's interest in collecting taxes. Cf. *ANR Pipeline Co*, 266 Mich App at 213-214 (indicating that privity did not exist where petitioner did not show that the party had the authority to represent the state's interest in collecting state taxes). If there are delin-

quent taxes, they are turned over to the county treasurer, who pays the township the delinquent taxes with funds from the county's fully funded revolving tax fund. Then, the county collects the delinquent taxes with interest and fees from the property owner. This is unlike the situation in *Baraga Co*, in which the township enforced the property tax laws and the state would step in only if the township failed to carry out its duties. *Baraga Co*, 466 Mich at 271-272. Rather, in this case, the township receives the tax rolls from the county and then sends bills to the taxpayers. The county automatically pays any taxes that the township is unable to collect. Accordingly, the county and the township work hand in hand when collecting taxes. Thus, the township and the county shared the same interest in the MTT litigation, which was to receive a fair assessment of the value of the property in order to jointly collect the proper amount of taxes on the property.

Additionally, under the private-party definition of privity, the township and the county share a "substantial identity of interests" and a "working functional relationship." As noted, the township and the county work together to collect the property taxes owed. If a taxpayer becomes delinquent the county will pay the township from a revolving fund and then seek reimbursement from the taxpayer. It is clear that the two entities are in a working functional relationship with one another to assess property and collect the property taxes.

Defendant argues that the township did not have the authority to waive interest on the county's behalf because it was the county that was owed the delinquent taxes. Accordingly, defendant argues that the two entities do not share the same interests. As explained, however, the township and the county did share the

same interests: to assess property and collect property taxes. If defendant believed that the township did not adequately represent these interests in the litigation, he should have intervened. See MCL 205.744. Defendant argues that when the litigation was initiated in 2007 it was for an assessment, and plaintiff had yet to become delinquent on its taxes. Thus, defendant did not have notice that plaintiff sought to have interest waived on the delinquent taxes that had not yet come due. However, there is evidence that defendant was aware that plaintiff owed delinquent taxes for 2007 through 2010, when the litigation was still ongoing, because he sent plaintiff bills each year and admitted to paying the township from the revolving fund. Further, there is evidence that during the pendency of the litigation, plaintiff was not current on its taxes, so defendant filed a forfeiture certificate that was canceled because of the pending litigation. Thus, there is evidence that defendant had notice of the litigation, and if defendant did not want the township representing the county's interests, he should have intervened.

Defendant also argues that the MTT did not have the authority to waive interest on the delinquent taxes. However, there is no statutory authority that prevents the MTT from doing so. In fact, MCL 205.732(b) and (c) provide that the MTT's powers include, *but are not limited to*, "[o]rdering the payment or refund of taxes in a matter over which it may acquire jurisdiction" and "[g]ranting other relief or issuing writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it may acquire jurisdiction." Further, although defendant argues that MCL 211.78a(3) directs the county to charge interest on delinquent taxes, there is no statutory provision preventing the county from waiving this requirement. And MCL 211.44(4) allows a local govern-

ment unit that collects taxes to waive the administration fee and the penalty charge on late taxes.

Accordingly, because the township and the county were in privity with one another, the county would be bound by the consent judgment. Thus, it follows that plaintiff has a clear legal right to performance of the judgment and defendant has a clear legal duty to perform, which satisfies the first and second elements required to issue a writ of mandamus.

The third and fourth elements required for issuance of a writ of mandamus are also satisfied in that the act here is ministerial and plaintiff has no other adequate remedy, except to have the consent judgment enforced against defendant. Thus, we hold that the trial court erred by granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition. Accordingly, plaintiff's request for a writ of mandamus should have been granted.

Plaintiff also argues that the trial court erred when it determined that the term "interest" in the stipulation did not mean interest on the delinquent taxes, it only meant judgment interest. However, the trial court did not make this determination. It based its decision solely on the fact that the consent judgment only applied to the parties involved in the litigation. Because the trial court did not decide this issue, we are not required to address it on appeal. However, because the parties raised this issue below and interpretation of the consent judgment is necessary for a proper determination of this case, we will decide it. See *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (noting that when an issue is raised but not decided below, "a party 'should not be punished for the omission of the trial court' ") (citation omitted); *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278;

739 NW2d 373 (2007) (noting that this Court may address an issue that was not decided below if "necessary for a proper determination of the case") (citations and quotation marks omitted).

Because a consent judgment is contractual in nature, its interpretation, including a trial court's determination whether contractual language is ambiguous, is subject to review de novo. *City of Flint v Chrisdom Props, Ltd*, 283 Mich App 494, 499; 770 NW2d 888 (2009); *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008).

"A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin*, 280 Mich App at 517. "In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage." *Id.* Our Supreme Court has stated the following in regards to contracts:

> A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that "[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." [*Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (quotation marks and citations omitted).]

Honoring the intent of the parties is the primary goal in contract interpretation, and that intent is best determined by the language of the contract. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005). Words in a contract must be interpreted according to their com-

mon meanings and may not be distorted. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). However, if the meaning of a term in a consent judgment is unclear or "equally susceptible to more than one meaning . . . interpretation is a question of fact, and the trial court may consider extrinsic evidence to determine the intent of the parties." *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008). But "[c]ourts are not to create ambiguity where none exists." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

The paragraph at issue provides:

> The parties agree to mutually waive penalty and interest due from either party provided all taxes or refunds due and owing as a result of this Joint Stipulation shall be paid by the Petitioner within twenty-eight (28) days of any issuance of new tax bills or tax computations forwarded to Petitioner resulting from this Stipulation.

Defendant argues that the term "interest" applies to judgment interest and not interest owed on the delinquent taxes. However, the stipulation clearly states that the parties agree to waive *interest* due from the parties on all taxes or refunds owed. It does not state that the parties agree to waive only the judgment interest. If the parties intended the waiver to only apply to judgment interest, the language should have reflected that fact. As noted, honoring the intent of the parties is best determined by the contractual language itself, and here, the language clearly states "interest" and not "judgment interest." Because the contract is clear, it should be enforced as written without considering extrinsic evidence. Thus, we hold that the term "interest" applies to the interest owed on the delinquent taxes.

Reversed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

DONOFRIO, P.J., and MARKEY and OWENS, JJ., concurred.

PEOPLE v MARTZ

Docket No. 307916. Submitted May 14, 2013, at Marquette. Decided May 30, 2013, at 9:05 a.m.

Calvin F. Martz was convicted by a jury in the Marquette Circuit Court, Thomas L. Solka, J., of first-degree criminal sexual conduct, unlawful imprisonment, resisting or obstructing a police officer causing serious impairment of a body function, and two counts of resisting or obstructing a police officer. Defendant appealed.

The Court of Appeals *held*:

The documents presented by defendant that allegedly gave defendant authority over the victim had no probative value or relevance to whether defendant used force or coercion to accomplish sexual penetration with the victim. The trial court did not abuse its discretion by refusing to admit the documents in evidence. The trial court did not abuse its discretion by determining that the testimony of the police officers who arrested defendant almost a week after defendant committed his acts of resisting and obstructing officers during the execution of a search warrant at defendant's residence was not relevant to defendant's claim that the police had engaged in misconduct when executing the search warrant. The trial court did not abuse its discretion when it did not allow defendant to call as witnesses the officers who arrested him.

Affirmed.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Matthew J. Wiese*, Prosecuting Attorney, and *Cheryl L. Hill*, Chief Assistant Prosecuting Attorney, for the people.

F. Randall Karfonta for defendant.

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

RONAYNE KRAUSE, P.J. Defendant appeals as of right his convictions by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b (force or coercion); unlawful imprisonment, MCL 750.349b; resisting or obstructing a police officer causing serious impairment of a body function, MCL 750.81d(3); and two counts of resisting or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent imprisonment for 15 to 40 years for the CSC I conviction, 15 to 22½ years for the unlawful imprisonment conviction, 10 to 15 years for the resisting and obstructing a police officer causing serious impairment conviction, and 16 months to 2 years for the resisting and obstructing a police officer conviction. We affirm.

This case arises out of a long, controlling, and abusive relationship between the complainant, Stephanie, her mother, Karen,[1] and defendant. Defendant claimed to be Stephanie's husband. According to Karen, they were married on May 18, 2000, when Stephanie was 21 years old, by a "Marriage Covenant" document.[2] Stephanie contended that the signature on the document was not hers and she had not been present when the document was created. According to Stephanie, defendant had claimed to be her husband since she was about 14 years old, at which time defendant would have been approximately 46 years old.[3] Stephanie testified

---

[1] Karen was apparently convicted of unlawful imprisonment for her role in the events of this case. She does not have an appeal pending at this time.

[2] Michigan does not recognize common-law marriages purportedly contracted after January 1, 1957. *Carnes v Sheldon*, 109 Mich App 204, 211; 311 NW2d 747 (1981).

[3] Marriage to a person under the age of 16 is void. MCL 551.51. Furthermore, although the age difference between a victim and a perpetrator of criminal sexual conduct is only relevant to CSC IV,

that she was afraid of defendant and had a personal protection order (PPO) against him. She explained, however, that her attempts to live away from defendant were undermined by her concern for her mother, with whom defendant continued to live.

Despite her concern about defendant, Stephanie decided in May 2011 to visit her mother. She contacted a state police officer to confirm that *she* would not be in violation of the PPO if she happened to encounter defendant. She left a note in her apartment for a friend explaining that she had gone to visit her mother and would be back. She left the radio on, a "purse wallet" behind, and her pain and psychiatric medications behind. She also left her cat, to whom Stephanie was a dedicated caretaker. No one was initially home when Stephanie arrived at defendant's and Karen's residence, but defendant arrived shortly thereafter and apparently believed Stephanie "was back to stay." Stephanie testified that defendant told her "you're going to stay here and you're going to stick to me like glue." She also testified that defendant followed her around the house, even accompanying her to the outhouse.[4]

That evening, defendant told her to go to his bedroom and she complied, despite being afraid "[b]ecause in the past he has been mean to me." Stephanie testified that defendant had hit her before, knocking her "jaw bone out of alignment." Defendant joined her in the bedroom, where he disrobed her and "forced" her to have sex with him, which caused her to bleed "[i]n my private." She testified that defendant believed he had a right to have sex with her because "[h]e thinks that I'm

---

specifically MCL 750.520e(1)(a), the "age of consent" in Michigan is otherwise 16 years of age. MCL 750.520b, MCL 750.520c, MCL 750.520d.

[4] The house lacked indoor plumbing.

his wife," and had considered her to be so since she was 14 years old. She testified that she was afraid to tell him that she did not want to have sex with him, and in the past when she said so, "[h]e would do it anyway, usually." She testified that defendant had first attempted to be intimate with her "a couple of days after" he told her that she would be his wife. Stephanie testified that she did not tell her mother that defendant had raped her because her mother also considered Stephanie to be married to defendant, "so she thinks that it is alright for him to have sex with me." Karen, in contrast, testified that Stephanie had a motorbike that she rode "[a]ll over the place" and that Stephanie could have left any time she wished, including during a shopping trip. Stephanie testified that she could not have left because defendant was always with her.

The manager at Stephanie's apartment became concerned when she did not see Stephanie for a few days. Other friends, including Stephanie's outpatient clinician at a mental health clinic, also became concerned. Several of them went to Stephanie's apartment with police officers and were admitted by the manager, where they discovered that Stephanie's cat had not been given food or water, and several of Stephanie's essentials, such as her cellphone and medication, had been seemingly abandoned. A friend received an envelope in the mail containing Stephanie's keys and a note stating that she would not be back and requesting that her cat be returned to the Humane Society.

A "well-being check" was commenced by the police at defendant's property. Initially, officers parked off the premises, walked to the door, identified themselves, and asked to talk. Defendant "started screaming at [them] to get off his property, that [they were] violating his civil rights, and that [they were] trespassing." Stephanie

testified that she heard defendant shouting at the police, but she was with her mother, "stuck in the back seat of a pickup truck" on the property, and when she tried to leave, Karen told her to remain where she was and stay silent. The police retreated and obtained a search warrant. In anticipation that defendant would not be cooperative, the local police and the Michigan State Police received assistance from the Upper Peninsula Substance Enforcement Team (UPSET), which had training in breaching houses. The officers wore attire marking them as police.

The police spent several minutes knocking on the door continuously, and they further made announcements with a loudspeaker. Stephanie testified that she heard the police announce themselves, bang on the door, and say her name. She testified that defendant told her and Karen "to be quiet and close the curtains." She observed defendant pace the floor, peek out the curtains, and retrieve a can of pepper spray and take it to the front door. Karen testified that she heard nothing because the house was "pretty darn sound-proof," and she believed any sounds from the door were from a bear that occasionally visited the area. The officers eventually decided to breach the door to the home.

The first two officers through the doors to the home testified that they were hit with a chemical spray causing immediate eye irritation and difficulty breathing. Karen confirmed that defendant had sprayed bear mace. Defendant later explained to officers that he had sprayed bear mace because he believed a bear was outside, although when "he recognized that it was a person with a gun," he decided to spray the mace anyway. As the officers retreated, one fell off the porch and broke his ankle. The officers then noticed "a commotion" in the house, and Stephanie "kind of

spilled" out of the door. They noticed that it appeared that someone was holding onto the back of her shirt. Karen testified that she tried to restrain Stephanie from leaving the house because she was concerned that the mace would harm her. Stephanie testified that defendant was the one who grabbed her shirt, and that he told her "that God told him to spray the police officers." Officers summoned Stephanie over to them and moved her "out of any line of fire." Because they had accomplished the purpose of the search warrant, the police then left with Stephanie. They subsequently obtained a warrant for defendant's arrest.

Defendant's theory of the case was generally that any relationship between himself and Stephanie was consensual, and also that she was known to make up stories and hallucinate while taking her medication. In an effort to prove these contentions, defendant attempted to introduce several other documents. One purported to set forth "my inalienable religious rights" and essentially sought to convey all Stephanie's rights to defendant. Another also discussed Stephanie's religious beliefs and stated that defendant was not engaged in any fraud and had to consent to any signature Stephanie executed; it also indicated that without defendant's knowledge or consent Stephanie was being forcibly kept on drugs that caused her to hallucinate. Another document was a "Pathways preliminary plan/individual plan of service" bearing Stephanie's signature and over which defendant had written "NULL AND VOID" and an additional note that "Romans 7:2 As Stephanies [sic] husband, Calvin F Martz, I only have authority for consent in all matters conserning [sic] Stephanie . . . and my consent is not given. You are discriminating against Stephanies [sic] and my religious rights." Defendant's first argument on appeal is that the trial

court erroneously refused to admit these documents, which he contends were necessary to support his defense. We disagree.

We review a trial court's decision to admit or deny evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion occurs when the trial court chooses an outcome falling outside "the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). MRE 401 provides that 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." The theory pursued by the prosecution at trial was that defendant used force or coercion "to accomplish sexual penetration." MCL 750.520b(1)(f). None of the proffered documents, even if taken at face value, make it less probable that defendant used force or coercion to accomplish sexual penetration.

Engaging in the presumption that any of the documents were themselves executed consensually by Stephanie, the most they could show would be that defendant and Stephanie believed themselves married to each other, that defendant had assumed the right to make decisions regarding Stephanie's medical care and contractual arrangements, and that Stephanie had issues with hallucinations while on certain medications. Absolutely none of those things conferred upon defendant a right to have nonconsensual sex with Stephanie. Furthermore, absolutely none of those things in any way disprove a coercive relationship between the two of them. Indeed, a casual reading of the documents strongly suggests a controlling and coercive relationship. The barbaric notion that a person cannot rape

their spouse has long since been abolished, and the existence of a caretaker relationship would seem to give rise to a *greater* obligation to refrain from exercising dominion over a ward, rather than constituting evidence that control is not in fact being exercised.[5] Furthermore, Stephanie's alleged issues with hallucinations while on her medicines were actually explored at trial and presented to the jury.

The documents purporting to give defendant authority over Stephanie had no probative value or relevance regarding whether defendant used force or coercion to accomplish sexual penetration with Stephanie. The trial court's exclusion of those documents was not an abuse of discretion. Even if there might have been some possible probative value to the documents regarding Stephanie's hallucinations, any such evidence would have been cumulative, and their exclusion was harmless beyond a reasonable doubt, particularly in light of Stephanie's own testimony at trial that her medicines caused hallucinations. The trial court again did not err. See *People v Fortson*, 202 Mich App 13, 18; 507 NW2d 763 (1993).

Defendant argues next that the trial court abused its discretion when it did not allow him to call as witnesses the officers who arrested him. Defendant argues that the testimony of the arresting officers was essential to

---

[5] We note that any grant of a power of attorney, patient advocacy, or other agency relationship fundamentally entails the principal's right to control the agent. See *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). The document at issue here purporting to grant defendant not only control over the victim's decisions but, significantly, also an essentially unilateral right to preclude the victim from making her own decisions or to revoke the purported agency is not evidence of an agency relationship of any sort. It is evidence of coercion rather than evidence of an exercise of free will. If anything, its exclusion from evidence could only have worked in defendant's favor.

his defense to the resisting and obstructing charges. However, defendant was arrested almost a week after the fact for his acts of resisting and obstructing officers during the execution of the search warrant at his residence on May 6, 2011. Defendant argued at trial that the *arresting* officers' testimony was relevant to his claim that the police engaged in misconduct when executing the *search* warrant. Clearly, defendant's arrest was based on events that occurred during the search. However, the arresting officers would not have had any personal knowledge of the events that occurred at the search and rescue. Consequently, their testimony would not have shed any light on any issue of consequence. The trial court therefore did not abuse its discretion be determining their testimony irrelevant.

Affirmed.

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

COMMERCE AND INDUSTRY INSURANCE COMPANY v
DEPARTMENT OF TREASURY

Docket No. 311104. Submitted April 3, 2013, at Lansing. Decided June 6, 2013, at 9:00 a.m. Leave to appeal sought.

Commerce and Industry Insurance Company (C&I), a New York corporation, brought an action in the Court of Claims against the Department of Treasury, seeking a tax refund of $2,787,358 for tax year 2003. Noting that Michigan's retaliatory tax, MCL 500.476a, imposes a tax on foreign insurers approximately equal to the burden imposed by the foreign state (in this case, New York) on a Michigan insurer, C&I contended that three separate payments made by insurers to the former New York Workmen's Compensation Board (now the New York Workers' Compensation Board) should have been excluded from calculating the burden imposed by New York, thereby reducing C&I's obligation under the Michigan retaliatory tax. Related cases involving AIU Insurance Company and American Home Assurance Company were consolidated, and those companies sought tax refunds for 2003 using the same theory as C&I. The three separate New York statutory assessments were a workers' compensation board assessment under former NY Workers' Comp 151(2)(b), which covered the administrative expenses of the board; a special disability fund assessment under former NY Workers' Comp 15(8)(h), which financed a special fund for previously injured workers; and a reopened cases fund assessment under former NY Workers' Comp 25-a(3), which financed a special fund for certain stale claims filed after a delay. Plaintiffs claimed that these three New York assessments should not be included as part of Michigan's retaliatory tax because they were not burdens on insurance companies doing business in New York. Plaintiffs moved for summary disposition, which the court, Rosemarie E. Aquilina, J., granted. The court concluded that the three assessments were actually imposed on policyholders, not the insurers themselves, and that the practical effect of the New York schemes was that insurers were ultimately responsible only for the administrative task of remitting to the board the surcharge received from policyholders, so the assessments were not a burden on the insurers. The court further concluded that even if the three assessments were burdens for purposes of the retaliatory tax, they

were excluded from the retaliatory tax calculation by MCL 500.134(5), which provides that charges in a foreign state similar to charges in Michigan for associations or facilities are excluded from the retaliatory tax calculation. Defendant appealed.

The Court of Appeals *held*:

1. A retaliatory tax is a tax imposed by a state on foreign corporations, usually insurers, when the foreign state imposes a higher aggregate tax burden on actual or hypothetical out-of-state corporations. The purpose of a retaliatory tax is to encourage states to impose equal tax burdens on all insurance companies, whether foreign or domestic, thereby promoting interstate business. Under MCL 500.476a, if an insurer's state of incorporation imposes a larger aggregate tax burden on a Michigan insurer doing business in that state than Michigan imposes on a company from that state doing business in Michigan, the foreign insurer must pay to Michigan a tax equal to the difference in the aggregate tax burdens. Thus, to compute the retaliatory tax due from a foreign insurer, Michigan tallies all the taxes, fines, penalties, and other burdens it otherwise imposes on the foreign insurer doing business in Michigan. It then tallies the burden a hypothetical Michigan insurer would pay to that insurer's home state were the hypothetical Michigan insurer doing the same amount of business there. If the other state's total burden on the hypothetical Michigan insurer doing the same amount of business in that state would be larger than the burden Michigan imposed on the foreign insurer, the actual burden Michigan imposes is subtracted from the other state's burden on the hypothetical insurer, and the difference is the retaliatory tax the foreign insurer owes Michigan.

2. MCL 500.134(5) provides that any premium or assessment levied by an association or facility, or any premium or assessment of a similar association or facility formed under a law in force outside this state, is not a burden or special burden for purposes of a calculation under MCL 500.476a, and any premium or assessment paid to an association or facility is not included in determining the aggregate amount a foreign insurer pays under MCL 500.476a. MCL 500.476a(6) defines "association or facility" as an association of insurers created under the Insurance Code, MCL 500.100 *et seq*., and any other association or facility formed under that act as a nonprofit organization of insurer members, including the Michigan Worker's Compensation Placement Facility created under MCL 500.2301 *et seq*. Those entities are essentially associations, organizations, or pools of insurers. Payments to them are not part of the Michigan burden on foreign insurers, and such

payments required by other states cannot be considered part of those states' burden when calculating retaliatory taxes.

3. Each of the New York statutes at issue specifically provided that the three charges were to be assessed on and collected from insurers like plaintiffs, but all insurance carriers had to collect the assessments from their policyholders through a surcharge. In other words, under the plain language of the statutes, there were two separate payments: one from the insurer to the state (the assessment) and another from the policyholder to the insurer (the surcharge). During the tax years at issue in this case, the assessments paid by insurers were separate from the surcharges paid by policyholders. Neither the assessment calculation nor the surcharge calculation guaranteed that assessments would equal surcharges. As a result, neither calculation connected an insurer's liability to the workers' compensation board for assessments with that insurer's collection of the same level of funds in surcharges from its policyholders. Additionally, the insurer's obligation to pay assessments to the board did not depend on the amount of surcharges separately collected by that insurer. Assessments and surcharges are conceptually and legally different, especially when assessments and surcharges are calculated by entirely different procedures. MCL 500.476a(1) provides that the retaliatory tax applies to the extent that a burden is imposed on an insurer by a foreign state. The New York statutes, however, provide that either the workers' compensation board or the board's chair imposed the assessments on insurers, and then insurers placed surcharges on policyholders so that the insurers could recover what they paid in assessments. Moreover, the assessments were imposed on the insurers themselves, not the policyholders. Consequently, the retaliatory tax applied to the entire amount of the assessments placed on insurers under those New York statutes. The trial court erred by concluding that MCL 500.134(5) and (6) operated to exclude the three assessments from the aggregate burdens imposed by New York.

4. With respect to MCL 500.134(5), which provides that any premium or assessment of a similar association or facility of a foreign state is not a burden or special burden for purposes of a calculation under MCL 500.476a, "similar" is commonly understood to mean having qualities in common. Thus, under the plain language of MCL 500.134(6), the New York burdens must have been imposed by (1) associations or facilities that (2) have qualities in common with the Michigan associations or facilities described. Because the New York entities were neither associations of insurers nor groups of insurers, and because the New York and

Michigan entities did not share sufficient common qualities, they were not similar for purposes of MCL 500.134(5). Plaintiffs argued that the assessment by the Michigan Worker's Compensation Placement Facility was similar to the three New York assessments because they have the effect of lowering the costs of otherwise uninsurable persons. The placement facility is a nonprofit organization of insurers that was statutorily created primarily to provide workers' compensation insurance to uninsurable employers and encourage maximum use of the private insurance system. The New York funds do not have those purposes.

5. The retaliatory tax scheme did not violate the equal protection provisions of the state and federal constitutions or the Dormant Commerce Clause.

Reversed and remanded for entry of an order granting summary disposition in defendant's favor.

1. TAXATION — RETALIATORY TAX — INSURANCE — CALCULATION.

A retaliatory tax is a tax imposed by a state on foreign corporations, usually insurers, when the foreign state imposes a higher aggregate tax burden on actual or hypothetical out-of-state corporations; under MCL 500.476a, if an insurer's state of incorporation imposes a larger aggregate tax burden on a Michigan insurer doing business in that state than Michigan imposes on a company from that state doing business in Michigan, the foreign insurer must pay to Michigan a tax equal to the difference in the aggregate tax burdens; to compute the retaliatory tax due from a foreign insurer, Michigan tallies all the taxes, fines, penalties, and other burdens it otherwise imposes on the foreign insurer doing business in Michigan and then tallies the burden a hypothetical Michigan insurer would pay to that insurer's home state were the hypothetical Michigan insurer doing the same amount of business there; if the other state's total burden on the hypothetical Michigan insurer doing the same amount of business in that state would be larger than the burden Michigan imposed on the foreign insurer, the actual burden Michigan imposes is subtracted from the other state's burden on the hypothetical insurer, and the difference is the retaliatory tax the foreign insurer owes Michigan.

2. TAXATION — RETALIATORY TAX — INSURANCE — PREMIUMS AND ASSESSMENTS BY ASSOCIATIONS AND FACILITIES.

MCL 500.134(5) provides that any premium or assessment levied by an association or facility, or any premium or assessment of a similar association or facility formed under a law in force outside this state, is not a burden or special burden for purposes of a

calculation under the retaliatory tax provision, MCL 500.476a, and any premium or assessment paid to an association or facility is not included in determining the aggregate amount a foreign insurer pays under that statute; MCL 500.476a(6) defines "association or facility" as an association of insurers created under the Insurance Code, MCL 500.100 *et seq*., and any other association or facility formed under that act as a nonprofit organization of insurer members; "similar" means having qualities in common; payments to those entities are not part of the Michigan burden on foreign insurers, and such payments required by other states cannot be considered part of those states' burden when calculating retaliatory taxes.

3. TAXATION — RETALIATORY TAX — INSURANCE — ASSESSMENTS AND SURCHARGES.

The retaliatory tax provision, MCL 500.476a(1), provides that the retaliatory tax applies to the extent that a burden is imposed on an insurer by a foreign state; assessments and surcharges under insurance statutes are conceptually and legally different, especially when assessments and surcharges are calculated by entirely different procedures; the retaliatory tax applies to the entire amount of the assessments placed on insurers by a foreign state if the statutory scheme provides for both an assessment paid by the insurer to the state and a surcharge paid by the policyholder to the insurer, the assessments paid by the insurers are separate from the surcharges paid by policyholders, and neither the assessment calculation nor the surcharge calculation guarantees that assessments will equal surcharges, that is, neither calculation connects an insurer's liability for assessments with that insurer's collection of the same level of funds in surcharges from its policyholders and the insurer's obligation to pay assessments does not depend on the amount of surcharges separately collected by that insurer.

Miller Canfield Paddock and Stone, P.L.C. (by *Gregory A. Nowak* and *Jackie J. Cook*), and *Sidley Austin LLP* (by *Tracy D. Williams*, *Peter D. Edgerton*, and *William M. Sneed*) for plaintiffs.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kevin T. Smith*, Assistant Attorney General, for defendant.

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

MURRAY, J. The question presented in this appeal is whether certain assessments placed upon insurance companies doing business in New York constitute a "burden" upon the insurance companies for purposes of Michigan's retaliatory tax. For the reasons that follow, we conclude that they do, and we therefore reverse the trial court's order granting plaintiffs' motion for summary disposition and remand for entry of an order granting defendant summary disposition of plaintiffs' complaint.

I. FACTS AND PROCEEDINGS

Plaintiff Commerce and Industry Insurance Company (C&I), a New York corporation, filed its complaint against defendant, the Michigan Department of Treasury (the department), seeking a tax refund of $2,787,358 for tax year 2003. In its complaint, C&I explained that Michigan's retaliatory tax imposes a tax on a foreign insurer approximately equal to the burden imposed by the foreign state (here, New York) on a Michigan insurer. C&I contended that three separate payments made by insurers to the former New York Workmen's Compensation Board, now the New York Workers' Compensation Board (the board), should be excluded from calculating the burden imposed by New York, thereby reducing its Michigan retaliatory tax obligation. On October 25, 2010, the parties stipulated to consolidating related cases involving plaintiffs AIU Insurance Company (AIU) and American Home Assurance Company (AHA). Using the same theory as C&I, AIU sought a tax refund of

$291,686 for tax year 2003, and AHA sought tax refunds for tax years 1995-1998 and 2003.[1]

These consolidated cases involve three separate statutory assessments imposed by New York: a Workers' Compensation Board assessment, which covers the administrative expenses of the board; a Special Disability Fund assessment, which finances a special fund for previously injured workers; and a Reopened Cases Fund assessment, which finances a special fund for certain stale claims filed after a delay. Plaintiffs claimed that these three New York assessments should not be included as part of Michigan's retaliatory tax because they were not burdens on insurance companies doing business in New York. The department, of course, took the opposite view.

Plaintiffs eventually filed a motion for summary disposition. The trial court entered a written opinion and order granting plaintiffs' motion, setting forth two reasons for its decision. First, the trial court concluded that the three assessments were actually imposed on policyholders, not the insurers themselves. The trial court reasoned that the practical effect of the New York schemes was that insurers were ultimately responsible only for the administrative task of remitting to the board the surcharge received from policyholders, so the assessments were not a "burden" on the insurers.

Second, the trial court alternatively concluded that even if the three assessments were "burdens" for pur-

[1] At oral argument before this Court, counsel for both sides stated that the tax years at issue are 2002-2003, though plaintiffs' brief indicated that the tax years 1995-1998 were also at issue for AHA. We accept counsels' oral representations that only the 2002-2003 tax years are at issue. See *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 374-378; 781 NW2d 310 (2009) (indicating that when a taxpayer seeks a tax refund, the version of the tax law then in effect should be applied unless the subsequent amendment has retrospective application).

poses of the retaliatory tax, they were excluded from the retaliatory tax calculation by a separate statute. That statute, the trial court explained, provides that charges in a foreign state "similar" to charges in Michigan for associations or facilities are excluded from the retaliatory tax calculation. MCL 500.134(5). The trial court reasoned that the three assessments were "similar" to those for the Michigan placement facility because the three assessments generally supported the New York workers' compensation system. Accordingly, the trial court granted plaintiffs' motion for summary disposition, and this appeal followed.

II. ANALYSIS

The standard of review is always a critical aspect of appellate review. Here, this Court "reviews de novo a decision by the Court of Claims on a motion for summary disposition and issues requiring statutory interpretation." *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 337; 793 NW2d 246 (2010).

A. RETALIATORY TAX

MCL 500.476a is the codification of Michigan's retaliatory tax and reads, in relevant part, as follows:

> (1) Beginning August 3, 1987, whenever, by a law in force outside of this state or country, a domestic insurer or agent of a domestic insurer is required to make a deposit of securities for the protection of policyholders or otherwise, or *to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or a special burden or other burden is imposed*, greater in the aggregate than is required by the laws of this state for a similar alien or foreign insurer or agent of an alien or foreign insurer, the alien or foreign insurer of that state or country is required, as a condition precedent to its transacting business in this state, to make a like deposit for like purposes

> with the state treasurer of this state, and to pay to the revenue commissioner for taxes, fines, penalties, certificates of authority, valuation of policies, and otherwise an amount equal in the aggregate to the charges and payments imposed by the laws of the other state or country upon a similar domestic insurer and the agents of a domestic insurer, regardless of whether a domestic insurer or agent of a domestic insurer is actually transacting business in that state or country. . . .
>
> (2) The purpose of this section is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes. [Emphasis added.]

A retaliatory tax is a tax imposed by a state on foreign corporations, usually insurers, when the foreign state imposes a higher aggregate tax burden on actual or hypothetical out-of-state corporations. *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 551; 629 NW2d 402 (2001) (*TIG Ins II*). Our Supreme Court has explained:

> Under the retaliatory tax, when an insurer's state of incorporation imposes a larger aggregate tax burden on a Michigan insurer doing business in that state than Michigan imposes on a company from that state doing business in Michigan, the foreign insurer must pay Michigan a tax equal to the difference in the aggregate tax burdens. See MCL 500.476a. Thus, to compute the retaliatory tax due from a foreign insurer, if any, Michigan tallies all the taxes, fines, penalties, and other burdens it otherwise imposes on the foreign insurer doing business in Michigan. Michigan then tallies the burden a hypothetical Michigan insurer would pay to that insurer's home state were the hypothetical Michigan insurer doing the same amount of business there. If the other state's total burden on the hypothetical Michigan insurer doing the same amount of business in that state would be larger than the burden Michigan imposed on the foreign insurer, the actual burden Michigan imposes is subtracted from the other state's burden on the

> hypothetical insurer, and the difference is the retaliatory tax the foreign insurer owes Michigan. [*Id*. at 551-552.]

The purpose of a retaliatory tax is to encourage states to impose equal tax burdens on all insurance companies, whether foreign or domestic, thereby promoting interstate business. See MCL 500.476a(2) and *Western & Southern Life Ins Co v State Bd of Equalization of California*, 451 US 648, 670-671; 101 S Ct 2070; 68 L Ed 2d 514 (1981).

In 1988, the Legislature realized that the actual revenue generated from the retaliatory tax as originally enacted by 1987 PA 261 and 262 was less than anticipated because foreign insurers were including assessments paid to private associations and facilities, such as the Worker's Compensation Placement Facility, in calculating their respective Michigan burdens. *TIG Ins II*, 464 Mich at 552-553. As a result, the Michigan burden was higher, and the retaliatory tax paid by the foreign insurers was lower. *Id*. at 553.

The Legislature responded by enacting 1988 PA 349, which "changed the method of calculating the [retaliatory] tax by providing that payments to private insurance associations and facilities are not counted as part of the Michigan burden when calculating retaliatory taxes." *TIG Ins II*, 464 Mich at 553. Accordingly, MCL 500.134 reads, in relevant part:

> (5) Any premium or assessment levied by an association or facility, or any premium or assessment of a similar association or facility formed under a law in force outside this state, is not a burden or special burden for purposes of a calculation under [MCL 500.476a], and any premium or assessment paid to an association or facility shall not be included in determining the aggregate amount a foreign insurer pays to the commissioner under [MCL 500.476a].

> (6) As used in this section, "association or facility" means an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members, including, but not limited to, the following:
>
> (a) The Michigan worker's compensation placement facility created under [MCL 500.2301 *et seq*.].
>
> (b) The Michigan basic property insurance association created under [MCL 500.2901 *et seq*.].
>
> (c) The catastrophic claims association created under [MCL 500.3101 *et seq*.].
>
> (d) The Michigan automobile insurance placement facility created under [MCL 500.3301 *et seq*.].
>
> (e) The Michigan life and health insurance guaranty association created under [MCL 500.7701 *et seq*.].
>
> (f) The property and casualty guaranty association created under [MCL 500.7901 *et seq*.].
>
> (g) The assigned claims facility created under [MCL 500.3171].

The entities referred to in MCL 500.134(6)(a) through (g) are essentially associations, organizations, or pools of insurers. See, e.g., MCL 500.2301 and MCL 500.3301. "[P]ayments to these and other similar facilities are not part of the Michigan burden on foreign insurers, and such payments required by other states cannot be considered part of those states' burden when calculating retaliatory taxes." *TIG Ins II*, 464 Mich at 554.

Michigan's retaliatory tax is constitutional. In *TIG Ins II*, our Supreme Court reversed this Court's decision in *TIG Ins Co, Inc v Dep't of Treasury*, 237 Mich App 219; 602 NW2d 839 (1999) (*TIG Ins I*), rev'd 464 Mich 548 (2001), and observed that "the general constitutionality of Michigan's retaliatory tax is clear." *TIG Ins II*, 464 Mich at 557. In doing so, the Court concluded

that MCL 500.134(5) and (6) are rationally related to a legitimate state purpose, i.e., to "pressure [sister] states to relieve the tax burden on Michigan insurers doing business in those states." *Id*. at 559. Excluding payments to certain associations and facilities was "rationally related to a legitimate purpose," *id*. at 561, because by establishing facilities such as the Worker's Compensation Placement Facility, the Legislature could have reasonably believed that it was benefiting insurers by protecting them from insuring "high risk or otherwise uninsurable insureds," *id*. at 560. Further, by enacting MCL 500.134(5) and (6), the Legislature could have reasonably believed that it would encourage sister states to establish comparable facilities, thus protecting insurers in those states as well. *Id*. at 560-561.

B. NEW YORK LAW

As we have noted, the three separate "assessments" and "surcharges" at issue are meant to cover the costs of the board, NY Workers' Comp 151(2); the Special Disability Fund, NY Workers' Comp 15(8)(h); and the Reopened Cases Fund, NY Workers' Comp 25-a(3).

1. WORKERS' COMPENSATION BOARD CHARGE

In 2002-2003, NY Workers' Comp 151 provided for the imposition of an administrative charge to cover the administrative expenses of the board. See NY Workers' Comp 151(1). Subdivision (2)(a) set forth how to calculate the administrative expenses of the board, NY Workers' Comp 151(2)(a), while subdivision (2)(b) described the imposition of the board charge:

> An itemized statement of the expenses so ascertained shall be open to public inspection in the office of the board for thirty days after notice to the state insurance fund, all insurance carriers and all self-insurers affected thereby,

> before *the board shall make an assessment* for such expenses. *The chair shall assess upon and collect a proportion of such expenses as hereinafter provided from each insurance carrier*, the state insurance fund and each self-insurer. [NY Workers' Comp 151(2)(b), as amended by 2000 NY Laws 510 (emphasis added).]

2. SPECIAL DISABILITY FUND CHARGE

NY Workers' Comp 15(8) provides for a compensation procedure for workers who suffer a second injury after previously suffering injury in the course of prior employment. See NY Workers' Comp 15(8)(a). The Special Disability Fund is an independent fund designed to eliminate the additional costs associated with hiring a person who has previously suffered injury. See *id*. In 2002-2003, NY Workers' Comp 15(8)(h) set forth the assessment calculation for the Special Disability Fund and described its imposition as follows:

> As soon as practicable after [May 1, 1958], and annually thereafter as soon as practicable after January first in each succeeding year, *the chair of the board shall assess upon and collect from all self-insurers, the state insurance fund, and all insurance carriers*, a sum equal to one hundred fifty per centum of the total disbursements made from the special disability fund during the preceding calendar year . . . . [NY Workers' Comp 15(8)(h), as amended by 2000 NY Laws 510 (emphasis added).]

3. REOPENED CASES FUND CHARGE

NY Workers' Comp 25-a provides for a special fund for certain workers who file claims more than seven years after the date of injury. See NY Workers' Comp 25-a(1). In 2002-2003, NY Workers' Comp 25-a(3) set forth the assessment calculation for the Reopened Cases Fund and described its imposition as follows:

> Annually, as soon as practicable after January first in each year, the chairman shall ascertain the condition of the fund and whenever the assets shall fall below the prescribed minimum as herein provided *the chairman shall assess and collect from all insurance carriers*, in the respective proportions established in the prior fiscal year under the provisions of [NY Workers' Comp 151] for each carrier, an amount sufficient to restore the fund to the prescribed minimum. . . .
>
> Such assessment and the payments made into said fund shall not constitute an element of loss for the purpose of establishing rates for workers' compensation insurance as provided in the insurance law but shall for the purpose of recoupment be treated as separate costs by carriers. *Carriers shall assess such costs on their policyholders* in accordance with rules set forth by the New York compensation insurance rating board, as approved by the superintendent of insurance. [NY Workers' Comp 25-a(3), as amended by 1993 NY Laws 729 (emphasis added).]

4. NY WORKERS' COMP 151(2)(c)

Finally, NY Workers' Comp 151(2)(c) provided in 2002-2003 that insurers must collect these assessments from their policyholders through a surcharge:

> Assessments for the special disability fund, the fund for reopened cases and for the operations of the board shall not constitute elements of loss but shall for collection purposes be treated as separate costs by carriers. *All insurance carriers, including the state insurance fund, shall collect such assessments from their policyholders through a surcharge based on premium* in accordance with rules set forth by the New York compensation insurance rating board, as approved by the superintendent of insurance. Such surcharge shall be considered as part of premium for purposes prescribed by law including, but not limited to, computing premium tax . . . . [NY Workers' Comp 151(2)(c), as amended by 2000 NY Laws 510 (emphasis added).]

Thus, each statute specifically provides that the three charges are to be assessed on and collected from insurers like plaintiffs, but that "[a]ll insurance carriers . . . shall collect such assessments from their policyholders through a surcharge . . . ." NY Work Comp § 151(2)(c). In other words, under the plain language of the statutes, there are two separate payments: one from the insurer to the state (the assessment) and another from the policyholder to the insurer (the surcharge). We turn now to see if the New York courts interpret these statutes differently than what the plain language seems to state.

At least one decision by the New York Supreme Court, Appellate Division, suggests that during the relevant time period the "assessments" imposed on insurers for each of these three charges were distinct from the "surcharges" imposed on policyholders. In *In re Selective Ins Co of America v New York Workers' Compensation Bd*, 102 AD3d 72, 73-74; 953 NYS2d 368 (2012), the court introduced the case as follows:

> Petitioners are insurance carriers authorized to provide workers' compensation insurance in New York. Pursuant to the self-supporting mechanism for the workers' compensation system, the Workers' Compensation Board *collects assessments from carriers* in order to fund the Board's administrative and operational expenses (*see* Workers' Compensation Law § 151), the Special Disability Fund (*see* Workers' Compensation Law § 15 [8] [h]) and the Special Fund for Reopened Cases (*see* Workers' Compensation Law § 25-a). *The carriers recover, or offset, these assessments from their insured policyholders through a surcharge*, which is included in the insured's premiums (*see* Workers' Compensation Law §§ 15 [8] [h]; 25-a [3]; 151 [2] [a]). *The assessments charged to the carriers are calculated* by the Board based upon the statutory methodology contained in the Workers' Compensation Law and *without regard to the amount of surcharges collected by the carriers from their*

> *policyholders*; the surcharges are computed by the carriers in accordance with rules of the New York Compensation Insurance Rating Board (hereinafter NYCIRB) (*see* Workers' Compensation Law §§ 15 [8] [h]; 25-a [3]; 151 [2] [c]; Insurance Law § 2313 [NYCIRB is a private coalition of carriers licensed to act as a "rate service organization"]). [Emphasis added.]

The court explained that from 2001 to 2009 (which includes the years at issue in our case) "each carrier's assessment was allocated by the Board based upon the carrier's proportionate share of the 'total written premiums' " written in the previous year. *Selective Ins Co*, 102 AD3d at 74. In contrast, "the carriers offset those assessments by collecting surcharges from their policyholders, which were computed based upon 'standard premiums' pursuant to NYCIRB's manual that outlined the methodology for calculating surcharges." *Id*. The court explained that the different methods for calculating assessments and surcharges resulted in some carriers paying more in assessments than they collected in surcharges, whereas other carriers collected more in surcharges than they paid in assessments. *Id*.

In 2009, the New York Legislature amended the workers' compensation law to recalculate the statutory allocation of the three charges. *Selective Ins Co*, 102 AD3d at 74-75. Specifically, the 2009 amendment provided that "assessments, like surcharges, would be allocated based upon a carrier's proportionate share of total 'standard premiums.' " *Id*.

Between 2001 and 2010, the petitioners in *Selective Insurance Co* paid assessments exceeding the surcharges collected in accordance with the proper statutory methods. *Selective Ins Co*, 102 AD3d at 75. After the 2009 amendment was enacted to equalize assessments and surcharges, the petitioners brought suit to recover the "excess" assessments paid to the board

between 2001 and 2009. *Id*. at 75-76. The court ultimately held that the workers' compensation law did not "authorize[] the Board to pay back those carriers for the amount by which their assessments exceeded surcharges collected." *Id*. at 79.

Selective Ins Co confirms that, at least during the tax years at issue in our case, the assessments paid by insurers were separate from the surcharges paid by policyholders. For example, in describing the petitioners' assessment/surcharge disparity between 2001 and 2009, the court noted that neither the assessment calculation nor the surcharge calculation guaranteed that assessments would equal surcharges. *Selective Ins Co*, 102 AD3d at 77-78. As a result, neither calculation "connect[ed] *a carrier's liability to the Board for assessments* with that carrier's collection of the same level of funds in surcharges from their policyholders." *Id*. (emphasis added). Additionally, in describing the three charges, the court stated that "*the carrier's obligation to pay assessments to the Board* is not dependent upon the amount of surcharges *separately collected* by that carrier." *Id*. at 79 (emphasis added). *Selective Ins Co* thus establishes that assessments and surcharges are conceptually and legally different, which was especially true before the 2009 amendment, when assessments and surcharges were calculated by entirely different procedures. See, also, *Held v New York Workers' Compensation Bd*, 85 AD3d 35; 921 NYS2d 674 (2011) (suggesting that the assessments for the Workers' Compensation Board charge and the Special Disability Fund charge are imposed directly upon the respective insurers).

Returning to the case at hand, MCL 500.476a(1) provides that the retaliatory tax applies to the extent that a "burden is imposed" on an insurer by a foreign

state. The plain language of the relevant versions of NY Workers' Comp 151(2)(b), NY Workers' Comp 15(8)(h), and NY Workers' Comp 25-a(3) provided that either the chair or the board imposes the assessments on insurers, and then surcharges are placed on policyholders by the insurers so that the insurers can recover what they have paid in assessments. Moreover, New York courts have indicated that the assessments are imposed on the insurers themselves, not the policyholders. *Selective Ins Co*, 102 AD3d at 77-78. Consequently, we hold that the retaliatory tax applies to the entire amount of the assessments placed on insurers under these three statutes.

Plaintiffs argue, citing *First American Title Ins Co v Combs*, 258 SW3d 627 (Tex, 2008), that they are merely a conduit for transmitting the burden actually placed on policyholders. *First American Title Ins Co* provides a good example of a true "conduit" situation, and in doing so highlights why that is not the status of insurers under the New York statutes. In that case, under then-existing Texas law, when an insurer issued a policy through an independent agent, the agent retained 85 percent of the premiums and remitted the remaining 15 percent to the insurer. *Id*. at 629-630. One hundred percent of the premiums were subject to the Texas premium tax, so the agent was liable for 85 percent of the premium tax, and the insurer was liable for 15 percent of the premium tax. *Id*. at 630, 632-633. However, under Texas law the agent did not pay the 85 percent tax obligation directly to the state; rather, the agent paid the tax obligation to the insurer, and the insurer remitted the entire tax obligation to the state. *Id*. at 632-633. The insurers argued that "the full amount of their payment should be included in the retaliatory tax calculation," while the state argued that "because [the insurers] remit[] 85% of the premium tax

to the State as an administrative mechanism and in economic reality bear[] only 15% of the tax burden, the insurer[s] can only include 15% of the tax in [their] calculation of taxes 'directly imposed.' " *Id*. at 633.

The Texas Supreme Court agreed with the state, noting that the relevant law "describes the insurer's role as a pass-through entity relied on by the State to 'facilitate[] the collection of the premium tax' from the insurance agent.' " *First American Title Ins Co*, 258 SW3d at 634, quoting former Tex Ins Code Ann art 9.59, § 8(b).[2] The court explained that "[a]t most, the only compulsion or obligation required of the insurer with regard to 85% of the premium tax is to write a check drawn on money remitted by the agent—at the end of the day, the insurer's bank account is not negatively impacted." *First American Title*, 258 SW3d at 634. The court further explained that the "administrative burden of acting as a conduit for the agents' tax payments does not rise to the level of a 'direct imposition' and therefore cannot be counted as a burden meriting inclusion in the retaliatory tax calculation." *Id*.

Thus, the statutory procedures at issue in *First American Title Ins Co* directly placed a tax burden on title insurance agents (85 percent of the total premium tax). The same statutes required the agents to send those tax monies to the insurer, which would then transmit the agent's tax payments to the state. Here, in contrast, there are two separate charges: the assessment and the surcharge. The assessment is the relevant charge be-

[2] Tex Ins Code Ann art 9.59, § 8(b), as amended by 2001 Tex Sess Laws ch 763, provided, in part:

> The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the *insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.* [Emphasis added.]

tween the insurer and the state, and the surcharge is the relevant charge between the insurer and the third party. And, as explained by the court in *Selective Ins Co*, during the tax years at issue the assessment and the surcharge were separate amounts determined by separate calculations, which at times resulted in the assessments paid being higher or lower than the surcharges collected. Contrary to the situation in *First American Title Ins Co*, in which the court stated that Texas insurers' accounts would not be negatively affected since the insurers were only acting as a pass-through agent, under the applicable New York law an insurer could—and many did—pay more in assessments to the state than surcharges collected. That process and result is not the same as existed in Texas.

Our decision in *Saginaw Co v John Sexton Corp of Mich*, 232 Mich App 202; 591 NW2d 52 (1998), also offers an example of a true conduit—or pass-through—situation. In that case the local ordinance required landfill operators to collect money from users of the facility. *Id*. at 208. Not surprisingly, we concluded that such a provision merely imposed "a ministerial duty on landfill owners and operators to collect fees payable by those who deposit waste in the landfills." *Id*. Unlike that ordinance, which placed one direct payment obligation on the landfill customer, the New York assessments were directly placed on the insurers, which then separately charged policyholders. The ordinance in *Saginaw Co* was a true pass-through situation; the New York provisions were not.

Accepting plaintiffs' argument—that under the statutory scheme the ultimate burden of the charges is imposed on policyholders—would require disregarding the plain reading of the statutes and ignoring the *Selective Ins Co* decision, which explained that before 2009 assessments and surcharges were separate pay-

ments subject to separate calculations. Additionally, all businesses ultimately pass on tax costs to consumers, so ultimately the consumer is always burdened by the taxes paid to the state. But unquestionably taxes paid by an insurer are part of the retaliatory tax calculation, even though the cost will ultimately be passed on to consumers. That the New York statute makes explicit that this cost (or at least part if it prior to 2009) is ultimately to be passed on to the consumer does not require a different conclusion.[3]

For the reasons expressed, we hold that the trial court erred by concluding that MCL 500.134(5) and (6) operate to exclude the three assessments from the aggregate burdens imposed by New York.

C. SIMILAR BURDENS

In light of the foregoing conclusion we must now address plaintiffs' alternative argument, accepted by the trial court, that these New York burdens are similar to those charged in Michigan and therefore are not to be included in the retaliatory tax calculations pursuant to MCL 500.134(5).

MCL 500.134(5) provides in part that "any premium or assessment of a *similar association or facility*" of a

[3] Plaintiffs argue that imposing the retaliatory tax on the basis of the New York charges would not be consistent with the purpose of the retaliatory tax, which is to deter other states from enacting discriminatory or excessive taxes. Specifically, plaintiffs contend that in operation, Michigan insurers in New York are simply obligated to remit to the state the surcharges received from policyholders, thus incurring a relatively small administrative burden, whereas imposing the retaliatory tax against the *entire amount* of the assessments would effectively result in a much larger burden for the New York insurer in Michigan than is actually imposed in New York. However, the New York insurers can pass these same charges on to the consumer, as would the hypothetical Michigan insurer under these statutes.

foreign state "is not a burden or special burden for purposes of a calculation under [MCL 500.476a] . . . ." Of the three words we have emphasized in the foregoing statutory language, only "similar" is not defined by the Legislature. MCL 500.134(6) defines "association or facility" as "an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members . . . ."[4] "Similar" is commonly understood to mean "having qualities in common[.]" *Random House Webster's College Dictionary* (2001). Thus, under the plain language of MCL 500.134(6), the New York burdens must be imposed by (1) associations or facilities that (2) have qualities in common with the Michigan associations or facilities. Because the New York entities are neither associations of insurers nor groups of insurers, and because the New York and Michigan entities do not share sufficient common qualities, we hold that they are not similar for purposes of MCL 500.134(5).

As noted earlier, by statute the three New York assessments are to be levied by either the board or the chair. During the relevant time NY Workers' Comp 2(2), as amended by 1990 NY Laws 924, provided, in relevant part, that " '[c]hairman' means the chairman of the workmen's compensation board of the state of New York," and " '[b]oard' means the workmen's compensation board of the state of New York[.]" The members of the board are individual persons appointed by the governor of New York. See NY Workers' Comp 140. The chair is a member of the board specifically designated by the governor of New York. See *id*. Neither the chair nor the board is an association or organization of

[4] MCL 500.134(6)(a) through (g) contains a nonexhaustive list of associations or facilities and includes the Michigan Worker's Compensation Placement Facility. MCL 500.134(6)(a).

insurers, so the three charges levied by the chair or the board are not "any premium or assessment of a similar *association or facility*" excluded under MCL 500.134(5) and (6).[5] (Emphasis added.)

Additionally, we reject plaintiffs' argument that the assessment by the Michigan Worker's Compensation Placement Facility is similar to the three New York assessments because they have the effect of lowering the costs of otherwise uninsurable persons. See MCL 500.2301.[6] Plaintiffs read the similarity requirement too broadly, as an examination of the purposes of the New York entities reveal that they do not have common qualities with Michigan's placement facility.

The Michigan Worker's Compensation Placement Facility is a nonprofit organization of insurers that was statutorily created to primarily "provide worker's compensation insurance to uninsurable employers and to encourage maximum use of the private insurance system." *Mich Ass'n of Ins Agents v Mich Worker's Com-*

---

[5] Although the department never argued that MCL 500.134(5) and (6) do not apply because neither the chair nor the board is an "association of insurers" or a "nonprofit organization of insurer members," the issue of similarity under MCL 500.134(5) clearly was, and we may decide unraised issues of statutory construction because they involve purely legal issues. See *Prudential Ins Co of America v Cusick*, 369 Mich 269, 290; 120 NW2d 1 (1963).

[6] MCL 500.2301 reads:

> Each insurer authorized to write worker's compensation insurance in this state shall participate in the Michigan worker's compensation placement facility for the purpose of doing all of the following:
>
> (a) Providing worker's compensation insurance to any person who is unable to procure the insurance through ordinary methods.
>
> (b) Preserving to the public the benefits of price competition by encouraging maximum use of the normal private insurance system.

pensation Placement Facility, 220 Mich App 128, 132; 559 NW2d 52 (1996). The Reopened Cases Fund, however, has no such purpose, as it was created to shift liability for payment of benefits for certain stale cases that were closed and later reopened. See *In re Claim of Early v New York Tel Co*, 57 AD3d 1341, 1343; 870 NYS2d 573 (2008). The Michigan Worker's Compensation Placement Facility does not make benefit payments to claimants or reimbursements to employers, and it does not otherwise specifically deal with formerly closed cases.

Likewise, the Special Disability Fund provides monetary reimbursement to insurers or employers for supplemental benefits paid to certain previously injured workers to help reduce the costs to the current employer. See, generally, *In re Claim of Roland v Sunmark Indus*, 127 AD2d 894, 895; 511 NYS2d 972 (1987). It is not a vehicle which assists employers in obtaining insurance or which promotes the use of the private insurance industry. And, as a result of that conclusion, the fact that one of the many responsibilities of the board is to oversee these funds does not further plaintiffs' argument. The board is also responsible for deciding worker's compensation claims, *LMK Psychological Serv, PC v American Transit Ins Co*, 64 AD3d 752, 754; 882 NYS2d 719 (2009), which of course is an area over which Michigan's worker's compensation placement facility has no jurisdiction. Moreover, plaintiffs have not pointed to any law or regulation that affords the board authority over providing insurance to uninsurable employers or persons.

Finally, plaintiffs' reliance on *TIG Ins I* is in error. First, it was reversed by our Supreme Court. See *TIG Ins II*, 464 Mich at 551, 563. We generally shy away from relying on cases that have been reversed. Second,

and just as importantly, we do not read *TIG Ins I* as providing a broad definition of "similar" under MCL 500.134(5). Indeed, the Court pointed out that the statute does *not* clarify what is a " '*similar* association or facility formed under a law in force outside this state,' " *TIG Ins I*, 237 Mich App at 231, and provides no attempt to define the meaning of the statutory term. Third, what the Court did say was that "[o]n its face" the statute "provides that assessments made to nonprofit organizations of insurer members are not burdens, regardless of where those organizations are located." *Id*. And, as we have concluded, one reason why the New York burdens are not precluded from the retaliatory tax calculation is because the funds and the board are not "nonprofit organizations of insurer members" located in New York. Hence, even were *TIG Ins I* a case upon which we could validly rely, it would support our conclusion.

D. CONSTITUTIONAL ISSUES

Plaintiffs' final argument is that basing the retaliatory tax on the three charges violates the equal protection provisions of the state and federal constitutions. "[R]ational basis review applies in challenges of retaliatory taxes." *TIG Ins II*, 464 Mich at 557; see also *Western & Southern Life*, 451 US at 657. In *TIG Ins II*, our Supreme Court held that the retaliatory tax scheme did not violate the equal protection provisions of the state and federal constitutions. *TIG Ins II*, 464 Mich at 563. Similarly to the situation in *TIG Ins II*, the Legislature could have had the purpose of encouraging foreign states to impose the three charges through separate nongovernmental facilities. A statute subject to rational basis review does not violate equal protection "merely because it may be overinclusive." *People v*

Derror, 475 Mich 316, 340; 715 NW2d 822 (2006), overruled in part on other grounds by *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).

The retaliatory tax also does not violate the Dormant Commerce Clause, a condition previously set by the United States Supreme Court. *Western & Southern Life*, 451 US at 652-655. The Court explained that the McCarran-Ferguson Act, 15 USC 1011 *et seq*., "removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance . . . ." *Id*. at 653.

For the reasons expressed in this opinion, we reverse the trial court's order granting plaintiffs' motion for summary disposition and remand for entry of an order granting the department summary disposition. We do not retain jurisdiction.

No costs, an issue of public importance being involved. MCR 7.219(A).

M. J. KELLY, P.J., and CAVANAGH, J., concurred with MURRAY, J.

PEOPLE v MITCHELL

Docket No. 311360. Submitted May 14, 2013, at Lansing. Decided June 6, 2013, at 9:05 a.m.

Bradford S. Mitchell was convicted by a jury in the Saginaw Circuit Court, Robert L. Kaczmarek, J., of second-degree murder and carrying a dangerous weapon with unlawful intent. Defendant appealed, alleging that the trial court erred by denying defendant's request for a jury instruction on voluntary manslaughter and that the evidence was insufficient to support his conviction under MCL 750.226 of carrying a weapon with unlawful intent.

The Court of Appeals *held*:

1. The trial court erred by denying defendant's request for a voluntary manslaughter jury instruction. A trial court, when a defendant is charged with murder, must give a voluntary manslaughter instruction if the instruction is supported by a rational view of the evidence. There was sufficient evidence to warrant an instruction on voluntary manslaughter because, if believed, the evidence would support a finding of provocation. The trial court abused its discretion by failing to give a voluntary manslaughter instruction. Defendant showed that it is more probable than not that a different outcome would have resulted without the error. Defendant's conviction for second-degree murder is reversed and the matter is remanded for a new trial.

2. There was insufficient evidence to support defendant's conviction of carrying a weapon with unlawful intent. The language of MCL 750.226 sanctions conduct when a person "goes armed" with a qualifying weapon with unlawful intent. The plain language of the statute requires more than movement within the place where the weapon is initially obtained, rather, "goes" denotes departing or leaving a place. The "goes armed" language requires that in order to be guilty of violating the statute, the evidence must establish that the accused departed from a location while equipped with a qualifying weapon in his or her possession and, at the time of departing, had the intent to use the weapon unlawfully against another person. There was insufficient evidence to prove that defendant violated MCL 750.226. Merely grabbing a qualifying weapon that happens to be present at the

crime scene and immediately using the weapon unlawfully does not establish that a person "goes armed."

Reversed and remanded.

CRIMINAL LAW — CARRYING A WEAPON WITH UNLAWFUL INTENT — WORDS AND PHRASES — GOES ARMED.

The phrase "goes armed" in the statute providing that any person who, with intent to use the same unlawfully against the person of another, goes armed with a qualifying weapon is guilty of a felony requires that in order to be found guilty of violating the statute the evidence must establish that the accused departed from a location while equipped with a qualifying weapon in his or her possession and, at the time of departing, had the intent to use the weapon unlawfully against another person; merely grabbing a qualifying weapon that happens to be present at the crime scene and immediately using that weapon unlawfully does not establish that a person "goes armed" (MCL 750.226).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

Strauss & Strauss, PLLC (by *Gary D. Strauss*), for defendant.

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

HOEKSTRA, P.J. Defendant appeals as of right his convictions following a jury trial of second-degree murder, MCL 750.317, and carrying a weapon with unlawful intent, MCL 750.226. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 30 to 50 years' imprisonment for his second-degree murder conviction and to 3 to 7½ years' imprisonment for his weapon conviction. Because we conclude that the trial court erred by denying defendant's request for an instruction on voluntary manslaughter and because there was insufficient evidence to support defendant's

weapon conviction, we reverse defendant's convictions and remand for a new trial on the charge of second-degree murder.

Defendant's convictions are the outgrowth of his ongoing argument with the victim regarding five dollars that the victim owed defendant. The victim was defendant's neighbor in an apartment complex. Testimony during trial established that in the days leading up to the victim's death, defendant was harassing the victim by banging on the walls of his apartment and kicking or banging on his doors. Defendant also made threatening statements to the victim. Mark Yelle, a friend of the victim, testified that he spoke with the victim while defendant was harassing him about the money and the victim stated that he planned to "defend himself" if defendant bothered him again and indicated he would "beat" defendant. The victim's ex-wife, April Kolhoff, also testified about defendant's threats regarding the victim's debt and defendant's conduct of yelling and pounding on the doors. Both Yelle and Kolhoff testified that they were with the victim at the victim's apartment on January 14, 2011, but that their attempts to contact the victim on January 15, 2011, were unsuccessful.

On January 16, 2011, the victim's body was found face down on the kitchen floor of his apartment. An autopsy showed that the victim sustained injuries to his head, neck, and back, including a skull fracture and three or four stab wounds on the back of his neck. The medical examiner testified that some of the victim's injuries were consistent with being struck by an object such as a baseball bat. The police interviewed several people who knew the victim, including defendant. Defendant admitted having been involved in a physical altercation with the victim and testimony by the police

established that defendant had a swollen hand, a scratch on his face, and his right eye was bruised. However, defendant claimed that he struck the victim only in self-defense after the victim attacked him with a baseball bat.

Defendant was eventually arrested in connection with the victim's death. He was tried before a jury on charges of open murder and carrying a weapon with unlawful intent. The jury returned a verdict finding defendant guilty of second-degree murder and carrying a weapon with unlawful intent. This appeal ensued.

At trial, defendant maintained that the assault "was in the heat of the moment" and that the victim was the initial aggressor and, therefore, defendant requested a voluntary manslaughter instruction. The trial court denied defendant's request, finding insufficient evidence of adequate provocation to support the instruction. On appeal, defendant argues that the trial court erred by denying his request for a voluntary manslaughter instruction.[1] We agree.

---

[1] Defendant raises two additional arguments on appeal pertaining to his conviction of second-degree murder. We conclude that both issues are without merit. First, defendant asserts that the trial court erred by denying his request for an instruction on the doctrine of imperfect self-defense. However, during oral argument, defendant conceded, and we agree, that this argument has no merit because our Supreme Court recently held that the doctrine of imperfect self-defense does not exist in Michigan. *People v Reese*, 491 Mich 127, 130, 151; 815 NW2d 85 (2012). Second, defendant argues that the trial court erred by denying his request for a directed verdict on the open murder charge because there was insufficient evidence to establish either first- or second-degree murder. Having reviewed the evidence presented by the prosecution, we conclude that this argument lacks merit because viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

"We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). However, not all instructional error warrants reversal. Reversal is warranted only if " 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26. "[T]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity*, 460 Mich at 495. The verdict is undermined when the evidence clearly supports the requested lesser included instruction that was not given to the jury. *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002).

When a defendant is charged with murder, the trial court must give an instruction on voluntary manslaughter if the instruction is "supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). To prove that a defendant committed voluntary manslaughter, " 'one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.' " *People v Reese*, 491 Mich 127, 143; 815 NW2d 85 (2012), quoting *Mendoza*, 468 Mich at 535. However, provocation is not an element of voluntary manslaughter; rather, it is a circumstance that negates the presence of malice. *Mendoza*, 468 Mich at 536. In *People v Tierney*, 266 Mich App 687; 703 NW2d 204 (2005), this Court held that "[t]he degree of provocation required to mitigate a killing

from murder to manslaughter 'is that which causes the defendant to act out of passion rather than reason.' " *Id*. at 714-715, quoting *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Further, "[i]n order for the provocation to be adequate it must be that which would cause a reasonable person to lose control." *Tierney*, 266 Mich App at 715 (citation and quotation marks omitted). Whether the provocation was reasonable is a question of fact; but if "no reasonable jury could find that the provocation was adequate, the court may exclude evidence of the provocation." *Id*. (citation and quotation marks omitted).

We find the following facts in this case relevant to whether the trial court erred by concluding that a voluntary manslaughter instruction was not supported by the evidence. First, the testimony demonstrated that the victim owed defendant a small sum of money and that, before this incident, defendant had been threatening and harassing the victim by banging or kicking on the walls and doors of his apartment in an effort to collect the money from the victim. Further, Yelle testified that before his death, the victim indicated that he was going to "beat [defendant's] ass" if defendant continued to bother him about the money. Although defendant did not testify at trial, the jury heard evidence that defendant maintained that the victim was the initial aggressor through his interview with the police, the recording of which was played for the jury, and his signed statement. During the interview and in the signed written statement, defendant stated that he went to the victim's apartment and the victim opened the door. The victim started using profanity and then swung a baseball bat and struck defendant. Defendant maintained that he was able to take the baseball bat from the victim, but claimed that the victim still hit him in the right eye three or four times. Defendant claimed

that he used the baseball bat that he took from the victim to hit the victim on the head and shoulders and that the victim fell to the floor moaning and moving around. Defendant claimed that he left the apartment at that time.

Defendant's version of the altercation was corroborated in part by the testimony of the police that when they took defendant's statement on the same day that the victim's body was found, defendant had a swollen hand, a scratch on his face, and a bruise on his right eye. Moreover, a baseball bat, which the prosecution maintained was the murder weapon and which tested positive for the presence of the victim's blood, was discovered in the victim's apartment. Further, Yelle testified that the victim kept a baseball bat in his apartment, which supports defendant's claims that the baseball bat belonged to the victim and was at the victim's apartment before the altercation and that defendant did not bring the murder weapon with him to the scene.

We conclude that these proofs constitute sufficient evidence to warrant an instruction on voluntary manslaughter because, if believed, the evidence would support a finding of provocation.[2] Accordingly, the trial court abused its discretion by failing to give a voluntary manslaughter instruction.

We next consider whether the trial court's failure to give the requested instruction was error requiring reversal. Error that requires reversal occurs when the

---

[2] *People v Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991), in which the Court held that mere words will not generally constitute adequate provocation, supports this conclusion. In explaining why the evidence submitted during the trial in that case was insufficient to demonstrate adequate provocation, the Court noted that "there were no punches thrown" and there was "no physical contact of any kind . . . ." *Id*. Thus, the implication is that a physical altercation could constitute adequate provocation.

error is outcome determinative, meaning the error undermined the reliability of the jury verdict. *Cornell*, 466 Mich at 365.

In this case, we need look no further than the question posed to the trial court during jury deliberations. The note sent by the jury stated: "Do we only have three options available for the murder charge: (1) Guilty first-degree; (2) Guilty second-degree; (3) Not guilty?" The trial court responded in the affirmative. The jury's inquiry strongly suggests that it wanted to consider, and likely would have convicted defendant of, a lesser charge than first- or second-degree murder if given the opportunity. In light of the jury's inquiry and the fact that the evidence supported the instruction, we conclude that defendant has shown that it is "more probable than not that a different outcome would have resulted without the error." *Lukity*, 460 Mich at 495. Accordingly, defendant is entitled to reversal of his conviction for second-degree murder and a new trial.[3] *Id*. at 497.

Next, defendant argues that the evidence was insufficient to support his conviction of carrying a weapon with unlawful intent in violation of MCL 750.226.

We review de novo challenges to the sufficiency of the evidence, examining the evidence in a light most favor-

---

[3] We note that defendant may not be retried on a charge of first-degree murder because the jury implicitly acquitted him of that charge when it found him guilty of second-degree murder. *People v Garcia*, 448 Mich 442, 448-449; 531 NW2d 683 (1995); *Green v United States*, 355 US 184, 190; 78 S Ct 221; 2 L Ed 2d 199 (1957) (holding that a retrial on first-degree murder charges after the defendant's second-degree murder conviction had been reversed placed the defendant in jeopardy twice for the same offense in violation of the constitution when the defendant had been charged with both first- and second-degree murder and the jury had found the defendant guilty of second-degree murder and its verdict had been silent with regard to the first-degree murder charge).

able to the prosecution to determine whether a rational trier of fact could have found every essential element proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010).

In this case, the prosecution charged that defendant "did, with intent to use the same unlawfully against the person of another, go armed with a knife having a blade over three inches in length and/or a dangerous or deadly weapon or instrument, to-wit: baseball bat; contrary to MCL 750.226." Relevant to the charges in this case, the evidence introduced at trial established that a knife with a blade over three inches was recovered from the waistband of the victim's clothes. However, there was no evidence that this knife was used to inflict any of the injuries sustained by the victim. Further, the prosecution did not offer any evidence that the knife belonged to defendant or that defendant brought the knife with him to the victim's apartment. Nor was there any evidence produced at trial that defendant had a different knife with him at the time of the assault. A baseball bat was also recovered from the scene. The medical examiner testified that the victim was killed when his head was struck by a blunt hard surface, such as a baseball bat. Further, Yelle testified that the victim kept a baseball bat in his apartment. Defendant also asserted, during his interview by the police, that the baseball bat belonged to the victim, who allegedly opened the door and immediately swung the baseball bat at defendant.

During closing argument, the prosecution argued that defendant did not have to "bring a weapon" with him to be guilty of carrying a weapon with unlawful intent. Rather, the prosecution maintained that defendant could be found guilty of carrying a weapon with unlawful intent if the evidence established that he

picked up the baseball bat at the victim's apartment and made the decision to use it.

On appeal, defendant maintains that there was insufficient evidence to support his conviction because there was no evidence to demonstrate that a knife over three inches in length was used and the evidence supports only a finding of self-defense in regard to the use of the baseball bat. We agree that there was insufficient evidence to support his conviction, but for reasons not argued by defendant.

Defendant's sufficiency challenge requires interpretation of the "goes armed" requirement found in the carrying a weapon with unlawful intent statute, MCL 750.226. In particular, we must determine whether the statutory requirement that a person "goes armed" can be satisfied if a person arms himself or herself at the scene of an incident or whether a person must leave a place with a weapon and proceed toward another location.

Resolution of this issue requires statutory interpretation. We review de novo questions of statutory interpretation. *People v Peltola*, 489 Mich 174, 178; 803 NW2d 140 (2011). The goal of statutory interpretation is to give effect to the intent of the Legislature. *Id*. at 181. "The most reliable indicator of the Legislature's intent is the words in the statute." *Id*. The words of a statute are given their plain and ordinary meaning, and judicial construction of unambiguous statutory language is not permitted. *Id*. A dictionary may be consulted to determine the meaning of a word that has not acquired a unique meaning at law. *People v Wood*, 276 Mich App 669, 671; 741 NW2d 574 (2007).

MCL 750.226 provides:

> Any person who, with intent to use the same unlawfully against the person of another, goes armed with a pistol or

> other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any other dangerous or deadly weapon or instrument, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years or by a fine of not more than 2,500 dollars.

We begin our analysis by noting that despite the fact that the word "carrying" is not used in the statutory text, violation of MCL 750.226 is typically referred to as the crime of "carrying a weapon with unlawful intent." See, e.g., *People v Veling*, 443 Mich 23, 29; 504 NW2d 456 (1993); *People v Short*, 289 Mich App 538, 539; 797 NW2d 665 (2010); *People v Parker*, 288 Mich App 500, 501; 795 NW2d 596 (2010). The use of the term "carrying" to describe the conduct proscribed by MCL 750.226 likely stems from the statute's catch line that describes the offense as "CARRYING FIREARM OR DANGEROUS WEAPON WITH UNLAWFUL INTENT." However, the catch line of a statute is not part of the statute itself, and should not be used to construe the section more broadly or narrowly than the text of the section would indicate. MCL 8.4b; *People v Nick*, 374 Mich 664, 665; 133 NW2d 201 (1965). Rather, the catch line is "inserted for purposes of convenience to persons using publications of the statutes." MCL 8.4b.

Further, we observe that the use of the term "carrying" has carried over into the caselaw interpreting MCL 750.226. The elements of MCL 750.226 are commonly referred to as: "(1) *carrying* a firearm or dangerous weapon, (2) with the intent to unlawfully use the weapon against another person." See *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992) (emphasis added). However, unlike the reliance on the word "carrying" to either describe or identify the elements of MCL 750.226, the language of the statute itself sanctions conduct when a person "goes armed" with a

qualifying weapon with unlawful intent. Because the language of the statute controls our interpretation of the Legislature's intent, we conclude that the word "carrying" does not have any significance in either identifying the elements of the offense or understanding what actions are sufficient to convict under MCL 750.226. *Peltola*, 489 Mich at 181; MCL 8.4b. Rather the operative language is "goes armed."

The word "go" is relevantly defined as "to leave a place; depart." *Random House Webster's College Dictionary* (1992). The word "arm" is relevantly defined as "to equip with weapons." *Id.* Thus, we conclude that the plain language of the statute requires more than movement within the place where the weapon is initially obtained; rather, "goes" denotes departing or leaving a place. Hence, when the "goes armed" language of the statute is properly understood, it requires that in order to be guilty of violating MCL 750.226, the evidence must establish that the accused departed from a location while equipped with a qualifying weapon in his or her possession and, at the time of departing, had the intent to use the weapon unlawfully against another person.[4]

---

[4] While not presented as an issue on appeal, we note that the criminal jury instruction, which the trial court relied on to instruct the jury, similarly fails to use the statutory language to describe the elements of MCL 750.226. CJI2d 11.17 begins by stating that "[t]he defendant is charged with the crime of being armed with a dangerous weapon with unlawful intent." Thus, the criminal jury instruction uses the phrase "being armed" instead of the statutory phrase "goes armed." The term "being" is defined as "the fact of existing; existence." *Random House Webster's College Dictionary* (1992). Thus, "being armed" connotes a very different type of behavior than when a person "goes armed" because "being armed" requires only the existence of the state of having a weapon, while in order to be a person who "goes armed" one must leave a place or depart with a weapon. Because the statute clearly prohibits only the conduct of a person who "goes armed," use of the phrase "being armed" impermissibly expands the scope of MCL 750.226.

Applying this interpretation of MCL 750.226 to the facts of this case, we conclude that the prosecution's theory of the case and the evidence it relied on to support that theory were insufficient to prove defendant guilty of violating MCL 750.226. The evidence indicates that both the knife and the baseball bat were discovered in the victim's apartment, and testimony established that the victim routinely kept a baseball bat at his apartment. No evidence was submitted to support the conclusion that defendant brought the baseball bat, a knife, or any other qualifying weapon, with him to the victim's apartment. Further, contrary to the prosecution's position, merely grabbing a qualifying weapon that happens to be present at the crime scene and immediately using that weapon unlawfully does not establish that a person "goes armed." Moreover, we note that if the prosecution's interpretation of the statute were accepted, every crime where a qualifying weapon is used would also constitute a violation of MCL 750.226.

Therefore, we conclude that there was insufficient evidence to prove defendant was guilty of a violation of MCL 750.226. "Acquittal, not retrial, is the proper remedy, as dictated by double jeopardy principles." *Parker*, 288 Mich App at 509.[5]

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

TALBOT and WILDER, JJ., concurred with HOEKSTRA, P.J.

---

[5] In light of our conclusion that reversal is required, we decline to address defendant's arguments regarding the alleged scoring errors.

PORTER v HILL

Docket No. 306562. Submitted October 9, 2012, at Lansing. Decided June 11, 2013, at 9:00 a.m. Leave to appeal sought.

Robert and Judith Porter brought an action in the Saginaw Circuit Court, James T. Borchard, J., against Christina M. Hill, seeking an order granting plaintiffs grandparenting time with Hill's two minor children. Hill is the biological mother of the children and sole legal parent of the children. The biological father of the children, Russell Porter, is the biological son of plaintiffs. Russell's parental rights to the children had been involuntarily terminated as a result of physical abuse, and Russell and defendant were subsequently divorced. Russell paid child support until he died and his parents thereafter brought the present action. Defendant sought summary disposition on the basis that plaintiffs lacked standing to pursue the order because their son's parental rights had been terminated. The trial court granted the motion. Plaintiffs appealed the order granting summary disposition.

The Court of Appeals *held*:

1. At the time of his death, Russell was not a legal parent of the children. Plaintiffs, as Russell's parents, derived their rights as grandparents through Russell. Russell's death had no effect on his rights or those of plaintiffs. Accordingly, for purposes of this case, Russell was not a legal parent and plaintiffs are not legal grandparents. Plaintiffs have no basis on which to seek an order of grandparenting time.

2. There is no authority for plaintiffs' contention that the term "natural," as it is used in MCL 722.22 in defining "parent" and "grandparent" is merely a substitute for "biological."

3. Russell ceased being a parent at all, in the eyes of the law, after his parental rights were terminated. Because he was not a "parent," it is axiomatic that he could not be a "natural parent."

4. The facts that Russell paid child support until he died and that defendant claimed Social Security benefits for the children through Russell do not entitle plaintiffs to grandparenting time. In the absence of statutory authority, a parent who has had his

or her parental rights to a child terminated may not claim any right to see or contact the child attendant to the payment of child support.

Affirmed.

BOONSTRA, J., dissenting, would hold that the Legislature's use of the phrase "natural parent" and its affording to a grandparent a right to seek grandparenting time independent of parental rights and notwithstanding parental desires, along with the overarching concern for the best interest of the children that guides the Court of Appeals interpretation of the Child Custody Act, indicate both that plaintiffs have a special right or substantial interest in this case and that the statutory scheme at least implies that the Legislature intended to confer standing on plaintiffs. A person whose parental rights have been terminated, and who has therefore lost his or her rights as a "legal parent" remains a "natural parent" and, therefore, a "parent" under MCL 722.22. MCL 722.27b(5) recognizes the Legislature's intent that a "grandparent" seeking grandparenting time may be a "natural or adoptive parent" of a "parent . . . whose parental rights have been terminated." In other words, even though a person's parental rights have been terminated, he or she may still be a "parent" for purposes of enabling a grandparent to seek grandparenting time. The order dismissing plaintiffs' request for grandparenting time should be reversed.

1. CHILD CUSTODY ACT — TERMINATION OF PARENTAL RIGHTS — WORDS AND PHRASES — PARENT — GRANDPARENT.

The Child Custody Act defines the term "parent" as "the natural or adoptive parent of a child" and the term "grandparent" as "a natural or adoptive parent of a child's natural or adoptive parent"; a person ceases being a "parent" at all, in the eyes of the law, after the person's parental rights are terminated and, because such a person is no longer a "parent," the person is also not a "natural parent" (MCL 722.22[e] and [h]).

2. CHILD SUPPORT — TERMINATION OF PARENTAL RIGHTS — PAYMENT OF CHILD SUPPORT — RIGHT TO VISITATION.

A parent who has had his or her parental rights to a child terminated may not, in the absence of statutory authority, claim any right to see or contact the child attendant to the payment of child support for the child.

Dill & Brady (by *Colin M. Dill*) for plaintiffs.

Susan J. Tarrant for defendant.

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

METER, J. Plaintiffs appeal as of right the trial court's order granting summary disposition to defendant. Plaintiffs argue that the trial court erred by ruling that they did not have legal standing to seek a grandparenting-time order. We affirm.

Defendant is the biological mother and sole legal parent of two children. The biological father of the children is defendant's ex-husband, Russell Porter, the biological son of plaintiffs. Russell's parental rights were involuntarily terminated as a result of physical abuse, and Russell and defendant subsequently divorced. Russell paid child support until his death.

Following their son's death, plaintiffs sought an order of grandparenting time. Defendant moved for summary disposition, arguing that plaintiffs did not have standing to pursue such an order, because their son's parental rights had been terminated. The trial court granted defendant's motion.

"Whether a party has standing is a question of law that we review de novo." *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008) (citation and quotation marks omitted). We also review de novo a trial court's decision regarding a motion for summary disposition. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008).

Michigan's Child Custody Act, MCL 722.21 *et seq*., "is the exclusive means for pursuing" orders of parenting time. *Van v Zahorik*, 460 Mich 320, 328; 597 NW2d 15 (1999). MCL 722.27b(1) provides that "[a] child's grandparent may seek a grandparenting time order under 1 or more of the following circumstances: . . . (c) The child's parent who is a child of the grandparents is deceased." The term "parent" is defined as "the natural or adoptive parent of a child[,]" MCL 722.22(h), and the

term "grandparent" is defined as "a natural or adoptive parent of a child's natural or adoptive parent," MCL 722.22(e).

At the time of his death, Russell was not a legal parent of the children. He had no right to have any input regarding matters in their lives; in fact, to do so would have violated a court order. Plaintiffs, as Russell's parents, derived their rights as grandparents through him. Russell's death had no effect on his rights or those of plaintiffs, and there is no authority for plaintiffs' contention that "natural" as used in MCL 722.22 is merely a substitute for "biological." The recent case of *People v Wambar*, 300 Mich App 121; 831 NW2d 891 (2013), is instructive. At issue in *Wambar* was whether a man whose parental rights to a child had been terminated on the basis of abuse or neglect and who then attempted to unlawfully take the child could be convicted under the general child-taking statute, MCL 750.350, or whether the defendant should have been charged under the parental-kidnapping statute, MCL 750.350a. 300 Mich App at 123-124. The general statute states that "[a]n adoptive or natural parent of the child shall not be charged with and convicted for a violation of this section." MCL 750.350(2). The defendant argued that "natural parent" meant "biological parent" and encompassed him to the extent that he could not be convicted under MCL 750.350. *Wambar*, 300 Mich App at 124.

This Court upheld the defendant's conviction under the general statute, emphasizing that the defendant's status as a parent had been terminated in a legal proceeding, *id*. at 126, and that the phrase "natural parent" is not automatically equivalent to the phrase "biological parent," *id*. at 125 n 5. This Court stated that "[i]t would be anomalous for the Legislature to

authorize a court to terminate a person's parental rights but to protect[1] that same person if he or she attempted to take the child away from a person with legal rights to the child." *Id*. at 126.

Similarly, with respect to the present case, it would be anomalous for the Legislature to authorize a court to terminate a person's parental rights on the basis of abuse but then to somehow "revive" those rights for purposes of grandparent visitation. Accordingly, for purposes of the present case, Russell was not a legal parent,[2] plaintiffs are not legal grandparents, and they have no basis on which to seek an order of grandparenting time.

Plaintiffs argue that because their son continued to pay child support and thus met his parental responsibilities, they are entitled to grandparenting time, i.e., visitation, an express parental right. However, in *In re Beck*, 488 Mich 6, 8; 793 NW2d 562 (2010), the Michigan Supreme Court observed that, under Michigan's

---

[1] The potential punishment under the parental-kidnapping statute, MCL 750.350a, is much less than under MCL 750.350. See *Wambar*, 300 Mich App at 126 n 6.

[2] The dissent claims that we are equating the phrase "natural parent" with the phrase "legal parent." However, in stating that Russell was not a legal parent, we are emphasizing the fact that Russell ceased being a "parent" at all, in the eyes of the law, after his parental rights were terminated. Because he was not a "parent," it is axiomatic that he could not be a "natural parent." The juxtaposition of "natural parent" and "adoptive parent" in MCL 722.22 makes perfect sense in this context. The use of the term "natural" is employed to distinguish a *legal* parent affiliated with a child by reason of biology from a *legal* parent affiliated with a child by reason of adoption. As clearly stated in *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 314; 805 NW2d 226 (2011), "[t]he phrase 'natural parent' [in MCL 722.22(h)] was used by the Legislature to distinguish between adoptive parents and non-adoptive parents." It was not used to distinguish between adoptive parents and persons (i.e., nonparents) who produced a child by virtue of biological processes. See, generally, *id*. at 313-314.

statutory scheme, parental rights are distinct from parental obligations. The *Beck* Court held that while an order terminating parental rights terminates a parent's "liberty interest in 'the care, custody, and control of their children[,]' " see *id*. at 11, quoting *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000), a termination order does not eliminate the parental obligation to support a child, *Beck*, 488 Mich at 15. A parent whose parental rights have been terminated "retains *absolutely no rights* with respect to the children and no right to interpose himself in the lives of his children." *Beck*, 488 Mich at 16 n 23 (emphasis added). "In the absence of statutory authority, the terminated parent may not claim *any* right to see or contact the children attendant to the payment of child support." *Id*.

Plaintiffs also emphasize that defendant claimed Social Security benefits for the children through Russell Porter; however, such benefits relate to the support obligation that continues, as noted, even after parental rights are terminated. Similarly, even if the children are entitled to inherit from Russell, such rights of the children to financial benefits do not somehow revive the parental rights of the parent.

Finally, plaintiffs cite MCL 722.27b(5), which provides:

> If 2 fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time filed under subsection (3). This subsection does not apply if 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is deceased or whose parental rights have been terminated.

We acknowledge that the second sentence of MCL 722.27b(5) appears to lend support to plaintiffs' argument in that it mentions a situation in which a grandparent seeks to visit a child even though the child's parent has had his or her parental rights terminated. However, the circumstances outlined (e.g., a stepparent adoption) are not present here, and thus MCL 722.27b(5) does not advance plaintiffs' case. As noted by defendant, it is likely that the Legislature included the termination-of-rights language in this statute in order to accommodate a situation in which a parent has voluntarily released his or her parental rights merely to allow for a stepparent adoption. We strongly urge the Legislature to amend this statute to clarify that the second sentence of MCL 722.27b(5) does not apply in cases where parental rights have been involuntarily terminated on the basis of neglect or abuse or in cases where parental rights have been relinquished following the initiation of child-protective proceedings.

Affirmed.

FITZGERALD, P.J., concurred with METER, J.

BOONSTRA, J. (*dissenting*). I respectfully dissent, for the reasons that follow.

I. BASIC FACTS AND PROCEDURE

At issue in this case is whether the plaintiff grandparents of two minor children have a right to seek grandparenting time under the Child Custody Act, MCL 722.21 *et seq*. Of particular significance in the context of this case are the facts that (a) the children's biological father, Russell Porter, who is plaintiffs' son, is deceased, and (b) before Russell's death, his parental

rights were terminated by court order. Following Russell's death, plaintiffs sought grandparenting time. That request was opposed by defendant, the children's biological mother, who moved for summary disposition, contending that because of the termination of Russell's parental rights, plaintiffs did not have standing to seek grandparenting time.

The trial court granted summary disposition in favor of defendant, albeit grudgingly, stating:

> I'm going to make it real simple. This matter is going to go up on appeal no matter who wins or losses [sic]. I am going to keep it simple for appeal, because *it's something that the appellate courts should decide*.
>
> It's the Court's — and I am not making any determination on these grandparents. They appear to be fine people. *But I am going to have to rule that under the Child Custody Act your rights come through those of your child. And I'm ruling that the Child Custody Act does not allow, when somebody's parental rights are terminated, for the grandparents to seek visitation.*
>
> As I said, *I hope the Court of Appeals reverses me on this issue.* And I have kept it real simple so it can be taken up on appeal. But I think it's something that the Court of Appeals needs to decide, and it hasn't yet. And I'm ruling for summary judgment on behalf of the mother, and that the parental rights have been terminated. And, therefore, right to grand parenting visitation, in my view under the Child Custody Act, I don't see any legal support for it. [Emphasis added.]

The trial court thus concluded in its order granting defendant's motion for summary disposition that "Plaintiffs do not have standing to request grandparent visitation for the reason that the Plaintiff's son, the biological father of the minor children, had his parental rights terminated on February 4, 2010."

II. STANDARD OF REVIEW

As the majority correctly notes, we review de novo questions of law regarding standing, *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008), as well as summary disposition determinations, *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). We also review de novo questions of statutory interpretation. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). The overriding goal of statutory interpretation 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 touchstone of legislative intent is the statute's language. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 13; 795 NW2d 101 (2009). The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a term of art with a unique legal meaning. MCL 8.3a; *Brackett v Focus Hope*, *Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).

III. THE CHILD CUSTODY ACT GENERALLY

The Child Custody Act states, in pertinent part, as follows:

> A child's grandparent may seek a grandparenting time order under 1 or more of the following circumstances:
>
> * * *

(c) The child's parent who is a child of the grandparents is deceased."[1] [MCL 722.27b(1)(c).]

Before delving into the meaning of this statutory provision, I note that the overriding concern of the Child Custody Act is the best interests of the affected children. MCL 722.25(1); *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). Consequently, the act provides (a) a presumption "that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health"; (b) an opportunity for a petitioning grandparent to "overcome the presumption"; and (c) for the trial court then to "consider whether it is in the best interests of the child to enter an order for grandparenting time" pursuant to a number of factors that the court is obliged at that juncture to consider. MCL 722.27b(4)(b), and (6).[2]

In this case, the trial court did not reach those issues, and specifically did "not mak[e] any determination on these grandparents."[3] Instead, the trial court's determination was premised on a lack of "standing," i.e., a

[1] Subdivision (b) of subsection (1) also is arguably implicated here, because it allows a grandparent to seek grandparenting time where "[t]he child's parents are divorced," MCL 722.27b(1)(b), and defendant and Russell were divorced shortly before Russell's death. However, presumably because of Russell's intervening death, that statutory section is not before us on this appeal.

[2] The Legislature adopted these presumptions and standards as an amendment of the Child Custody Act, see 1970 PA 91 as amended by 2004 PA 542, effective January 3, 2005, to address the constitutional infirmities of the previous version of Michigan's grandparent-visitation statute, as found by our Supreme Court in *DeRose v DeRose*, 469 Mich 320, 335; 666 NW2d 636 (2003), citing *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000).

[3] The trial court in fact noted that plaintiffs "appear to be fine people," and it expressed regret over its denial of plaintiffs' request for grandparenting time and hope that this Court would reverse that decision.

preliminary determination that the Child Custody Act did not permit plaintiffs to seek grandparenting time because Russell's parental rights had been terminated.

IV. STANDING GENERALLY

Our Supreme Court has stated that

> [t]he purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to "ensure sincere and vigorous advocacy." Thus, the standing inquiry focuses on whether a litigant "is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." [*Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (citations omitted).]

A prospective plaintiff lacks standing if he or she is not a real party in interest, because the "standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy." *City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997), citing *Mich Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). A real party in interest is the one who is vested with the right of action on a given claim. *Kalamazoo*, 221 Mich App at 534, citing *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 96; 535 NW2d 529 (1995). " 'Standing does not address the ultimate merits of the substantive claims of the parties.' " *Lansing Sch Ed Ass'n*, 487 Mich at 357, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995).

According to our Supreme Court, a plaintiff has standing "whenever there is a legal cause of action." *Lansing Sch Ed Ass'n*, 487 Mich at 372. "Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has stand-

ing." *Id*. Standing may be found if "the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id*.

As I hereinafter discuss in part V of this opinion, I would hold that the Legislature's use of the phrase "natural parent" and its affording to a grandparent a right to seek grandparenting time independent of parental rights and notwithstanding parental desires, along with the overarching concern for the best interest of children that guides our interpretation of the Child Custody Act, indicate both that plaintiffs have a special right or substantial interest in this case and that the statutory scheme at least *implies* that the Legislature intended to confer standing on plaintiffs. *Id*.

V. STATUTORY INTERPRETATION

As noted, the Child Custody Act permits a child's "grandparent" to seek grandparenting time when the child's "parent" who is a child of the grandparent is deceased. MCL 722.27b(1)(c). We must interpret the statutory language in accordance with the definitions that are supplied by the act itself. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). MCL 722.22 provides the following pertinent definitions:

> As used in this act:
>
> * * *
>
> (e) "Grandparent" means a natural or adoptive parent of a child's natural or adoptive parent.
>
> * * *

(h) "Parent" means the natural or adoptive parent of a child.

Applying these definitions to MCL 722.27b(1), the Child Custody Act permits a "natural parent" of a "natural parent" to seek grandparenting time. There is no dispute here that plaintiffs were the "natural parents" of Russell. The only question before us, therefore, is whether Russell was a "natural parent" of the minor children.

The Child Custody Act does not, however, define the term "natural parent." Plaintiffs contend that this Court should interpret the term "natural parent," as used in the Child Custody Act, as the equivalent of "biological parent." Indeed, the legal and ordinary definitions of the word "natural" do imply a physical link. *Random House Webster's College Dictionary* (1997) defines "natural," in relevant part, as being "related by blood rather than by adoption." Similarly, Black's Law Dictionary (9th ed) defines "natural," in part, as "[o]f or relating to birth," as in a "natural child as distinguished from [an] adopted child."

In affirming the trial court (notwithstanding the trial court's stated preference to be reversed), however, the majority does not really answer the question before us, i.e., whether Russell was a "natural parent" of the minor children. Instead, the majority notes that at the time of his death, Russell was no longer a "legal parent" of the children. But "natural parent" and "legal parent" are obviously two very different terms, carrying distinct meanings.

In essentially equating the two, the majority finds "instructive" this Court's recent decision in *People v Wambar*, 300 Mich App 121; 831 NW2d 891 (2013). In *Wambar*, the question was whether a person whose parental rights to a child had been terminated could be

convicted of unlawfully taking the child under the general child-taking statute, MCL 750.350, or whether the person should have been charged under the parental-kidnapping statute, MCL 750.350a (which carries lesser penalties). As the majority notes, this Court in *Wambar* indeed concluded, in the context of that criminal statutory scheme, that the term "natural parent" "is not automatically equivalent" to the term "biological parent." The rationale for that conclusion in *Wambar* is, however, important. In *Wambar*, this Court stated that "[i]t would be anomalous for the Legislature to authorize a court to terminate a person's parental rights but to protect that same person if he or she attempted to take the child away from a person with legal rights to the child." *Wambar*, 300 Mich App at 126. Hence the majority in the instant case concludes:

> Similarly, with respect to the present case, it would be anomalous for the Legislature to authorize a court to terminate a person's parental rights on the basis of abuse but then to somehow "revive" those rights for purposes of grandparent visitation. Accordingly, for purposes of the present case, Russell was not a legal parent, plaintiffs are not legal grandparents, and they have no basis on which to seek an order of grandparenting time.

With due respect to the majority, I do not believe that its conclusion follows. The considerations that were present in *Wambar* simply are not present here. Because Russell is deceased, there is no potential here for him to receive a benefit or any "protection" from interpreting the term "natural parent" according to its plain and ordinary meaning. Nor would an interpretation of the term "natural parent" according to its plain and ordinary meaning in any way "revive" Russell's parental rights, as the majority suggests.

What I find "anomalous," in fact, is that the majority declines to equate "natural parent" with "biological

parent" in this context, yet equates "natural parent" with "legal parent" as its basis for affirming. I find the former equation of terms much more compelling and supportable than the latter, particularly given the plain and ordinary meaning of the terms.[4] In fact, in using the phrase "natural or adoptive parent" to define the terms "parent" and "grandparent," the Child Custody Act specifically juxtaposes the adjective "natural" with the complementary adjective "adoptive." MCL 722.22. An "adoptive parent" is a form of "legal parent." *Id*.; see *Theodore v Packing Materials, Inc*, 396 Mich 152, 162-163; 240 NW2d 255 (1976) ("The legal relationship between parents and their natural children is effectively terminated when the children are legally adopted by others. All rights and obligations between the child and parents are severed and the adoptive parents become the legal parents in all respects."). Consequently, the majority's equation of the term "natural parent" with the term "legal parent" in the context of grandparenting time, notwithstanding the Legislature's juxtaposition of "natural" with "adoptive," would impermissibly render the two terms surplusage. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). "Natural parent" must connote something more and different than simply having "legal" parental rights.

My conclusion also finds support in the language of our Supreme Court. In *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009), the Court found that "a parent whose rights have been terminated . . . cannot initiate an action for custody under the [Child Custody Act] because it would amount to a collateral attack on the

[4] I find irrelevant the questions whether Russell continued to have support obligations after the termination of his parental rights or the children were eligible for Social Security benefits through him. Those factors relate to Russell's status as a "legal parent," not to his status as a "natural parent."

earlier proceedings." *Id*. at 277. In so finding, the Court observed that a "termination order, by its nature, finds that custody with the *natural parent* is not in the child's best interests. A *parent's* only recourse in such cases is to appeal the order." *Id*. (emphasis added). In other words, a person whose parental rights have been terminated, and who has therefore lost his or her rights as a "legal parent," remains a "natural parent" and, therefore, a "parent," under the definition of the Child Custody Act.

I also do not agree with the majority's assertion that "[p]laintiffs, as Russell's parents, derived their rights as grandparents through him" and, therefore, that Russell's loss of his parental rights automatically also deprived plaintiffs of their grandparent rights. Certainly, the former proposition is true at some level. That is, if the grandparents' child were not the parent of a minor child, then the grandparents also would not be the grandparents of that minor child. However, the Child Custody Act is premised on the recognition that, at least in some circumstances, a grandparent's right to grandparenting time arises independently of parental rights and notwithstanding parental desires. Otherwise, there would be no reason to statutorily provide grandparents with a right to seek grandparenting time. The majority implicitly recognizes this, inasmuch as it "acknowledge[s] that the second sentence of MCL 722.27b(5) appears to lend support to plaintiffs' argument in that it mentions a situation in which a grandparent seeks to visit a child even though the child's parent has had his or her parental rights terminated." That statutory subsection provides:

> If 2 fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time filed under subsection (3). *This subsection*

> *does not apply if* 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, and *the grandparent seeking the order is the natural or adoptive parent of a parent* of the child who is deceased or *whose parental rights have been terminated*. [Emphasis added.]

While, as the majority notes, the circumstances of a stepparent adoption are not present here, this statute nonetheless undercuts the majority's preferred statutory interpretation. By its very terms, this statutory provision recognizes the Legislature's intent that a "grandparent" seeking grandparenting time may be a "natural or adoptive parent" of a "parent . . . whose parental rights have been terminated." In other words, even though a person's parental rights have been terminated, he or she may still be a "parent" for purposes of enabling a grandparent to seek grandparenting time.[5]

---

[5] Although my conclusion rests on interpretation of Michigan law, I note that other jurisdictions have recognized grandparents' standing to seek visitation under similar circumstances. For example, the Pennsylvania Superior Court has found that the parents of a biological father whose rights were terminated had standing to seek grandparent visitation. See *Rigler v Treen*, 442 Pa Super 533, 537-538; 660 A2d 111 (1995). Additionally, the New Mexico Court of Appeals has determined that New Mexico's statutory scheme "intended that the trial court, upon a showing that such visitation was in the best interests of the child, could authorize grandparent visitation even though [the grandmother's] son had relinquished his parental rights." *Lucero v Hart*, 120 NM 794, 798; 907 P2d 198 (NM App, 1995). The Indiana Court of Appeals has similarly found standing for grandparents to seek visitation notwithstanding the termination of a parent's parental rights. *In re Groleau*, 585 NE2d 726, 728 (Ind App, 1992). The Colorado Court of Appeals has stated that "[g]randparent visitation rights are derived from statute and are not contingent on the continuation of the parent-child legal relationship . . . ." *People in the Interest of N S*, 821 P2d 931, 932 (Colo App, 1991). Although each of these jurisdictions has its own complex statutory scheme for determining child custody and grandparents' rights, I find the basic reasoning of these

The majority therefore implores the Legislature to amend the statute, based on the majority's belief regarding what the Legislature "likely" intended. In my view, the majority thereby impermissibly "legislates" its own policy preference, notwithstanding the clear and unmistakable meaning of the actual words that the Legislature chose to employ. MCL 8.3a; *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002).

VI. CONCLUSION

For these reasons, I respectfully dissent and would reverse the trial court's dismissal of plaintiffs' request for grandparenting time on grounds of standing. I express no opinion on the merits of plaintiffs' request, because those merits should first be evaluated by the trial court pursuant to the standards set forth in the Child Custody Act.[6]

---

cases persuasive in light of our own statutory scheme. See *Holland v Trinity Health Care Corp*, 287 Mich App 524, 529 n 2; 791 NW2d 724 (2010) ("Cases from other jurisdictions, although not binding, may be persuasive.").

[6] I note in passing that while defendant argues on appeal that the Child Custody Act, at least insofar as it relates to grandparenting time, should be "strictly construed," the Child Custody Act itself states that it should be "liberally construed . . . ." MCL 722.26(1). In any event, defendant's arguments in this respect go to the ultimate merits of plaintiffs' request for grandparenting time (which are not now before us), not to the preliminary issue of standing that is here presented on appeal.

RAINS v RAINS

Docket No. 312243. Submitted May 7, 2013, at Detroit. Decided June 13, 2013, at 9:00 a.m.

Shannon M. Rains, who shared joint legal and physical custody of the child she had with her former husband, Jeffrey A. Rains, moved in the Oakland Circuit Court for a change of domicile so that she could relocate from Grand Blanc to Traverse City with her fiancé. Defendant responded by filing a motion requesting primary physical custody of the child. The court, Lisa Gorcyca, J., began its analysis by finding that the child had an established custodial environment with both parents, then placed the burden on plaintiff to establish by clear and convincing evidence that the factors set forth in MCL 722.31(4) favored a change in domicile. Having ruled that plaintiff had failed to meet this standard, the court reevaluated the factors set forth in MCL 722.23 that govern the best interests of the child and, on that basis, denied plaintiff's motion and modified the parties' parenting-time schedule. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff properly invoked appellate jurisdiction as of right under MCR 7.202(6)(a)(iii) because the order on the motion for a change of domicile had the potential to affect an established joint custodial environment.

2. The trial court erred by requiring plaintiff to establish that the factors set forth in MCL 722.31(4) favored a change in domicile by clear and convincing evidence rather than by a preponderance of the evidence. However, remand is not warranted because even if plaintiff had been able to establish these factors under the correct standard, the court would have denied the motion on the ground that plaintiff could not have proved by clear and convincing evidence that the move was in the child's best interests.

3. The trial court's finding that there was an established custodial relationship with both parents was supported by the evidence on the record.

4. The trial court's findings regarding best-interest factors b, c, e, j, and k were not against the great weight of the evidence.

5. The trial court's failure to explicitly state the change in circumstances that justified its review of the best-interest factors was not a clear legal error that warranted reversal because plaintiff's plan to commute more than 200 miles with the child was sufficient to justify a modification of the parenting-time schedule.

Affirmed.

1. PARENT AND CHILD — CHILD CUSTODY — CHANGES OF DOMICILE — APPELLATE JURISDICTION.

An order on a motion for a change of domicile is a final order that may be appealed as of right under MCR 7.202(6)(a)(iii) if it has the potential to affect an established custodial environment.

2. PARENT AND CHILD — CHILD CUSTODY — CHANGES OF DOMICILE.

To determine whether a motion for a change of domicile should be granted, a court must determine (1) whether the moving party has established by a preponderance of the evidence that the factors set forth in MCL 722.31(4) support the motion; (2) if so, whether an established custodial environment exists; (3) if so, whether the change of domicile would modify or alter that established custodial environment; and (4) if so, whether the change in domicile would be in the child's best interests by considering whether the factors set forth in MCL 722.23 have been established by clear and convincing evidence.

Haas & Associates, PLLC (by *Trish Oleksa Haas*), and *The Ferrick Law Firm* (by *Connor Ferrick*) for plaintiff.

Scott Bassett for defendant.

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

K. F. KELLY, J. Plaintiff, Shannon M. Rains, appeals as of right a trial court's order denying her motion for a change of domicile and modifying the parenting-time schedule between her and defendant, her former husband, Jeffrey A. Rains. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties have an 11-year-old child. On May 12, 2010, the trial court entered a consent judgment of divorce, providing for joint legal and physical custody of the child. The judgment established a parenting-time schedule, which provided: (1) plaintiff and defendant alternated weekends, from Friday after school until Monday morning when the child was returned to school, or 5:00 p.m. if the child did not have school, (2) defendant had the child every Wednesday after school until the following morning when defendant returned him to school, or 5:00 p.m. if he did not have school, and (3) defendant had the child every other Tuesday after school following plaintiff's parenting-time weekend until Thursday morning when defendant returned the child to school, or 5:00 p.m. if he did not have school. The judgment also provided for even division of holidays and school breaks.

On April 25, 2012, plaintiff filed a motion for change of domicile to move the child from the metropolitan Detroit area to Traverse City, where her fiancé had recently accepted a job. Plaintiff proposed a modification to defendant's parenting time to every other weekend during the school year and every other week during the summer months. In response to plaintiff's motion, defendant moved for a change of custody, requesting that he be awarded primary physical custody of the child.

The Friend of the Court (FOC) recommended that plaintiff's request for a change of domicile be denied on the basis of the four factors enumerated in MCL 722.31(4). The FOC concluded that the proposed move did not have the capacity to improve the child's life given his close ties with his friends and community and the fact that he was unlikely to notice any change in the

family's financial situation. Despite the parties' strained relationship, the FOC did not believe that plaintiff's motivations were to frustrate defendant's parenting time; however, the FOC noted that a change in domicile would cause a significant change in the current parenting-time pattern. Given the financial comfort of both parties, the FOC found that there was no evidence that defendant's opposition to the change was motivated by a desire to maintain his reduced child support. Finally, the FOC found that neither party presented issues related to domestic violence.

At a five-day evidentiary hearing, Derk Pronger testified that he and plaintiff were to be married on September 21, 2012. Pronger had been an administrator at William Beaumont Hospital, where he earned approximately $150,000 a year. Pronger's new job in Traverse City provided career advancement and increased his salary to the mid $200,000s. Pronger believed his new position made him a leader in Traverse City, from which the family would benefit.

Marcia Ross, the parenting-time coordinator appointed by the trial court, testified that this was a difficult case given the high level of conflict between plaintiff and defendant, and that the child might find the move "somewhat unsettling" because the divorce had been hard on him. Further, Ross believed the move would prevent the parties from being involved with the child when he was with the other parent. While acknowledging that the fighting between plaintiff and defendant "bothers [the child] immensely," Ross thought that having plaintiff and defendant in close proximity to one another was important to him. Accordingly, Ross recommended that the status quo be maintained for the child's best interests. Ross indicated that plaintiff and defendant should continue to seek coun-

seling to resolve their issues, noting that both were defensive and that their behavior toward one another was "vile." However, Ross indicated that the child was "fabulous" and that plaintiff and defendant were "facilitating whatever needs to be facilitated," despite the intense fighting that went on when plaintiff and defendant had direct contact, including in the presence of the child.

Dr. Flack,[1] a licensed psychologist, testified that she had been treating the child since January 21, 2011, and both parents were involved in the child's treatment. Flack was aware that there were disagreements about the midweek exchanges, but believed that the difficulties between plaintiff and defendant went beyond this subject and that the midweek exchanges were not better or worse for the child.

Flack testified that the child knew about the potential move before defendant did and was reluctant about the prospect. However, Flack indicated that this reaction was typical for a child and that she believed the child was resilient enough to cope with the move. Flack also opined that defendant and the child could maintain a loving relationship despite the distance if plaintiff supported the relationship and defendant played an active role in the child's life. Flack testified that while neither party did "a wonderful job encouraging relationships in both directions," she opined that plaintiff put the child's interests first, and that defendant had significantly improved in doing so as well.

Plaintiff testified that she and Pronger had been dating for three years. She encouraged Pronger to apply for the position in Traverse City because she knew it was a "once in a lifetime" opportunity. Plaintiff believed

---

[1] Dr. Flack did not give her first name at the hearing.

that the child's life would be improved by the move because (1) he would be living in "a solid family structure" and would experience a healthy marriage, (2) Pronger and his family held prestigious positions in Traverse City, which the child would benefit from, (3) the child would live in a neighborhood with lots of children, (4) the Traverse City Catholic schools were superior to those in the metro Detroit area, (5) one of the child's friends would also be at the new school, and (6) the new distance would prevent midweek transfers, which were disruptive to the child because his belongings would sometimes get left behind. Plaintiff believed that the move would alleviate the stress of midweek transfers and prevent the child from being pulled into conflicts between plaintiff and defendant.

At the time of the evidentiary hearing, the sale of plaintiff's home was pending closing, and plaintiff planned to rent an apartment in the area and commute back and forth to the yet-to-be-purchased family home in Traverse City. Plaintiff told the court that she would not leave her son behind, but would stay and parent her son if the court determined that he could not move with her to Traverse City. Plaintiff testified that she could not make any decisions about her employment until the trial court made its decision regarding the motion for change of domicile, but explained that she would have the option of working or not working if the family moved to Traverse City. At the time of the hearing, plaintiff earned roughly $130,000 to $140,000 a year as a pharmaceutical sales representative.

Conversely, defendant testified that he opposed the move to Traverse City for several reasons: (1) the child was doing well in his current environment, (2) it would be detrimental to move the child away from his extensive extended family, friends, school, and father, (3) the

move would turn defendant into a "weekend dad" instead of a full-time dad, and (4) defendant had been the child's primary caregiver. Defendant did not believe the move would be best for the child, particularly given that the child already had issues that required him to see Flack. Defendant believed that alternating weeks would be better for the child because it would require less interaction between plaintiff and defendant and there would be less travel back and forth between plaintiff's home and defendant's home.

Defendant testified that after the divorce, he purchased a home in Grand Blanc because it was on the child's bus route; had sidewalks, lots of children, and community sporting facilities; and was approximately five miles from plaintiff's former home. Defendant owned his own business and had a home office, which allowed him to be flexible with his work schedule. He earned more than $80,000 a year and also managed a trust valued at more than $750,000.

Both plaintiff and defendant testified regarding specific problematic encounters that have occurred between them. The trial court judge noted that she was "well aware of the background of this case, and is well aware that mom thinks dad has issues, dad thinks mom has issues, [and] they both have issues with each other."

On August 21, 2012, the trial court issued an opinion and entered an order denying plaintiff's motion for change of domicile, and it also modified the parenting-time schedule to an alternating week format. Plaintiff now appeals as of right.

II. APPELLATE JURISDICTION

Defendant argues that the appeal should be dismissed for lack of jurisdiction because the trial court's order denying plaintiff's motion for change of domicile

was not a final order appealable as of right. Defendant argues in his appellate brief:

> The only custody issue before the trial court was appellee's motion for change of custody. Appellant did not seek a change of custody. She sought only a change of domicile (although her requested relocation, if granted, would have disrupted the child's established custodial environment in the homes of both parents). Moreover, appellee's request for a custody change was contingent on the appellant's decision to relocate with the child to the Traverse City area away from the child's family, friends, and school. It was not the appellee's desire to disrupt the child's established custodial environment with both parties. When the trial court denied appellant's change of domicile motion, appellee's change of custody request became moot.
>
> The trial court, by keeping the established joint legal and joint physical custody arrangement intact, implicitly recognized that appellee's motion for change of custody was contingent on the outcome of the domicile issues. This view is further reinforced by the fact that the appellee did not appeal the trial court's decision to keep the existing custody arrangement intact. Therefore, there is no custody issue before this Court on appeal. As such, appellant's appeal should have been filed by leave, not by right.

"Whether this Court has jurisdiction to hear an appeal is an issue that we review de novo." *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012). While we acknowledge defendant's well-stated argument that the trial court's decision denying a change of domicile effectively left the custody arrangement "as is," we nevertheless conclude that we have jurisdiction to hear this appeal as of right.[2]

---

[2] Even if we were to conclude that the denial of the motion for a change of domicile was not appealable as of right, we would nonetheless consider the merits of plaintiff's appeal as on leave granted "in the interest of judicial economy." See *Detroit v Michigan*, 262 Mich App 542, 545-546; 686 NW2d 514 (2004).

A final order includes "a postjudgment order *affecting the custody of a minor*[.]" MCR 7.202(6)(a)(iii) (emphasis added). This Court has previously defined the phrase "affecting the custody," at least in the context of a trial court's decision denying a motion for change of custody:

> Black's Law Dictionary defines "affect" as "[m]ost generally, to produce an effect on; to influence in some way." Black's Law Dictionary (9th ed), p. 65. In a custody dispute, one could argue, as plaintiff does, that if the trial court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied. [*Wardell*, 297 Mich App at 132-133.]

Thus, we must ask whether the trial court's order denying plaintiff's motion for a change of domicile "influences where the child will live," regardless of whether the trial court's ultimate decision keeps the custody situation "as is."

There is little published caselaw regarding whether an order granting or denying a motion for a change of domicile constitutes an appeal of right. However, one

case illustrates that our Supreme Court favors treating such decisions as final orders. In *Thurston v Escamilla*, this Court dismissed for lack of jurisdiction an appeal from a trial court's order granting a change of domicile, concluding such an order was "a postjudgment order that does not affect the custody of a minor. . . . Domicile is not custody." *Thurston v Escamilla*, unpublished order of the Court of Appeals, entered September 10, 2003 (Docket No. 250568). We subsequently denied appellant's motion for reconsideration:

> The Court has reviewed the three unpublished cases cited by the appellant in support of the argument that there is an appeal of right from the order changing domicile. In [*Arthur v Arthur*, unpublished opinion of the Court of Appeals, issued April 17, 2001 (Docket No. 230437)], the opinion erroneously states that there was an appeal of right filed; the appeal was in fact by leave. In both *Telesz v Shearer*, [unpublished opinion of the Court of Appeals, issued August 16, 2002 (Docket No. 238907)] and *Visovatti v Visovatti*, [unpublished opinion of the Court of Appeals, issued February 23, 1999 (Docket No. 207010)], the orders in question both granted a change in domicile and denied the appellants' motions for change of custody. Clearly part of those orders affected the custody of a minor and were appealable by right. The order in this case did not involve a decision regarding any motion for change of custody and therefore *Shearer* [and] *Visovatti* do not apply. Furthermore, at the time the claims of appeal were filed in those two cases and the opinions issued there was no court rule prohibition against raising issues from the remainder of the order that did not affect custody of the minor. Therefore, the appellants were able to raise issues regarding domicile. But, effective September 1, 2002, MCR 7.203(A) was amended to limit the appeal to only that part of the order affecting custody. Parties are no longer permitted to use an order denying or granting custody to litigate by right a decision regarding domicile. [*Thurston v Escamilla*, unpublished order of the Court of Appeals, entered October 24, 2003 (Docket No. 250568).]

Our Supreme Court disagreed:

> In lieu of granting leave to appeal, the September 10, 2003, order of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals for plenary consideration. MCR 7.302(G)(1). The divorce judgment awarded joint legal and physical custody to both parties, and there was, in fact, an established joint custodial environment under which defendant had nearly daily contact with the children. The August 12, 2003, order of the Saginaw Circuit Court granting plaintiff's motion for change of domicile does not mention a change of custody, but by permitting the children to be removed by plaintiff to the state of New York, the order is one "*affecting* the custody of a minor . . ." within the meaning of MCR [7.202(6)(a)(iii)] [emphasis supplied]. See also MCL 722.31. Therefore, the August 12, 2003, order is final, and appealable by right. MCR 7.203(A)(1). [*Thurston v Escamilla*, 469 Mich 1009 (2004).]

Here, the trial court denied plaintiff's motion for change of domicile and, without explicitly stating so, also denied defendant's motion for a change of custody. Defendant concedes that his motion for a change of custody was premised exclusively on plaintiff's success in changing domicile and, therefore, he does not take issue with the trial court's ruling. Under *Wardell*, a trial court need not change a custodial arrangement in order for its decision to affect custody. Plaintiff had hoped to move the child to Traverse City, where he would reside primarily with her and see defendant every other weekend. The trial court's decision not to allow such a move to take place necessarily influenced where the child would live. Therefore, the fact that the parties were left in status quo as a result of the trial court's order is not dispositive.

Further, as in *Thurston* and as further discussed below, the parties in this case enjoyed joint legal and physical custody of the child and there was an estab-

lished joint custodial environment with both parents. If a change in domicile will substantially reduce the time a parent spends with a child, it would potentially cause a change in the established custodial environment. *Gagnon v Glowacki*, 295 Mich App 557, 573; 815 NW2d 141 (2012); *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). Therefore, we conclude that plaintiff has properly invoked appellate jurisdiction as of right. *Wardell* has provided an expansive definition of "affecting the custody of a minor." Additionally, in *Thurston* our Supreme Court indicated that an order on a motion for change of domicile that could affect an established joint custodial environment is appealable by right.

III. CHANGE OF DOMICILE

A. STANDARD OF REVIEW

This Court reviews a trial court's decision regarding a motion for change of domicile for an abuse of discretion and a trial court's findings regarding the factors set forth in MCL 722.31(4) under the "great weight of the evidence" standard. *Gagnon*, 295 Mich App at 565. " 'An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias.' " *Brown v Loveman*, 260 Mich App 576, 600-601; 680 NW2d 432 (2004), quoting *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000). This Court "may not substitute [its] judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011). However, "where a trial court's findings of fact may have been influenced by an incorrect view of the law, our review

is not limited to clear error." *Id*. A trial court's findings regarding the existence of an established custodial environment are reviewed under the "great weight of the evidence" standard and must be affirmed unless the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). This Court reviews questions of law de novo. *Brown*, 260 Mich App at 591.

B. THE PROPER LEGAL FRAMEWORK

We take this opportunity to reiterate the correct process that a trial court must use when deciding a motion for change of domicile.

A motion for a change of domicile essentially requires a four-step approach. First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4), the so-called *D'Onofrio*[3] factors, support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence.

---

[3] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976).

1. CONSIDERING WHETHER THE MOVING PARTY HAS ESTABLISHED THE FACTORS ENUMERATED IN MCL 722.31(4) BY A PREPONDERANCE OF THE EVIDENCE

MCL 722.31(1) prohibits "a parent of a child whose custody is governed by court order [from changing] a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." MCL 722.31(4) requires the trial court to consider several factors when a parent requests such a move, keeping the child as the primary focus:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

"The party requesting the change of domicile has the burden of establishing by *a preponderance of the evi-*

dence that the change is warranted." *McKimmy*, 291 Mich App at 582 (emphasis added).

2. DETERMINING WHETHER AN ESTABLISHED CUSTODIAL ENVIRONMENT EXISTS

It is only *after* the trial court determines that the moving party has shown by a preponderance of the evidence that a change of domicile is warranted that the trial court must determine whether an established custodial environment exists. *Gagnon*, 295 Mich App at 570; *Rittershaus v Rittershaus*, 273 Mich App 462, 463, 470; 730 NW2d 262 (2007).

Under Michigan law:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

This Court has described an established custodial environment as

> [an environment] of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger*, 277 Mich App at 706.]

A child may have an established custodial environment "with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Id*. at 707.

3. DETERMINING WHETHER A CHANGE OF DOMICILE WILL ALTER OR MODIFY THE ESTABLISHED CUSTODIAL ENVIRONMENT

After the trial court determines that the moving party has shown by a preponderance of the evidence that a change of domicile is warranted and if there is an established custodial environment, the trial court must determine whether the change in domicile would cause a change in the established custodial environment. *Gagnon*, 295 Mich App at 570; *Rittershaus*, 273 Mich App at 463, 470 n 2. "It is possible to have a change of domicile while having both parents retain joint physical custody without disturbing the established custodial environment." *Brown*, 260 Mich App at 596.

4. DETERMINING WHETHER A CHANGE OF DOMICILE IS IN THE CHILD'S BEST INTERESTS BY CLEAR AND CONVINCING EVIDENCE

If the trial court concludes that a change in an established custodial environment would occur, then the party requesting the change of domicile must prove by clear and convincing evidence that the change is in the child's best interests. *Gagnon*, 295 Mich App at 570; *Rittershaus*, 273 Mich App at 463, 470-472.

MCL 722.23 establishes the factors to be considered in determining a child's best interests:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

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

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

"These findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties. However, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005) (citations omitted). "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App at 705.

C. APPLICATION OF THE LAW

1. INCORRECT APPLICATION OF THE LEGAL FRAMEWORK

In its order, before evaluating the change-in-domicile factors under MCL 722.31(4), the trial court noted that

"[i]nitially, the Court must determine whether an established custodial environment exists." After concluding that the child had an established custodial environment with both parents, the trial court noted that "since the proposed change would modify the established custodial environment, the burden is on Plaintiff Mother, as the parent proposing the change, to establish by clear and convincing evidence that the change is in the child's best interest." The trial court concluded that plaintiff had failed to demonstrate by clear and convincing evidence that the change in domicile was justified under the factors set forth in MCL 722.31(4). The trial court engaged in a best-interest analysis in its discussion of defendant's motion for change of custody. The trial court determined, without noting what standard it was applying, that the factors favored defendant. For this reason, the trial court determined that given plaintiff's pending marriage and potential move to Traverse City, a new parenting schedule was required.

Although the trial court clearly undertook a painstaking review of the evidence and made a well-reasoned conclusion in this case, it operated under the wrong legal framework. The trial court should have first determined whether plaintiff could demonstrate by a preponderance of the evidence that the four factors favored a change of domicile. If so, the trial court could have proceeded on the question of whether the proposed change would change the child's established custodial environment. A potential change in the established custodial environment would have required plaintiff to prove by clear and convincing evidence that the change was in the child's best interests. By using the clear-and-convincing-evidence standard instead of the preponderance-of-the-evidence standard when considering the preliminary question of whether the factors set forth in MCL 722.31(4) allowed for a change of domicile, the trial court committed a legal error.

However, while a trial court's clear legal error would generally require remand for further consideration under the proper legal framework, see *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994), we see no reason to remand this case. Given the particular circumstances here, even if the trial court had used the proper standard and found by a preponderance of the evidence that the factors in MCL 722.31(4) favored a change of domicile, because a change of domicile would have altered the child's joint custodial environment, plaintiff would have had to prove by clear and convincing evidence that the change in domicile was in the child's best interests. *Rittershaus*, 273 Mich App at 463, 470. It is obvious from the trial court's detailed findings and conclusions that it would have denied the motion for a change of domicile because of plaintiff's inability to prove by clear and convincing evidence that the move was in the child's best interests. Accordingly, even if plaintiff could have demonstrated by a preponderance of the evidence that the change in domicile was warranted, plaintiff failed to demonstrate that she could have ultimately proven by clear and convincing evidence that the change in an established custodial environment was in the child's best interests. Therefore, the trial court's erroneous application of the clear-and-convincing-evidence standard to the change-in-domicile factors does not require reversal and, for purposes of this appeal, we will proceed with the assumption that plaintiff proved by a preponderance of the evidence that the factors laid out in MCL 722.31(4) favored a change in domicile.

2. ESTABLISHED CUSTODIAL ENVIRONMENT

The trial court found that "[b]oth parents provide [the child's] material needs and necessities of life, including medical care, clothing, uniforms and sporting

equipment" and "[b]oth parties pay various expenses for baseball, basketball, skiing, and Boy Scouts." The trial court noted defendant's testimony regarding defendant's participation at the child's school, in athletic activities, Boy Scout projects, and the child's musical interests. The trial court also noted that despite defendant's efforts on two occasions to take the child to see a doctor, plaintiff discouraged defendant from doing so and chose to take the child to a doctor that was farther away, where plaintiff's fiancé was employed. The trial court concluded (1) that the child "naturally looks to both parties" for guidance, discipline, necessities of life, and comfort and (2) the child's relationships with both plaintiff and defendant "are marked by qualities of security, stability, and permanence."

Despite plaintiff's arguments to the contrary, the trial court's finding that there was an established joint custodial relationship is supported by the record. The testimony of the child's teacher and a mother of one of the child's friends both indicated that defendant was actively involved in the child's academic and extracurricular activities. Further, the child's psychologist testified that the child had a close relationship with defendant and was "comfortable with both [parents]."

Additionally, defendant testified that the child tells defendant he loves him and that they hug, hold hands, pray together at night, and talk every day. Defendant went to most of the child's sports games and practices. He purchased his home because it was on the child's school's bus route and had sidewalks, lots of children, and community sporting facilities. Defendant also indicated that he intended to remain in his home indefinitely, despite his relationship with a woman who lives a distance away in Lansing. While defendant gave up parenting time, he explained that he surrendered mid-

week parenting on the basis of the parenting time coordinator's suggestion to try the week on/week off schedule in the summer to reduce conflict.

We reject plaintiff's claim that the established custodial environment was destroyed by the child's uncertainty about where he would be living in the future. Repeated changes in physical custody and the uncertainty resulting from an upcoming custody trial can destroy an established custodial environment. *Baker v Baker*, 411 Mich 567, 580-581; 309 NW2d 532 (1981); *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993). However, in the present case, there have not been repeated changes in physical custody—both parents have shared joint physical custody of the child since the divorce judgment. The child has traveled back and forth from plaintiff's and defendant's homes to effectuate parenting time, but defendant's home is located a mere five miles from plaintiff's home, which was the marital home.

In the present case, the record supports the conclusion that the child's custodial environment was with both parents. Defendant was actively involved in the child's daily life, including weeknight overnights, attendance at sports games and practices, volunteering at the child's school, and speaking with him every night. The trial court did not err by finding that an established custodial environment existed with both parents.

3. BEST INTEREST FACTORS

In its discussion of the best-interest factors, the trial court credited defendant with factors (d), (e), and (i). The trial court credited plaintiff and defendant equally regarding factors (a), (b), (c), (f), (g), and (h), and credited neither plaintiff nor defendant regarding fac-

tors (j) and (k). Plaintiff only challenges the trial court's findings regarding factors (b), (c), (e), (j), and (k).

a. MCL 722.23(b)

Plaintiff argues that the great weight of the evidence does not support the trial court's finding that both plaintiff and defendant could equally provide the child with love, affection, and guidance and continue educating and raising him in his religion or creed.

The testimony revealed that both parents were actively involved at the school as well as in the child's extracurricular activities. Plaintiff testified that she was a practicing Catholic, and defendant testified that he was Catholic and had no intentions to change his religion, though he did occasionally attend, and had taken the child to, a nondenominational church for family rather than religious reasons. Defendant supported the child's being an altar server, but because of scheduling difficulties and frustrations, defendant did not want the child to participate in the activity on defendant's parenting-time days. Plaintiff testified that defendant paid for half of the child's tuition, which was discounted because of plaintiff's tithing at the church.

Despite plaintiff's contentions regarding a past dispute between the child and defendant, defendant's failure to pay registration fees for camp and school, and defendant's not being willing to assist with altar serving during his parenting time, the trial court's finding that both parties should be equally credited with this factor is not against the great weight of the evidence.

b. MCL 722.23(c)

Plaintiff argues that the great weight of the evidence does not support the trial court's finding that both

plaintiff and defendant were equally able to provide the child with food, clothing, medical care, and other material needs because defendant admitted that plaintiff handled all of the child's medical and dental needs and took care of the child when he was ill, and defendant admitted to failing to pay court-ordered child support, camp fees, and school fees.

Both plaintiff and defendant have sizable incomes, roughly $140,000 and $85,000, respectively. Both plaintiff and defendant testified regarding the necessities they provided for the child. Defendant admitted that he has not yet made child-support payments, but he explained that plaintiff's attorney had not yet filed the required paperwork and that he had put money in escrow to cover the payments.

Defendant also admitted that plaintiff took the child to most of his doctor and dentist appointments, but he explained that (1) the dentist was a friend of plaintiff's and he would take the child to another dentist if plaintiff would allow it, (2) the child's doctor was located an hour away from defendant's home at the facility where Pronger works, (3) plaintiff did not approve of the child's seeing the local doctor defendant would have taken him to, and (4) defendant generally went along with plaintiff's decisions regarding the child's medical and dental care because plaintiff generally did not agree with defendant's choices. Defendant also admitted that because plaintiff was a pharmaceutical representative, she knew more about medicine than he did. Defendant denied plaintiff's claims that defendant would essentially "dump" the child with her when the child got sick. Defendant admitted that he did not pay the child's school enrollment fee and camp fees because he was frustrated with plaintiff's ordering him around and not allowing him to participate in decision-making.

There is evidence on the record to support the trial court's findings. Also, this factor involves credibility determinations, and this Court defers to the trial court on such matters. *Berger*, 277 Mich App at 705. The trial court's finding that plaintiff and defendant should be equally credited with this factor was not against the great weight of the evidence.

c. MCL 722.23(e)

Plaintiff argues that the great weight of the evidence does not support the trial court's finding that whether the family unit would stay intact favored defendant because plaintiff had not yet purchased a home in Traverse City. Further, she argues that the trial court did not evaluate the benefits the child would gain from having a two-parent household and, instead, focused on the home itself.

"This factor exclusively concerns whether the family unit will remain intact, not an evaluation about whether one custodial home would be more acceptable than the other." *Ireland v Smith*, 451 Mich 457, 462; 547 NW2d 686 (1996) (citations and quotation marks omitted). However, in this case, the trial court's findings make it clear that the trial court was concerned with the *permanence* of plaintiff's and defendant's homes, rather than the actual homes themselves. Plaintiff's contention that the trial court should have considered the benefits of a two-parent home is without merit because plaintiff and Pronger were not yet married at the time of the evidentiary hearing. While plaintiff and Pronger were planning to purchase a home, defendant intended to stay in his home indefinitely, a home that the child had already grown accustomed to. Plaintiff also had recently sold the marital home, and because the trial court denied the motion to change domicile,

plaintiff would essentially have had two custodial homes: a home in Traverse City and an apartment in Grand Blanc. Therefore, the trial court's finding in favor of defendant on this factor was not against the great weight of the evidence.

d. MCL 722.23(j)

Plaintiff argues the great weight of the evidence does not support the trial court's finding that the factor of facilitating a relationship between the parents and the child favored neither party because Flack testified that plaintiff did well in not discouraging the child's relationship with defendant, while the record showed that defendant routinely berated plaintiff in front of the child, failed to use the court-ordered parent coordination services, and only infrequently attended the child's psychological counseling sessions.

The trial court found that "[plaintiff's] testimony, past actions, and demeanor reflects her desire to move [the child] away from [defendant,] thereby discouraging a close and continuing parent-child relationship." The trial court acknowledged that both plaintiff and defendant admitted their relationship was difficult, and it noted that the e-mail exchanges between the parties reflected a high level of conflict. The trial court found that, while defendant was equally at fault for the conflict, he had made significant improvement in his relationship with plaintiff, while plaintiff had not similarly improved.

Plaintiff testified that she found it impossible to coparent the child with defendant. Plaintiff believed she bore "a small responsibility" for the dysfunctional relationship with defendant, explaining that she tried to focus on the child in her communications with defendant while defendant took any opportunity he could to

insult her. Plaintiff stated that the fewer interactions she had with defendant, the fewer opportunities he would have to be verbally abusive to her. Plaintiff responded affirmatively when asked if she believed she was still being harassed by defendant. Conversely, defendant complimented and gave credit to plaintiff during his testimony. Defendant often accepted responsibility for past decisions and his past improper conduct involving plaintiff. The trial court was in a better position to determine plaintiff's demeanor, and this Court defers to the trial court regarding credibility determinations. *Berger*, 277 Mich App at 705.

Flack opined that defendant had "improved significantly in not discouraging the relationship between" plaintiff and the child. When Flack first met defendant, he was more apt to be demeaning or yell at people in the child's life, but he had not done so recently, at least in front of the child. Flack also testified, "I don't feel like either party does a wonderful job encouraging relationships in both directions. . . . I think that [plaintiff] does a good job at not discouraging the relationship, and I think she does a real good job at reminding him to have a good relationship with his father."

Plaintiff argues that defendant's failure to use court-ordered parenting services showed his disregard for his relationship with plaintiff. While defendant admitted that he was resistant to using Ross rather than someone less expensive, defendant ended up using her services. Defendant did not attend the child's counseling as frequently as plaintiff, but Flack testified that defendant did go when issues arose.

A review of the facts demonstrates that both plaintiff and defendant were responsible for the ongoing conflict between them. Therefore, there is evidence on the record to support the trial court's findings, and the trial

court's finding that neither party should be credited with this factor was not against the great weight of the evidence.

e. MCL 722.23(k)

Plaintiff argues the great weight of the evidence does not support the trial court's finding that the factor of domestic violence favored neither party because the trial court erred by refusing to consider prejudgment evidence. Plaintiff alternatively contends that even if only postjudgment evidence were considered, there was sufficient evidence of domestic violence on defendant's part that this factor should have favored plaintiff.

The trial court noted that it was aware of several previous PPOs and that the court had set aside a PPO against defendant after reviewing a videotape of the incident that gave rise to it, finding that it had no basis. Whether the alleged incidents of domestic violence that plaintiff alleges occurred constitutes a credibility determination, and this Court defers to the trial court on such matters. *Berger*, 277 Mich App at 705. Therefore, the trial court's finding that the record did not support plaintiff's claims of domestic violence was not against the great weight of the evidence.

IV. MODIFICATION OF PARENTING TIME

Plaintiff argues that the trial court erred when it revisited the best-interest factors because defendant did not prove that there was proper cause or change of circumstances to do so. Defendant counters that there was no change in custody, only a change in parenting time, which was necessitated by plaintiff's unilateral action of moving to the Traverse City area and renting an apartment in the Grand Blanc area because these

actions precluded plaintiff from being able to fulfill her midweek parenting-time requirements.

Modifications in parenting time are not necessarily changes in custody. See *Shade v Wright*, 291 Mich App 17, 25; 805 NW2d 1 (2010). Changes in parenting time are distinct from changes in custody, and only if a "change in parenting time results in a change in the established custodial environment" should the court apply the "proper cause and change of circumstances" framework to a proposed change in parenting time. *Id* at 27. "When a modification in parenting time would amount to a change of the established custodial environment, it should not be granted unless the circuit court 'is persuaded by clear and convincing evidence that the change would be in the best interest of the child.' " *Pierron v Pierron (Pierron I)*, 282 Mich App 222, 249; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010), quoting *Brown*, 260 Mich App at 595. "If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Pierron v Pierron (Pierron II)*, 486 Mich 81, 86; 782 NW2d 480 (2010). When a parenting-time modification does not change the established custodial environment, "a more expansive definition of 'proper cause' or 'change in circumstances' is appropriate . . . ." *Shade*, 291 Mich App at 28. In order to modify a parenting-time schedule, if the modification would not constitute a change in an established custodial environment, the party proposing the change must show by a preponderance of the evidence that the change is in the child's best interests. *Id*. at 23.

While defendant filed a motion to change custody and requested primary physical custody of the child, the

trial court ordered the parents to continue sharing joint physical custody and ordered a new parenting-time schedule: alternating weeks and a midweek dinner with the child and the nonresidential parent. The previous parenting-time schedule essentially was: (1) every other weekend, from Friday afternoon to Monday morning, for plaintiff and defendant, (2) Wednesday overnights for defendant, (3) Tuesday overnights, every other Tuesday following plaintiff's parenting time weekends, for defendant, and (4) the remaining time with plaintiff. Under the previous parenting-time schedule, plaintiff and defendant divided or alternated holidays and school breaks and were each given two weeks of vacation parenting time. The trial court estimated that the previous parenting-time schedule provided plaintiff with approximately 209 overnights and defendant with approximately 156 overnights.

Under the new parenting-time schedule, plaintiff and defendant each have roughly 182 overnights. This reduces plaintiff's parenting time by 27 overnights, which gives plaintiff about 2.25 fewer overnights a month. This change was not likely to "change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort" and, therefore, does not rise to the level of a change in custody. *Pierron II*, 486 Mich at 86.

While plaintiff is correct that the trial court did not explicitly state a proper cause or change in circumstances to justify the change, the trial court's analysis of the best-interest factors demonstrates that the trial court based the decision to modify the parenting-time schedule on plaintiff's testimony that (1) she sold her home, (2) she was engaged to a man who was moving to Traverse City, and (3) if her motion to change domicile were denied, she would rent an apartment in Grand

Blanc and commute between Traverse City and Grand Blanc. Accordingly, the trial court's failure to explicitly state the change in circumstances justifying review of the best-interest factors was not a clear legal error.

Because of the more than 200-mile distance between Traverse City and Grand Blanc, plaintiff's new commuting lifestyle constituted proper cause or a change in circumstances that was sufficient to justify the trial court's modification of parenting time. *Shade*, 291 Mich App at 29-30. While plaintiff contends that because she testified that she would not move to Traverse City without her child, there was no proper cause or change in circumstances to revisit the custody order, plaintiff also testified that if the trial court denied her motion for a change in domicile, the child would commute with her to Traverse City for her parenting-time weekends and holidays. Both plaintiff and defendant testified at length regarding the difficulties that arose from the child's shifting back and forth between plaintiff's and defendant's homes so frequently. Given that the child would no longer be shifting between just two homes, but now three homes, this change constituted a sufficient proper cause or change in circumstances to justify the parenting-time modifications that reduced the number of transfers of the child. Accordingly, the trial court did not err because its modification of parenting time was justified by a change in circumstances.

Affirmed.

BORRELLO, P.J., and MURRAY, J., concurred with K. F. KELLY, J.

PEOPLE v McDADE

Docket No. 307597. Submitted June 4, 2013, at Grand Rapids. Decided June 18, 2013, at 9:00 a.m.

Dallas A. McDade, Jr., was convicted by a jury in the Kalamazoo Circuit Court, Alexander C. Lipsey, J., of first-degree murder, three counts of possession of a firearm during the commission of a felony, two counts of assault with intent to commit murder, and carrying a concealed weapon. He was sentenced to life imprisonment without the possibility of parole for the first-degree murder conviction, life imprisonment for each of the two assault convictions, $2^1/_2$ to 5 years in prison for the concealed weapon conviction, and 2-year prison terms for the felony-firearm convictions. Defendant appealed.

The Court of Appeals *held*:

1. The evidence was sufficient to establish a foundation under MRE 901 to admit in evidence three notes that were written in the jail and passed between Marlen Stafford, an alleged witness to defendant's crimes, and another inmate, Shondell Kellumn. A guard testified that he passed the notes between Stafford and Kellumn and a police detective testified that Kellumn had indicated to him that he had passed the notes to and from defendant and that defendant actually wrote the second note. Both Stafford and Kellumn refused to testify at trial. The requirement of authentication or identification as a condition precedent to admissibility was satisfied by evidence sufficient to support a finding that the matter in question was what its proponent claimed. MRE 901(a).

2. The two notes written by Stafford were admissible because they were not offered into evidence to prove the truth of the matter asserted. If they constituted hearsay, they were admissible under the hearsay exception for statement's concerning a declarant's then existing state of mind, MRE 803(3), shedding light on Stafford's intent, plan, and design relative to testifying. The third note was admissible as an admission by a party opponent, MRE 801(d)(2), given the evidence that defendant actually

wrote the note. In addition, the note was not offered to prove the truth of the matter asserted. MRE 801(c). There was no hearsay violation.

3. The note that was passed to Stafford reflected an effort specifically designed to prevent Stafford from testifying; there was an intent to make Stafford unavailable as a witness. No violation of defendant's right to confrontation occurred as a result of the admission of the notes or a recording of Stafford's interviews with the police. If error occurred in this regard, it was harmless.

4. Defendant failed to show the necessary nexus between the facts of this case and the alleged need for a handwriting expert. The trial court did not err by denying defendant's request for appointment of the expert.

5. The composition of the photographic lineup presented to various witnesses was not impermissibly suggestive to the extent that it would have given rise to a substantial likelihood of misidentification. None of the circumstances surrounding the identifications made the identifications suggestive or otherwise improper. In addition, there existed an independent basis for the witnesses to identify defendant in court since the witnesses had experienced a long period in which to observe defendant during the criminal episode and periods of their interaction.

6. Defendant, who was 17 when the homicide was committed, had been sentenced, had filed a claim of appeal, and had submitted an appellate brief before *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *People v Carp*, 298 Mich App 472 (2012), were decided. The holding in *Miller* is therefore applicable in this case under the holding in *Carp*. Pursuant to *Carp*, when sentencing an individual below 18 years of age for a homicide offense, the sentencing court must, at the time of sentencing, evaluate and review those characteristics of youth and the circumstances of the offense as delineated in *Miller* and *Carp* in determining whether, following the imposition of a life sentence, the juvenile is to be deemed eligible or not eligible for parole. Defendant's sentence for the first-degree murder conviction is vacated and the matter is remanded for resentencing consistent with *Miller* and *Carp*.

Convictions affirmed, sentences affirmed in part and vacated in part, and remanded for resentencing.

1. CRIMINAL LAW — EVIDENCE — EXPERT WITNESSES — INDIGENT DEFENDANTS.

A trial court's decisions whether a handwritten note has been properly authenticated for admission into evidence or to grant an

indigent defendant's motion for the appointment of an expert witness are reviewed for an abuse of discretion.

2. EVIDENCE — DETERMINING ADMISSIBILITY.

A trial court, in determining whether the evidence proffered for admission at trial is admissible, may consider any unprivileged evidence regardless of that evidence's admissibility at trial.

3. EVIDENCE — HEARSAY — UNAVAILABILITY OF DECLARANT CAUSED BY PARTY.

A court may, if a declarant is unavailable, admit a statement of the declarant 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; a defendant forfeits his or her constitutional right of confrontation if a witness's absence results from wrongdoing procured by the defendant; the forfeiture rule applies only when the defendant, or an intermediary, engaged in conduct specifically designed to prevent a witness from testifying and there must be an intent to make the witness unavailable (MRE 804[b][6]).

4. EVIDENCE — PHOTOGRAPHIC LINEUPS — SUGGESTIVENESS.

A photographic identification procedure or lineup violates due process guarantees when it is so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.

5. HOMICIDE — SENTENCES — PERSONS UNDER EIGHTEEN — PAROLE.

A sentencing court must consider characteristics associated with youth and the circumstances of the offense, as identified in *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407(2012), when determining whether to sentence a person who was under the age of 18 at the time of their homicide offense to life in prison with or without the eligibility for parole.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jeffrey R. Fink*, Prosecuting Attorney, and *Cheri L. Bruinsma*, Assistant Prosecuting Attorney, for the people.

Donald L. Sappanos for defendant.

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

MURPHY, C.J. Defendant appeals as of right his convictions by a jury of first-degree murder, MCL 750.316, three counts of possession of a firearm during the commission of a felony, MCL 750.227b, two counts of assault with intent to commit murder, MCL 750.83, and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to mandatory life imprisonment absent the possibility of parole for the first-degree murder conviction, life imprisonment for each of the two assault convictions, 2 1/2 to 5 years' imprisonment for the concealed weapon conviction, and 2-year prison terms for the felony-firearm convictions. We affirm defendant's convictions and all his sentences, except for the mandatory life sentence for the murder conviction. Pursuant to *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012), and given that defendant was 17 years old at the time of the murder, we vacate the murder sentence and remand for resentencing consistent with the directives in *Miller* and *Carp*.

On July 14, 2010, James Warren went to a store in Kalamazoo where he spoke to defendant about acquiring some marijuana for resale in a profit-sharing arrangement. There was no drug transaction at the store, and instead defendant and Warren proceeded by bicycle to a home on Washington Avenue. Warren knew Lenell Ewell, who was often at the house. Ewell was friends with Carlton Freeman, and Freeman resided in one of the units in the subdivided house. Freeman, Ewell, and a mutual friend, Erick Jenkins, were at the home when defendant and Warren arrived at about 5:30 p.m. According to Warren, defendant gave him some marijuana to sell and a small amount of cash to make change when Warren sold the marijuana, and Warren rode away on defendant's bicycle, while defendant remained at the

house to await Warren's return.[1] Ewell had indicated that defendant could remain at the location while awaiting Warren's return, which ultimately never did transpire.

Freeman, Jenkins, Ewell, and defendant went into the backyard of the Washington Avenue home after Warren left the premises. Ewell and Jenkins were drinking beer, Freeman was not. Time passed absent Warren's return, and defendant eventually spoke to someone on his cellular telephone. Defendant appeared to become frustrated and started making accusatory statements concerning the other three men. They, however, expressed befuddlement and denied involvement in a scam against defendant. Freeman testified that defendant rejected their denials and remained angry at them. Defendant subsequently walked around to the front of the house where another individual, Marlen Stafford, was waiting. Freeman, Jenkins, and Ewell followed defendant around the house and stepped onto the home's porch, while defendant continued walking to the sidewalk where Stafford was standing. At some point, defendant told the group on the porch that "[h]e wasn't leaving till he got his stuff back." According to Freeman, defendant then took out a revolver and stated that "[s]omebody . . . was gonna die[.]" Freeman and Jenkins ran into the backyard and defendant began shooting. Freeman escaped, Jenkins did not. Ewell remained on the porch. He testified that he did not even realize that he had been shot until he heard someone say, "You got shot—."

---

[1] Ewell testified, however, that defendant gave Warren some money to go purchase marijuana for defendant. Freeman testified that he did not know why defendant waited at the house after Warren's departure. With respect to Warren's version of the events, it is unclear where defendant obtained the marijuana that he purportedly gave to Warren for resale.

Officer Brian Cake was the first officer to respond to the shooting at the home. Cake asked Ewell if the bullet came from a vehicle, and Ewell responded affirmatively. Jenkins was found in the backyard with a single bullet wound to the back. He was pronounced dead shortly thereafter. Officer Joshua Breese spoke with Ewell for about 10 minutes at the hospital on the day of the shooting, and the officer thereafter indicated that Ewell gave him multiple stories about what had happened that day. Detective Harold West also went to see Ewell at the hospital, and the detective described him as being very irritable, still intoxicated, oscillating in emotional intensity, and repeatedly asserting that he did not want treatment and wished to leave. Later in the evening, West showed Ewell a photographic lineup, which included an individual named James Turner, but not defendant. Ewell did not take much time studying the photographs, pointed to Turner's image, and said that he was the shooter.

At some point in the evening of July 14, 2010, Officer Fidel Mireles transported Freeman to the police station to be interviewed. Mireles indicated that Freeman told him that "James" was one of the shooters. Detective Kristin Cole interviewed Freeman later that night and understood Freeman to have meant that "James," meaning James Warren, was merely involved with the shooting. Detective West again met and spoke with Ewell on July 16, 2010. As West entered the room, Ewell, without prompting, blurted out that he, in the prior interview, had mistakenly identified the wrong person. West showed Ewell a different photographic lineup, which included defendant. West observed Ewell "go over all the photographs, looking at each one . . . very, very carefully." Ewell then placed his hand on defendant's photograph and stated, "I got a funny feeling. I don't know why I'm getting this strange

feeling," followed by, "[t]his him. This the guy right there." Afterward, West told Ewell, "good job," but the detective claimed that his remark was merely an interpersonal nicety, not an affirmation of Ewell's identification of defendant. At trial, Ewell again identified defendant as the shooter and claimed that his initial misidentification of Turner was due to fear of reprisal.

On July 19, 2010, Detective Michael Hecht showed Freeman five photographic lineups, which separately included photographs of defendant, Warren, Turner, and Stafford. Freeman identified Warren as the person who originally accompanied defendant to the house, and he identified Stafford as the person who later came to the house and stood next to defendant. Freeman eventually selected defendant as the shooter. Before identifying defendant, Freeman had asked to see additional photographs. With respect to defendant's photograph, Freeman stated, "I want to say it's him" or "[i]t got to be him," among other things. He did not select James Turner. Hecht interviewed Stafford on July 20, 2010, which was Stafford's second interview, and Stafford eventually admitted that he had observed the shooting, identifying defendant as the shooter.

On July 24, 2010, Warren was interviewed by Detective Robert East and was presented a photographic lineup. Warren was not asked to first provide a description of the shooter before reviewing the lineup. Warren told the interviewing detective that he wished to look at a second page of photographs, but there were no other pages available. Detective East admitted that Warren repeated the word "tall" while looking at the lineup, and East acknowledged that because of the composition of the different photographs, defendant's head appeared closer to the top of the picture frame than did the heads of the other persons shown, despite the fact

that defendant was the shortest person in the lineup grouping. At trial, Warren again identified defendant.

Defendant agreed to be interviewed by Detective Hecht on July 27, 2010. He denied involvement with the shooting and claimed to have been at a family barbecue or with a woman. Defendant also provided the police several cellular telephone numbers that he claimed to have used recently. The police, with the assistance of FBI agent Mark Waldvogel, determined that the associated cellular telephone records indicated that one or more of the cellular telephone numbers provided by defendant reflected contacts or communications near Washington Avenue around the time of the shooting.

On October 1, 2010, Detective William Moorian organized a live, corporeal lineup featuring defendant. Warren attended the lineup while drunk and "recognized" a person in the lineup who was not defendant. Ewell and Freeman each viewed the lineup and identified defendant as the shooter.

On October 4, 2010, the day before the preliminary examination was conducted, Ewell contacted Detective Hecht and showed Hecht his cellular telephone, which displayed call logs, including at least one entry from a telephone number belonging to defendant's mother. Ewell had also received a call from a different phone number, with the caller warning Ewell that "[y]ou gonna get yours," and "[y]ou better watch your back."

As of August 8, 2010, an individual named Shondell Kellumn, along with defendant and Stafford, were all being held in the same jail. Defendant and Kellumn were held in the same cellblock, while Stafford was held in a different cellblock in the same wing of the jail. Stafford asked Deputy Bryan McLain to pass a handwritten note to Kellumn on August 8, which McLain photographed. This first note was addressed

to "Dalloc"[2] and stated, "They just came in[,] said if I come to your court day [and] say that you did it they will give me $60,000 to say you did it . . . ." Kellumn later asked McLain to pass a note to Stafford, which McLain also copied. This note read, in part:

> Marlen[:] even if you said something already[,] just don't say nothing when you go to Dallas court date. If you real like you say . . . . when you get on the stan[d,] just say you don't [know] this man and tell them you was just scared because Duck [Turner] said he was [going to] kill you or something . . . . Just play that role . . . .

McLain was then asked by Stafford to pass a final note to Kellumn, which was also photographed. This note provided, "I'm goin to court [and] say that," among other things.

Before trial, defendant requested appointment of an expert witness in handwriting analysis to determine whether one of the notes was written by defendant. The trial court denied the motion. At trial, the trial court admitted the three notes into evidence over defendant's objection, after which Kellumn and Stafford were called to the stand, refused to testify, and were then found "unavailable" for purposes of MRE 804 (hearsay exceptions for unavailable declarants). The prosecutor proceeded to move, under MRE 804(b)(6), for the admission of a videotaped recording of Stafford's police interviews, wherein Stafford acknowledged witnessing the shooting and identified defendant as the shooter. In a brief evidentiary hearing outside the presence of the jury, Detective Hecht testified that he spoke with Kellumn, who admitted passing the notes from Stafford to defendant and who further indicated that defendant actually wrote the note that was passed to Stafford.

[2] Defendant's first name is "Dallas."

Hecht also stated that the letters were written in "code" to make them sound as if they were written by another person. The trial court admitted Stafford's videotaped interviews, and defendant was ultimately found guilty on all counts.

On appeal, defendant first argues that the three jailhouse notes constituted inadmissible, unauthenticated hearsay, that the admission of Stafford's recorded interviews violated defendant's right of confrontation, and that the trial court erred by refusing to appoint a handwriting expert. We disagree. While a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, a preliminary or underlying issue of law regarding the admissibility of the evidence, such as whether a rule of evidence bars admission, is reviewed de novo. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id*. " 'The decision whether a letter has been properly authenticated for admission into evidence is a matter within the sound discretion of the trial court.' " *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004) (citation omitted). Likewise, "[t]his 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.

We shall first address the authentication argument. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). An example of authentication or identification that conforms to the requirements of MRE 901(a) is "[t]estimony that a matter is what it is claimed to

be." MRE 901(b)(1). "It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility." *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). Further, "a trial court may consider *any* evidence regardless of that evidence's admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible." *People v Barrett*, 480 Mich 125, 134; 747 NW2d 797 (2008). Here, Deputy McLain testified that he passed the notes at issue between Stafford and Kellumn, while Detective Hecht testified that Kellumn had indicated that he passed the notes to and from defendant and that defendant actually wrote the second note. This was sufficient to establish a foundation under MRE 901 for purposes of all three letters. *People v Roby*, 145 Mich App 138, 141; 377 NW2d 366 (1985).

We next address the hearsay argument in relationship to the three notes. Hearsay evidence is inadmissible unless it fits within an exception to the hearsay rule. MRE 802; *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). The two notes from Stafford were admissible because they were not offered into evidence "to prove the truth of the matter[s] asserted," MRE 801(c), and, assuming the notes constituted hearsay, they would qualify under the exception for statements concerning a declarant's then existing state of mind, MRE 803(3), shedding light on Stafford's intent, plan, and design relative to testifying. In regard to the other note, given the evidence that defendant actually penned the note, it was admissible as an admission by a party opponent, MRE 801(d)(2), and, moreover, the note was not offered to prove the truth of the matter asserted, MRE 801(c). The hearsay argument is unavailing.

With respect to the Confrontation Clause argument and the playing of Stafford's recorded interviews, we begin by observing the connection between our rules of evidence and the Confrontation Clause analysis. "Controversies over the admission of hearsay statements may also implicate the Confrontation Clause, US Const, Am VI, which guarantees a criminal defendant the right to confront the witnesses against him or her." *People v Dendel (On Second Remand)*, 289 Mich App 445, 452-453; 797 NW2d 645 (2010). Under MRE 804(b)(6), if a declarant is unavailable, a court may admit a "statement 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." MRE 804(b)(6) is "a codification of the common-law equitable doctrine of forfeiture by wrongdoing," and "[u]nder the doctrine, a defendant forfeits his or her constitutional right of confrontation if a witness's absence results from wrongdoing procured by the defendant[.]" *People v Jones*, 270 Mich App 208, 212; 714 NW2d 362 (2006) (citations omitted). In *Giles v California*, 554 US 353; 128 S Ct 2678; 171 L Ed 2d 488 (2008), the United States Supreme Court directly addressed the theory of "forfeiture by wrongdoing" for purposes of the Confrontation Clause. The Court held that the forfeiture rule applies only when the defendant, or an intermediary, engaged in conduct specifically designed to prevent a witness from testifying; there must be an intent to make a witness unavailable. *Id*. at 359-361.

Here, the note that was passed to Stafford in jail did reflect an effort specifically designed to prevent Stafford from testifying; there was an intent to make him unavailable. The notes from Stafford arguably might suggest that Stafford, on his own volition, did not intend to testify regardless of the note from

Kellumn/defendant. Nevertheless, the note to Stafford was clearly intended or designed to keep Stafford off the witness stand, and one could reasonably infer that Stafford did not testify because of the note. Indeed, the note, in addition to the language already quoted, had language that could be construed as threatening, although indirectly or implicitly so, because it indicated a desire by the writer to beat to death James Turner, referred to as "Duck," followed immediately by a statement that Stafford should expect the prosecution to put him on the stand against defendant. In sum, we hold that the trial court did not err in its ruling under the Confrontation Clause. Additionally, given the multiple identifications of defendant as the perpetrator, along with the circumstantial evidence, any assumed error was harmless beyond a reasonable doubt. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) ("Harmless error analysis applies to claims concerning Confrontation Clause errors," but the record must be thoroughly examined "in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error.").

We next address defendant's argument that an expert witness on handwriting should have been appointed, because it was contested whether defendant personally authored any of the notes, and since, without proof of direct authorship, the prosecution could not establish that defendant forfeited his confrontation right with respect to Stafford's police interviews. We disagree. In *Jones*, 270 Mich App at 220, the "[d]efendant [took] issue with the fact that the court relied on testimony from [an officer] concerning [a gang member's] threat and the alleged letter from defendant, rather than on direct testimony from [the intimidated witness] or his mother." However, this Court found that

under the circumstances of the case, the lack of direct evidence did not preclude a finding of the defendant's wrongdoing:

> To the extent that the court's finding rested on [the officer]'s credibility, it was a matter for the trial court to decide. . . . [T]he trial court could infer from the evidence before it that defendant had a role in intimidating or issuing the death threat to silence [the intimidated witness] . . . . [*Id*. at 220-221.]

Here, even if expert testimony in this case established that defendant did not put pen to paper, the trial court could still have reasonably found the testimony of Hecht and McLain sufficiently credible to infer that defendant had a role in encouraging Kellumn to write the note to Stafford. Defendant cannot show the necessary nexus between the facts of this case and the need for an expert. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995) (no error in denying appointment where expert testimony unlikely to benefit the defendant).

Next, defendant argues that the trial court improperly admitted evidence of various witnesses' identifications of defendant that were based on an unduly suggestive photographic lineup and that were communicated to the police under unduly suggestive circumstances. We disagree. A trial court's determination in a suppression hearing regarding the admission of identification evidence will generally not be reversed unless clearly erroneous. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Issues of law relevant to a motion to suppress are reviewed de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Barclay*, 208 Mich App at 675.

A photographic identification procedure or lineup violates due process guarantees when it is so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). In *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993), our Supreme Court stated:

> Like a photographic lineup, the suggestiveness of a corporeal lineup must be examined in light of the totality of the circumstances. As a general rule, "physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness . . . ." Differences among participants in a lineup
>
> "are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up. . . . It is then that there exists a substantial likelihood that the differences among line-up participants, rather than recognition of defendant, was the basis of the witness' identification."
>
> Thus, in *People v Holmes*, 132 Mich App 730, 746; 349 NW2d 230 (1984), where the defendant was the second tallest participant in the lineup and heavier than others, the lineup was not impermissibly suggestive because the defendant's appearance was substantially similar to that of the other participants. In *People v Horton*, 98 Mich App 62, 67-68; 296 NW2d 184 (1980), the lineup was not impermissibly suggestive despite alleged age and height differences between the defendant and the other participants and despite the fact that the defendant was the only participant with a visibly scarred face. A lineup in which the defendant was the only participant with both a mustache and a goatee was found to be not impermissibly suggestive in *People v Hughes*, 24 Mich App 223; 180 NW2d 66 (1970). [Citations omitted; other omissions in original.]

In *People v Dean*, 103 Mich App 1, 10; 302 NW2d 317 (1981), this Court observed "that the mere fact that defendant's photograph was taken from a vertical angle

was [not] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Here, defendant lists a number of differences between defendant and the other individuals included in the photographic array, which defendant claims merits suppression and reversal: the initial array had defendant's picture cropped so that the top of his head appeared closer to the top of the picture frame than did the heads of the other individuals, which was troublesome given that the shooter was described as "tall"; defendant's picture was placed between those of two young men with broader shoulders; three of the individuals had a somewhat darker skin tone; two individuals were wearing an earring; and only three of the individuals had more elongated heads. However, with the exception of the "height" argument, defendant fails to explain how these differences would result in a substantial likelihood of misidentification, as opposed to merely constituting "noticeable" differences. See *Holmes*, 132 Mich App at 746. If one were to accept defendant's complaints about the slight physical differences or variations, it would make it nearly impossible for the police to compose a lineup, forcing authorities to search for "twin-like" individuals to match against a defendant. With regard to the arguments concerning height and defendant's image being cropped too high, there was testimony that Warren, and only Warren, referred to the person from whom he had acquired the marijuana as being relatively "tall." We fail to see how this insignificant discrepancy would justify a conclusion that the photographic array was impermissibly suggestive. We hold that the composition of the photographic lineup was not impermissibly suggestive to the extent that it would have given rise to a substantial likelihood of misidentification. Further, in regard to defendant's

assertion that the circumstances surrounding the identifications were unduly suggestive, we hold that none of the complained-about circumstances rendered the identifications impermissibly suggestive or otherwise improper. Moreover, given the long period for observation of defendant by the witnesses during the criminal episode and periods of interaction, there existed an independent basis to identify defendant in court. *Gray*, 457 Mich at 114-116. Reversal is unwarranted.

Finally, we raise sua sponte a sentencing issue under our authority to "enter any judgment or order or [to] grant further or different relief as the case may require[.]" MCR 7.216(A)(7). In *Miller*, 567 US at ___; 132 S Ct at 2460, the United States Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " A court's ability to sentence a defendant to life imprisonment absent the possibility of parole for a crime committed as a juvenile is not foreclosed; however, the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 2469. In *Carp*, 298 Mich App at 537-538, this Court, examining *Miller*, held:

> The United States Supreme Court has, through a series of recent decisions culminating in *Miller*, indicated that juveniles are subject to different treatment than adults for purposes of sentencing under the Eighth Amendment. Specifically, we hold that in Michigan a sentencing court must consider, at the time of sentencing, characteristics associated with youth as identified in *Miller* when determining whether to sentence a juvenile convicted of a homicide offense to life in prison with or without the eligibility for parole. . . .

> While *Miller* is applicable to those cases currently pending or on direct review, we find that in accordance with *Teague* [*v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989),] and Michigan law that it (1) is not to be applied retroactively to cases on collateral review, such as Carp's, because the decision is procedural and not substantive in nature, and (2) does not comprise a watershed ruling. . . .
>
> In the interim, as guidance for our trial courts for those cases currently in process or on remand following direct appellate review, we find that MCL 791.234(6)(a) [prisoner sentenced to life for first-degree murder is not eligible for parole] is unconstitutional as currently written and applied to juvenile homicide offenders. When sentencing a juvenile, defined now as an individual below 18 years of age for a homicide offense, the sentencing court must, at the time of sentencing, evaluate and review those characteristics of youth and the circumstances of the offense as delineated in *Miller* and this opinion in determining whether following the imposition of a life sentence the juvenile is to be deemed eligible or not eligible for parole. We further hold that the Parole Board must respect the sentencing court's decision by also providing a meaningful determination and review when parole eligibility arises.

Here, the record reflects that defendant was born on November 6, 1992, that the homicide was committed on July 14, 2010, making defendant 17 years old at the time, that defendant was sentenced to mandatory life for the first-degree murder conviction on November 21, 2011, that a claim of appeal was filed by defendant on December 8, 2011, and that defendant's appellate brief, which did not raise any sentencing issues, was filed with this Court on June 14, 2012. *Miller* was issued by the United States Supreme Court on June 25, 2012, and *Carp* was issued by this Court on November 15, 2012. Accordingly, defendant had been sentenced, had filed a claim of appeal, and had submitted his appellate brief all before *Miller* and *Carp* were decided. Because the case was at the stage of direct appellate review in this

Court when *Miller* and *Carp* were decided, *Miller* is applicable under the holding in *Carp*. In that procedural posture, our application of *Miller* does not constitute a collateral attack on the sentence, as opposed to the circumstances in *Carp*, where appellate review by this Court and our Supreme Court had been conducted and completed and the *Miller* argument was subsequently entertained in a motion for relief from judgment. Given the dictates of *Miller* and *Carp* and the Eighth Amendment implications, along with the procedural and factual aspects of the case at bar, we remand for resentencing in regard to the first-degree murder conviction in a manner consistent with *Miller* and *Carp*.

Affirmed in all respects, except that we vacate the sentence for first-degree murder and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

FITZGERALD and HOEKSTRA, JJ., concurred with MURPHY, C.J.

YOST v FALKER

Docket No. 306774. Submitted February 7, 2013, at Detroit. Decided June 18, 2013, at 9:05 a.m. Leave to appeal sought.

Stacy A. Yost brought a third-party no-fault action in the Macomb Circuit Court against Howard R. Falker, alleging that a scar adjacent to her eye resulting from the automobile accident constituted a permanent, serious disfigurement. The jury concluded that it did not, and the court, John C. Foster, J., entered a judgment for defendant. Plaintiff moved for a new trial, asserting that during trial defense counsel had engaged in repeated misconduct that deprived her of a fair trial. The court denied the motion, and plaintiff appealed.

The Court of Appeals *held*:

During trial, defense counsel made several improper arguments and inquiries about plaintiff's decision to seek counsel and her decision to file suit. In his opening statement, defense counsel argued that the jury should reject plaintiff's claim because she filed her lawsuit less than one month after the accident. Questions that formed the bulk of his cross-examination of witnesses were clearly intended to improperly suggest that prompt consultation with counsel after an automobile accident was somehow improper and that the jury should find for defendant to deter the filing of lawsuits. In closing argument, defense counsel told the jury that it should reject plaintiff's claim because too many people are seeing lawyers and filing too many lawsuits and claimed that the suit and the amount of compensation sought was prompted by the greed of plaintiff's counsel. When an attorney's misconduct at trial is intended to prejudice the jury and divert the jurors' attention from the merits of the case, the burden is on the party who engaged in the misconduct to demonstrate that the misconduct did not have that effect and that retrial is not warranted. Typically, what effect any particular statement had on a jury cannot be demonstrated, so the party against whom the misconduct was directed is not required to demonstrate affirmatively that the statements had a prejudicial effect. It is clear that defense counsel sought to prejudice the jury. Defendant, however, was able to demonstrate affirmatively that his counsel's statements, though intended to preju-

dice the jury, did not have that effect. During deliberations, the jury sent a note to the trial court asking whether the jury could still compensate plaintiff if it concluded that she had not suffered a permanent, serious disfigurement. In the context of the entire record, this question made it clear that the jury did not conclude that plaintiff was unworthy of compensation or that it should deny compensation to discourage lawsuits. In light of this inquiry, it appears that the jurors concluded on the basis of the actual evidence, including their own view of plaintiff's scar throughout the trial, that the scar did not constitute a permanent, serious disfigurement. In the absence of the jury's written question that constituted compelling evidence of a lack of prejudice, however, reversal and a new trial would have been required for defense counsel's improper comments.

Affirmed.

TRIAL — ATTORNEYS — MISCONDUCT — PREJUDICIAL EFFECT ON JURY.

When an attorney's misconduct at trial is intended to prejudice the jury and divert the jurors' attention from the merits of the case, the burden is on the party who engaged in the misconduct to demonstrate affirmatively that the misconduct did not have that effect and that retrial is not required; the party against whom the misconduct was directed need not demonstrate affirmatively that the statements had a prejudicial effect.

Patrick A. Rooney and *Richard E. Shaw* for plaintiff.

Caravas & Manikas (by *Gary W. Caravas*) for defendant.

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM. In this third-party automobile negligence case, the jury concluded that plaintiff's scar adjacent to her eye did not rise to the level of a permanent, serious disfigurement, and so judgment for defendant was entered. Plaintiff moved for a new trial, asserting that during trial defense counsel engaged in repeated misconduct that deprived plaintiff of a fair trial. We agree that defense counsel engaged in miscon-

duct intended to divert the jury from the merits of the case. We affirm, however, because a note sent by the jury to the court during deliberations unequivocally demonstrated that these efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim.

During trial, defense counsel made several improper arguments and inquiries about plaintiff's decision to seek counsel and the decision to file suit. In his opening statement, defense counsel argued that plaintiff's claim should be rejected because her lawsuit was filed less than one month after the accident. He stated: "On October 26, '09, she starts a lawsuit. What? Twenty-four days after this accident she's already filing a lawsuit . . . ."

This theme was continued during proofs. The first witness called by the plaintiff was her husband. At the outset of cross-examination, defense counsel asked a series of questions concerning when the plaintiff first consulted an attorney, whether her husband attended the first meeting with the attorney, whether the attorney came to their home, how many times they met with the attorney, and the date the complaint was filed in relation to the accident. These questions, which made up the bulk of the entire cross-examination, were clearly intended to improperly suggest, like defendant's opening statement, that prompt consultation with counsel after an automobile accident was somehow improper and that the jury should find for defendant to deter the filing of lawsuits.

Defense counsel's cross-examination of plaintiff similarly focused on the timing of her consultation with and retention of counsel. Plaintiff was asked when she first consulted an attorney, how she selected the attorney, whether her husband was with her when she first met

with the attorney, why her attorney filed suit, and to confirm the date the lawsuit was filed in relation to those meetings.

This strategy reached its culmination after the parties rested. In closing argument, defense counsel told the jury that plaintiff's claim should be rejected because too many people are seeing lawyers and filing too many lawsuits:

> Two weeks [after the crash] and she's in the lawyer's office. And you say to yourself . . . two weeks with a scar like that to be going in to file a lawsuit.
>
> * * *
>
> In steps the lawyer. I can sue. . . . I'm going to sue. And he wastes no time. He drafts it --- we know that at least by 10-23 [2009] he drafts it, and it's filed with the court on the 26th. . . .
>
> * * *
>
> . . . And w*e've seen a lot of that in TV commercials, and every time you turn around, I'll sue, I'll sue.* [Emphasis added].

Defendant's attorney repeated this assertion again later in his closing argument and went so far as to claim that the suit and the amount of compensation sought was prompted by plaintiff's counsel's greed "[b]ecause after all is said and done, [plaintiff's counsel] [does] well on it. If he does well, he does well for the case."

It is well settled that the cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought "to prejudice the jury and divert the jurors' attention from the merits of the case." *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354; 273 NW2d 75 (1978); see also *Badalamenti v William*

Beaumont Hosp-Troy, 237 Mich App 278, 289; 602 NW2d 854 (1999); *Reetz v Kinsman Marine Transit Co*, 416 Mich 97; 330 NW2d 638 (1982); *Shemman v American Steamship Co*, 89 Mich App 656, 666; 280 NW2d 852 (1979); *Wayne Co Bd of Rd Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 138; 229 NW2d 797 (1975) (" '[O]ne cannot read the record without being impressed' that [counsel] refused to proceed solely on the merits.") (citation omitted). After a review of the entire record, we conclude that defense counsel did seek "to prejudice the jury and divert the jurors' attention from the merits of the case." *Kern*, 404 Mich at 354.

Typically, "[i]t cannot be demonstrated what effect any particular statement has on a jury," and for this reason the nonoffending party is not required to "demonstrate affirmatively" that the statements had a prejudicial effect. *GLS LeasCo*, 394 Mich at 139. However, this case is unusual in that defendant is able to affirmatively demonstrate that the statements, though intended to prejudice the jury, did *not* have that effect. During deliberations, the jury sent a note to the trial court asking, "If we, as a jury, choose no for question number one [whether plaintiff suffered a permanent, serious disfigurement], can we still compensate her?" Reviewing this question in the context of the entire record makes it clear that the jury did not conclude that plaintiff was unworthy of compensation or that it should deny compensation to discourage lawsuits. In light of the jury's inquiry, we are fully convinced that the jurors concluded on the basis of the actual evidence, including their own view of plaintiff's scar throughout the trial, that plaintiff's scar did not constitute a permanent, serious disfigurement.

Defense counsel's comments were improper. In the absence of the jury's written question that constituted

compelling evidence of a lack of prejudice, reversal and a new trial would have been required. However, given the jury's inquiry, we affirm.

SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ., concurred.

PIONEER STATE MUTUAL INSURANCE COMPANY v DELLS

Docket No. 310986. Submitted June 4, 2013, at Grand Rapids. Decided June 18, 2013, at 9:10 a.m.

Toni L. Hall was killed when a trailer towed by a van driven by Thomas E. Dells separated from the van and crashed into Hall's vehicle. At the time of the accident, Dells and his vehicles were covered by a motor vehicle insurance policy issued by Auto-Owners Insurance Company that had a liability limit of $100,000. Pioneer State Mutual Insurance Company insured Dells under a homeowner's insurance policy at the time of the accident. That policy had a limit of $500,000 in regard to liability for bodily injuries and contained a liability exclusion for bodily injuries arising out of the use of a motor vehicle or a trailer. An exception existed to the trailer exclusion for a trailer that was not towed by a motor vehicle. In a prior separate action, Tiffany Drye and Stephanie Helder (the personal representatives of Hall's estate) sued Dells for wrongful death. A tentative settlement agreement was reached by which the wrongful-death action would be dismissed without prejudice, a judgment of $600,000 would be entered against Dells, the first $100,000 of the judgment would be satisfied by the proceeds of the Auto-Owners policy, the estate would seek the $500,000 balance from Pioneer under Dells's homeowner's policy, and if it was determined that there was no coverage under the homeowner's policy, the estate would dismiss the action with prejudice. In the instant case, Pioneer filed a declaratory judgment action in the Kent Circuit Court against Dells, Drye, and Helder, alleging that Auto-Owners had tendered its policy limits to the estate, that the estate had made a claim against Pioneer for additional sums under the homeowner's policy, and that with respect to any liability that might be imposed against Dells, there was no coverage available under the Pioneer policy given its exclusion for bodily injuries arising out of the use of a motor vehicle. Drye and Helder counterclaimed, alleging that Dells had refused to execute the settlement agreement because of Pioneer's warning that execution would jeopardize Dells's coverage under the homeowner's policy. They alleged various causes of action, including a claim for declaratory relief. Drye and Helder subsequently moved for summary disposition on Pioneer's de-

claratory judgment action and their counterclaim, arguing that Hall's death arose out of the use of a trailer that was no longer being towed at the point of impact and that the trailer exclusion therefore did not apply in light of the exception. Pioneer also moved for summary disposition, arguing that Drye and Helder had failed to state a claim on which relief could be granted with regard to the counterclaim and that there was no genuine issue of material fact that the coverage exclusion applied because the trailer that struck Hall was set in motion while in the process of being towed by Dells's van. The court, Christopher P. Yates, J., granted Pioneer summary disposition with respect to the entire counterclaim except to the extent that the Drye and Helder had sought a declaratory judgment that the homeowner's policy provided coverage. The court granted Pioneer summary disposition on its declaratory judgment claim, holding that the exclusion barred coverage for Hall's injuries. The court concluded that the exclusion was intended to apply where a trailer had been in tow when it became detached and then caused bodily injuries and that the exception to the exclusion was intended to only address those circumstances in which a trailer was stationary, in dead storage, or otherwise not in the process of being towed. The court entered judgment for Pioneer. Drye and Helder appealed only the ruling on Pioneer's declaratory judgment action.

The Court of Appeals *held*:

1. The trial court did not err by granting summary disposition in Pioneer's favor with respect to declaratory relief. Dells generally had personal liability coverage under his homeowner's policy, and Halls's bodily injuries were caused by an "occurrence" as defined in the policy. Under the exclusions in the homeowner's policy, Dells's personal liability coverage did not apply to bodily injuries arising out of the use of any motor vehicle or any motorized land conveyance, including a trailer. Although an exception to this exclusion existed for a trailer not towed by or carried on a motorized land conveyance, it was unnecessary to reach this exception in order to resolve the appeal. While it was accurate to state that Hall's death arose out of the use of a trailer, it was equally accurate to state that her death arose out of the use of a motor vehicle, that is, Dells's van, whether the use was driving the van with the trailer in tow or the act of connecting the van to the trailer in the first place. Absent the use of the van to connect to and tow the trailer, there would have been no bodily injuries. The only reason that the trailer struck Hall's vehicle and caused her death was that it separated from Dells's van while in the process of being towed by the van. The van's use played an indispensable

and integral role in Hall's bodily injuries. While the trailer itself directly struck Hall, it was the use of the trailer in unison with the use and operation of the van that gave rise to Hall's death and the policy's various exceptions to the motor vehicle exclusion did not apply.

2. Even if it had been necessary to address the exception for a trailer that was not towed, Hall's death nonetheless arose out of the use of a towed trailer because if the trailer had not been in tow, there would have been no accident and no injuries. The act of towing the trailer was a necessary ingredient in producing the accident because the act had a direct causal connection to the accident, setting in motion a series of events that eventually resulted in bodily injuries. The policy's language effectively provided that the personal liability coverage did not apply with respect to bodily injuries arising out of the use of a trailer being towed. It did not provide that bodily injuries arising out of the use of a trailer was covered if the trailer was not being towed at or immediately before the time of impact between the trailer and a person or vehicle. Hall's death arose out of the use of a towed trailer. The language in the exception was intended to address the type of situation in which a trailer is sitting in a person's driveway and manages to cause injury to someone because of the alleged underlying negligence of its owner.

Affirmed.

Jonathon Shove Damon for Pioneer State Mutual Insurance Company.

Varnum LLP (by *Mark S. Allard*) for Tiffany Drye and Stephanie Helder.

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

MURPHY, C.J. Defendants Tiffany Drye and Stephanie Helder, copersonal representatives of the estate of Toni L. Hall (hereafter collectively referred to as "the estate"), appeal as of right the trial court's order granting summary disposition in favor of plaintiff, Pioneer State Mutual Insurance Company. Hall was killed when a trailer towed by a van driven by defendant Thomas

Edward Dells separated from the van and crashed into a vehicle driven by Hall. This appeal concerns whether the liability coverage in a homeowner's insurance policy issued by Pioneer to Dells is applicable with respect to wrongful-death damages. The policy contains a liability exclusion for bodily injuries arising out of the use of a motor vehicle, as well as a trailer, but there is an exception to the trailer exclusion for a "trailer not towed." The estate argues that Hall's death arose out of the use of a trailer that was no longer being towed at the point of impact; therefore, the trailer exclusion does not apply pursuant to the exception, resulting in liability coverage under the policy. Considering that the use of a motor vehicle, Dells's van, played an integral and indispensable role in giving rise to Hall's death, without which "use" the trailer would not have slammed into Hall's vehicle in the first place, we conclude that the motor vehicle exclusion itself bars liability coverage, regardless of the fact that it was the trailer and not the van that directly impacted Hall's car. And even if we assumed that the "trailer not towed" exception needed to be examined as part of the analysis, we conclude that Hall's death arose out of a towed trailer, given that the accident would never have occurred but for the towing of the trailer moments before impact. Accordingly, we affirm.

On the morning of October 28, 2009, Dells was driving his van eastbound on a 45 mile-per-hour, two-lane stretch of Ten Mile Road located in Kent County, and he was towing a utility trailer filled with scrap metal. At that time, the decedent, Hall, was driving a car heading westbound on the same stretch of Ten Mile Road. The trailer towed by Dells was attached to his van by means of a Reese hitch and, according to Dells's affidavit, the "hitch had been inserted into the receiver with a pin and clip (cotter) pin for six months prior to

the accident[.]" In his affidavit, Dells averred that as his van and Hall's car came close to crossing paths, and "the Reese trailer hitch separated from its receiver, causing the trailer, with the Reese hitch still attached to the trailer tongue, to separate from the van."[1] The trailer flew or bounced over another motor vehicle that had been proceeding behind Dells's van, crossed over the center line into the westbound lane, and then, hitch first and while airborne, punctured the driver's side front windshield of Hall's westbound car, impaling and killing her. Hall's car rolled over several times before coming to rest on its four wheels. A passenger in Hall's car suffered nonfatal injuries.

At the time of the accident, Dells and his vehicles were covered by a motor vehicle insurance policy issued by Auto-Owners Insurance Company (AOIC), which had a liability limit of $100,000. Pioneer insured Dells under a homeowner's insurance policy at the time of the accident, and the policy had a limit of $500,000 in regard to liability for bodily injury. In a separate action filed in January 2010, the estate sued Dells for wrongful death. AOIC retained an attorney to defend Dells, and a tentative settlement agreement was reached in December 2010 whereby the wrongful-death action would be dismissed without prejudice or costs to any party, a judgment of $600,000 would be entered against Dells,

[1] The responding police officer wrote in his investigation report as follows:

> It appears the pin holding the Reese hitch to the vehicle was either not in place or was actually missing from the vehicle. This caused the Reese hitch to fall out of the receiver on the van. This led to the trailer separating from the towing vehicle.

Dells averred in his affidavit that "[a]t the time of the accident the safety chains for the trailer were not attached to the Reese hitch or the van" and that the "hitch separated from its receiver because the pin holding the hitch in the receiver fell out or broke[.]"

the first $100,000 of the judgment would be satisfied with insurance policy proceeds tendered by AOIC, the estate would seek the $500,000 balance from Pioneer under Dells's homeowner's policy, and if it was determined that there was no coverage under the homeowner's policy, the estate would dismiss the action with prejudice. While AOIC was prepared to settle for the $100,000 policy limit, Pioneer had not even participated in the settlement discussions, and there were indications that Pioneer would deny coverage under the homeowner's policy.[2] Pioneer had previously been notified about the lawsuit by Dells's AOIC-retained counsel, who indicated that while he had not yet determined whether the Pioneer policy was implicated, the estate thought that there may be coverage under the homeowner's policy.

The settlement agreement was not executed because Pioneer warned Dells that execution of the settlement agreement would jeopardize Dells's coverage under the homeowner's policy even if coverage was applicable.[3] As to the instant suit, in January 2011 Pioneer filed a complaint for a declaratory judgment against Dells and the estate, alleging that AOIC had tendered its policy limits to the estate, that the estate had made a claim against Pioneer for additional sums under the homeowner's policy, and that, with respect to any liability that might be imposed against Dells, there was no available coverage under the Pioneer policy given its exclusion for bodily injury arising out of the use of a motor vehicle. The estate filed a counterclaim, alleging that Dells

---

[2] In a response to a request for admissions, Pioneer admitted that it had denied coverage to Dells under the homeowner's policy on or before February 18, 2011, with respect to the estate's claims.

[3] According to the briefs on appeal, the underlying litigation has not yet been settled.

had refused to execute the settlement agreement because of Pioneer's intrusion and its warning that execution would jeopardize Dells's coverage under the homeowner's policy, assuming the existence of any coverage. The estate alleged a cause of action for breach of contract on the basis of a third-party-beneficiary theory, and it made claims for penalty interest, declaratory relief, tortious interference with a contract, and tortious interference with a business expectancy.

The estate moved for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10) on Pioneer's declaratory judgment action and the estate's counterclaim. Before reciting the estate's arguments, it is necessary to give context to those arguments by quoting the relevant provisions in the homeowner's policy. In the portion of § II of the policy addressing liability coverages, the following is provided:

> COVERAGE E — Personal Liability
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury . . . caused by an occurrence[4] to which this coverage applies, we will:
>
> 1. pay up to our limit of liability [$500,000] for the damages for which the insured is legally liable.
>
> 2. provide a defense at our expense by counsel of our choice . . . . [Boldface omitted.]

In the portion of § II of the policy addressing exclusions, the following pertinent language is found:

> 1. Coverage E — Personal Liability . . . do[es] not apply to bodily injury or property damage:
>
> * * *

[4] In the section of the policy setting forth the various definitions, the term "occurrence" is defined, in part, as encompassing an accident that results in bodily injury during the policy period.

> g. arising out of:
>
> (1) the ownership, maintenance, use, occupancy, renting, loaning, loading or unloading of any motor vehicle or all other motorized land conveyances, including trailers;
>
> * * *
>
> This exclusion does not apply to:
>
> (1) a trailer not towed by or carried on a motorized land conveyance. [Boldface omitted.]

In its motion for summary disposition, the estate argued that insurance policies must be construed pursuant to their clear and unambiguous terms, that exclusions to coverage must be strictly interpreted in favor of coverage, that the trailer that killed Hall was "not towed" at the time that she directly incurred bodily injury and thus the exclusion was not applicable, and that the estate was entitled to judgment as a matter of law on the counts in the counterclaim. Pioneer filed its own motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the estate had failed to state a claim on which relief could be granted relative to the counterclaim and that there was no genuine issue of material fact that the coverage exclusion was applicable given that the trailer that struck Hall was set in motion while in the process of being towed by Dells's van.

The trial court granted Pioneer's motion for summary disposition with respect to the estate's entire counterclaim, and the estate has not appealed that ruling except to the extent that the estate had sought a declaratory judgment that the homeowner's policy provided coverage for the accident. The trial court granted Pioneer's motion for summary disposition on the declaratory judgment claim, finding that the exclusion barred coverage in regard to the fatal injuries suffered by Hall that arose out of the accident. In a thoughtful

written opinion, the trial court ruled that courts in other jurisdictions addressing comparable policy language and similar facts had held, without exception, that the exclusion forecloses coverage under a homeowner's policy when damages were incurred as the result of collisions with trailers that had broken free from the vehicles that had been towing them. Relying on language of these opinions, the trial court found that the exclusion was intended to apply where a trailer had been in tow when it became detached and then caused bodily injury. The trial court, again referring to language from foreign opinions, noted that although the trailer was not in tow at the instant of impact and for a very brief moment beforehand, the only reason the trailer ended up on westbound Ten Mile Road and striking Hall's vehicle was that it had been in tow up to the moment of separation. The exception to the exclusion was intended to address only those circumstances in which a trailer was stationary, in dead storage, or otherwise not in the process of being towed. The trial court concluded that it could not be found that the trailer was "not towed" for purposes of the exception to the exclusion. Subsequently, the trial court entered a final judgment consistent with its written opinion. The estate appeals as of right.

This Court reviews de novo a ruling on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion. *Guardian Environmental Servs, Inc v Bureau of Constr Codes & Fire Safety*, 279 Mich App 1, 5-6; 755 NW2d 556 (2008). Furthermore, the proper construction and application of an insurance policy presents a question of

law that is reviewed de novo. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

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. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). 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. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The 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). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

An insurance policy is subject to the same contract interpretation principles applicable to any other species of contract. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Except when an insurance

policy provision violates the law or succumbs to a defense traditionally applicable under general contract law, courts "must construe and apply unambiguous contract provisions as written." *Id*. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id*. at 464. A court cannot hold an insurance company liable for a risk that it did not assume. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). When its provisions are capable of conflicting interpretations, an insurance contract is properly considered ambiguous. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). "While we construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefitting an insured." *Henderson*, 460 Mich at 354 (citations omitted).

"A generally recognized principle of insurance law is that the burden of proof lies with the insured to show that the policy covered the damage suffered." *Solomon v Royal Maccabees Life Ins Co*, 243 Mich App 375, 379; 622 NW2d 101 (2000), citing 10 Couch, Insurance (3d ed), § 147:29, p 146-147, and *Williams v Detroit Fire & Marine Ins Co*, 280 Mich 215, 218; 273 NW 452 (1937). While the burden of proving coverage is on the insured, it is incumbent on the insurer to prove that an exclusion to coverage is applicable. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995). "While exclusions are strictly construed in favor of the insured, this Court will read the insurance contract as a whole to effectuate the intent of the

parties and enforce clear and specific exclusions." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008), citing *Hayley v Allstate Ins Co*, 262 Mich App 571, 575; 686 NW2d 273 (2004).

The estate argues that courts are required to construe insurance policies pursuant to their clear, unambiguous terms; that exclusions are to be strictly interpreted in favor of coverage; that the trailer that killed Hall was "not towed" at the time the bodily injury occurred, thereby barring application of the exclusion; and that the extrajurisdictional cases relied on by the trial court were distinguishable.

We hold that the trial court did not err by granting summary disposition in favor of Pioneer with respect to declaratory relief. There is no dispute that Dells generally had personal liability coverage under the homeowner's policy, with a liability limit of $500,000, and that in relationship to that personal liability coverage, Hall suffered bodily injury caused by an occurrence during the policy period. The question whether Dells was negligent or "legally liable" for damages is not before us. Under the exclusions in the homeowner's policy, the personal liability coverage enjoyed by Dells does not apply to bodily injury "arising out of . . . the . . . use . . . of any motor vehicle or all other motorized land conveyances, including trailers[.]" Although there is an exception to this exclusion relative to "a trailer not towed by or carried on a motorized land conveyance," we conclude that it is not even necessary to reach this exception in order to resolve the appeal.

While it is certainly accurate to state that Hall's death arose out of the use of a trailer, it is equally accurate to state that her death arose out of the use of a motor vehicle, i.e., Dells's van, whether the use was driving the van with the trailer in tow or the act of

connecting the van to the trailer in the first place. Absent the use of the van to connect to and tow the trailer that early October day, there would have been no bodily injury. The only reason that the trailer ended up striking Hall's vehicle and causing her death was that it separated from Dells's van while in the process of being towed down Ten Mile Road by the van. For purposes of the exclusion, and under the circumstances presented, one cannot logically dismiss the van's use as playing an indispensable and integral role in giving rise to Hall's bodily injury. While it was the trailer itself that directly struck Hall, the use of the trailer simply cannot stand on its own, independent of the van's use, as having been the cause of Hall's bodily injuries because it was the use of the trailer in unison with the use and operation of the van that gave rise to Hall's death. The various exceptions to the motor vehicle exclusion, including the "trailer not towed" exception, simply do not apply to Dells's van.[5]

Assuming for the sake of argument that the "trailer not towed" exception must be considered, we would still rule in favor of Pioneer. Hall's death arose out of the use of a towed trailer; if the trailer had not been in tow, there would have been no accident and no injury. The runaway trailer certainly did not launch itself. The act of towing the trailer was a necessary ingredient in producing the horrific crash because the act had a direct causal connection to the accident, setting into motion a series of events ultimately resulting in bodily injury. When read together, and omitting from consideration for now the reference to a "motor vehicle," the policy language effectively provides that the personal liability coverage is inapplicable with respect to bodily injury

[5] The additional exceptions concern certain off-road recreational vehicles, golf carts, and other vehicles not subject to vehicle registration.

arising out of the use of a trailer being towed or, stated otherwise, out of the use of a trailer unless it is "not towed." The estate's position is not consistent with the policy language in that it is more restrictive and confining than the words used in the policy. The policy does not provide that bodily injury arising out of the use of a trailer is covered if the trailer was "not towed" *at, or immediately before, the time of direct impact between the trailer and a person or vehicle*. The phrase "arising out of the use of" does not have a temporal component, nor even a contact component.[6] Hall's death arose out of the use of a towed trailer. One simply cannot separate the use of the trailer from the act of towing when determining what the bodily injury arose out of for purposes of applying the policy's language.

Furthermore, it is abundantly evident from the language used in the policy that the exception is intended to address the type of situation in which, for example, a trailer is sitting in a person's driveway and manages to cause injury to someone because of the alleged underlying negligence of its owner, who then seeks counsel through the insurer to mount a defense against a resulting lawsuit and protection from liability under the policy.

Finally, cases from other jurisdictions provide additional support for our holding. In *Nationwide Mut Ins Co v Integon Indemnity Corp*, 123 NC App 536, 538-539; 473 SE2d 23 (1996), the North Carolina Court of

[6] If, for example, a motor vehicle attempted to move into a lane of traffic occupied by a second vehicle and, absent physical contact, the maneuver caused the second vehicle to swerve off the roadway, go down an embankment, and then moments later crash into a utility pole, causing bodily injury, the exclusion here would still apply, given that the bodily injury arose out of the use of a motor vehicle, despite the absence of contact between the two vehicles and a delay between the causative driving maneuver (the use of the vehicle) and the subsequent crash.

Appeals, addressing policy language and factual circumstances comparable to those here, stated and ruled as follows:

> [T]he evidentiary materials in the record tend to show that on the date of the accident, defendant Timothy Ward was towing the metal livestock trailer behind Peggy Ward's 1979 Chevrolet truck. The truck had a towing ball, but the towing ball was not secured to the vehicle, and the safety chains on the trailer were not used or attached to the truck. The trailer subsequently became disconnected from the truck, crossed the center line of the highway, and struck Lynda Wood's car, resulting in her death. The complaint in the underlying wrongful death lawsuit alleges Timothy Ward's negligence in the operation of the truck, in exceeding a safe speed when towing an improperly loaded and secured trailer, and in "improperly load[ing] the trailer without regard to the danger in towing it . . . ."
>
> . . . In this case, . . . the defendant Estate's damages are alleged to have resulted solely from Timothy Ward's "use" of the truck in towing the trailer, and not any independent "non-automotive" cause. His alleged negligence in attaching, securing and towing the trailer could not have caused damages that were independent of the "use" of the truck itself. The homeowners liability policy expressly excepts liability arising in connection with the "use" of motor vehicles. The damages, therefore, arose outside the scope of coverage, under the plain language of the homeowners policy.
>
> Defendant Estate argues that the trailer is a "vehicle or conveyance not subject to motor vehicle registration," as described in section (4)(a) [of the policy], and is therefore not subject to the exclusion. Nonetheless, the exclusion still applies because the accident, and therefore the damages to the Estate, arose out of, and could not have occurred without, the "use" of the truck.
>
> We therefore hold that any damages arising out of the underlying lawsuit are excluded, by the motor vehicle exclusion, from the scope of the personal liability coverage

> provided by the Wards' homeowners policy. [Second alteration and first omission in original.]

The North Carolina case is consistent with our analysis with respect to the use of a motor vehicle, Dells's van, and its indispensable role in giving rise to Hall's bodily injuries.

In *White v American Deposit Ins Co*, 732 So 2d 675, 677 (La App, 1999), the Louisiana Court of Appeal observed:

> [T]he State Farm homeowner's policy was intended to exclude a boat and trailer in tow. The fact that the boat and trailer became detached and crossed the median into the path of Rose White does not render the boat "not in tow" for purposes of taking it out of the exclusion. The boat and trailer were moving, and since the trailer had no power of its own, the movement was attributable to the towing vehicle. Hence, even if the boat was not in tow at the point of impact, the damages of Rose White arose out of the use of a motor vehicle and were directly related to the towing of the boat and trailer.
>
> The homeowner's policy of State Farm does not apply . . . .

Applying this sound logic and reasoning here, Dells's trailer was moving when the accident occurred, and because the trailer had no power of its own, the movement was attributable to the towing vehicle, Dells's van. Hence, even if the trailer had not been in tow at the point of impacting Hall's car, the estate's damages nonetheless arose out of the use of a motor vehicle and were directly related to the towing of the trailer.

Affirmed. Pioneer, having fully prevailed on appeal, is awarded taxable costs pursuant to MCR 7.219.

FITZGERALD and HOEKSTRA, JJ., concurred with MURPHY, C.J.

ISLAND LAKE ARBORS CONDOMINIUM ASSOCIATION v
MEISNER & ASSOCIATES, P.C.

Docket No. 307353. Submitted June 11, 2013, at Lansing. Decided June 18, 2013, at 9:15 a.m.

Island Lake Arbors Condominium Association filed a declaratory judgment action against Meisner & Associates, P.C., in the Oakland Circuit Court, seeking a declaration that it owed Meisner no additional legal fees. Meisner had provided legal services for Island Lake against the developer of its condominium development before Island Lake terminated the contract and retained new counsel who later settled the original action pursuant to a confidential agreement. The parties' written retainer agreement required Island Lake to pay Meisner a reduced hourly fee plus a 12 percent contingency fee calculated on the basis of the cash value of any judgment or settlement reached with the opposing party against whom Island Lake had filed the original action. Island Lake paid Meisner all fees owed under the contract's hourly and termination provisions before terminating Meisner's services. The circuit court, Martha D. Anderson, J., denied the parties' opposing motions for summary disposition, concluding that because the parties' retainer agreement was ambiguous concerning Island Lake's liability for additional attorney fees, a jury would have to determine the fee issue; the circuit court refused to unseal the underlying action's settlement terms until that contract issue was resolved by a jury. Meisner filed an application for leave to appeal, which the Court of Appeals granted. Unpublished order of the Court of Appeals, entered August 10, 2012 (Docket No. 307353).

The Court of Appeals *held*:

1. A retainer agreement is interpreted according to its plain and ordinary meaning and a contract is ambiguous only if its terms are unclear or reasonably susceptible to more than one meaning. In this case, the circuit court erred by concluding that the contract was ambiguous and by denying Meisner summary disposition. Meisner agreed to work at a reduced hourly rate in exchange for a 12 percent contingency fee if the case was successfully concluded and the contract clearly provided that Meisner would earn that contingency fee even if discharged before the case concluded.

2. When an attorney's employment is terminated before fully completing the contracted-for services, he is entitled to compensation for the reasonable value of his services on the basis of quantum meruit—which compensates an attorney for completed work on the basis of evaluating as closely as possible the actual deal struck between the client and the attorney—and not on the basis of the hourly or contingent-fee contract. The quantum meruit award is capped at the maximum amount of attorney fees provided in the contingency-fee agreement. To determine the fee owed to an attorney under a contingency-fee agreement in such a situation, the court must determine: (1) the cash value of the settlement according to the method set forth in the parties' contract and (2) the percentage of work performed to reach the settlement by both the original attorney whose employment was terminated and the successor counsel. The attorney is then entitled to recover the contracted-for contingency fee percentage of that portion of the recovery that is attributable to the share of work he completed. In this case, because it failed to fulfill its services under the terms of the contract, Meisner's fee could not be determined on the basis of the number of hours worked multiplied by a reasonable hourly fee because the retainer agreement specified that Meisner would receive a percentage of the recovery if the underlying action was successful. The fact finder must compare and contrast the contributions made by Meisner and successor counsel to determine Meisner's proportionate contribution toward completion of the underlying settlement; Meisner could not recover more than 12 percent of its contributory share of the work performed on the settlement.

Reversed and remanded for further proceedings consistent with the opinion.

ATTORNEY AND CLIENT — FEES — DISCHARGE BEFORE COMPLETION OF WORK — QUANTUM MERUIT — CONTINGENCY FEES.

When an attorney's employment is terminated before fully completing the contracted-for services, he is entitled to compensation for the reasonable value of his services on the basis of quantum meruit—which compensates an attorney for completed work on the basis of evaluating as closely as possible the actual deal struck between the client and the attorney—and not on the basis of the hourly or contingent-fee contract; a quantum meruit award is capped at the maximum amount of attorney fees provided in the contingency-fee agreement; the court must determine: (1) the cash value of the settlement according to the method set forth in the parties' contract and (2) the percentage of work performed by both the original attorney whose employment was terminated and the

successor counsel, to reach the settlement; an attorney may recover the contracted-for contingency fee percentage of that portion of the recovery that is attributable to the share of work he completed.

Sullivan, Ward, Asher & Patton, P.C. (by *Ronald S. Lederman*, *Christopher B. McMahon*, and *Jennifer R. Moran*), for Island Lake Arbors Condominium Association.

The Meisner Law Group, P.C. (by *Robert M. Meisner* and *Edward J. Lee*) for Meisner & Associates, P.C..

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

PER CURIAM. Island Lake Arbors Condominium Association hired Meisner & Associates, P.C. to prosecute a civil action against Toll Brothers, Inc., the condominium developer and builder. The parties' written retainer agreement provided for a hybrid compensation arrangement. Island Lake agreed to pay Meisner a reduced hourly rate supplemented by a 12 percent contingency fee, which would be calculated based on the cash value of any judgment or settlement reached with Toll Brothers.

Meisner provided legal services for about 18 months before Island Lake terminated the contract and retained new counsel. When Meisner claimed an attorney's charging lien, Island Lake brought this declaratory judgment action, asserting that it owed Meisner no additional legal fees.

The circuit court determined that Meisner's retainer agreement was ambiguous concerning Island Lake's liability for additional attorney fees and that a jury would have to unravel the contract's contradictory terms. The litigation against Toll Brothers subsequently settled pursuant to a confidential agreement.

The circuit court refused to unseal the settlement terms until after a trial resolved the agreement's ambiguity.

This Court granted Meisner's application for leave to appeal, and we now reverse the circuit court. The contract unambiguously provides that Meisner is entitled to a contingent share of Island Lake's recovery. The amount of Meisner's fee must be decided by applying quantum meruit principles and cannot exceed 12 percent of the total recovery against Toll Brothers, the details of which must be revealed to Meisner.

I. UNDERLYING FACTS AND PROCEEDINGS

Toll Brothers, Inc. developed and constructed Island Lake and a neighboring condominium property, Island Lake North Bay. In 2008, the Island Lake North Bay Association retained Meisner to sue Toll Brothers for damages arising from alleged construction defects. In 2009, Island Lake retained Meisner to file a similar suit.

Island Lake signed a lengthy retainer agreement drafted by Meisner. Paragraphs 2 and 3 provide for a mixed hourly and contingent fee:

> 2. HOURLY RATE FEES: *In addition to the contingent fee* stated below, the Association shall pay to the Law firm for services rendered with regard to the prosecution of its claims against the developer . . . the following hourly rate fees which are less than what the Law firm would otherwise seek for its services for such complex and unusual litigation, and which shall remain unchanged through the duration of the litigation:
>
> A. You will be charged for legal services rendered by our attorneys ranging from $225.00 to $285.00 per hour for out of Court time. . . .
>
> * * *

> 3. CONTINGENT FEE: *In addition to the hourly rates* stated above, which shall not be modified during the course of this representation the Association shall pay the following contingency fee . . . to wit: twelve (12%) percent of all actual money, cash equivalents, and "in kind" property, services, values, savings, and/or benefits of any kind realized, paid to, and/or received by the Association . . . whether by way of settlement, case evaluation award, arbitration award, judgment . . . . [Emphasis added.]

Paragraph 10 of the agreement addresses Island Lake's right to terminate Meisner. It provides that even if new counsel enters the case, Island Lake "nonetheless" agrees to meet its fee obligation to Meisner:

> 10. OTHER/ADDITIONAL LAWYERS: The Association understands that while it may, as the client, elect or determine to supplement the Law firm with other lawyers or law firms, to replace the Law firm with other lawyers or law firms, and/or to discharge the Law firm at any time, *it nonetheless represents and agrees that it shall pay the Law firm all amounts i[t] has agreed to pay under this Agreement*, by which it has induced the Law firm to perform services for it. [Emphasis added.]

The retainer agreement also refers to and specifically incorporates a document called "Attachment A." Attachment A sets forth the "basis, facts, and representations by the Association which underlie and support" the retainer agreement. It continues in relevant part:

> In light of the complex and anticipated time-consuming nature of the litigation, the Law firm has offered to represent the Association with regard to litigation on a purely hourly basis; but at a lower rate than those presently stated in the General Retainer Agreement.
>
> * * *
>
> The Association understands that the reduction and "non-increase" in hourly fees for the litigation, *the perma-*

nence of the said hourly fees for the litigation are intended to be intertwined with the contingent fee payable to the Law firm with regard to the litigation, which contingent fee itself is substantially and materially lower than what the Law firm has stated it would otherwise seek with regard to the litigation.

* * *

The Association's understanding that the Law firm's prior, present, and future work in organizing and planning for the litigation, in examining various issues, and in preparing and filing the Complaint, are crucial and extremely significant elements of the contemplated litigation and the direction thereof, *which entitle the Law firm to full compensation for its efforts in accordance with the provisions of the Litigation Fee Agreement* particularly in view of the Association's understanding and appreciation of:

* * *

(h) The Law firm's higher hourly fees and high potential contingent fee(s) that might otherwise be sought or charged with regard to the litigation. [Emphasis added.]

Paragraph 13 of the retainer agreement, titled "Termination," creates the ambiguity perceived by the circuit court. It describes the mechanics of an attorney-client separation and necessitates payment of fees and costs attendant to "wrapping up our representation":

13. <u>TERMINATION</u>: If you desire to ask that we cease performing any services for you and/or you otherwise decide to terminate this firm, you must communicate same to us in writing so as to avoid any confusion concerning our representation of you and our instructions in connection therewith. However, it is understood that there will be costs incurred in wrapping up our representation of you should we be terminated or if the firm chooses to terminate our representation of you, which are chargeable billings to you depending upon the reason and source of our termina-

> tion. This would include, but is not limited to, the preparation of a Substitution of Counsel and/or Motion hearing and Order of Withdrawal if we are terminated by you, and other costs and time incurred in regard to the transfer and/or closing of the files including collating and copying.

The circuit court construed this language as providing that upon termination Meisner was entitled only to "wind-up fees," and that this provision conflicted with the contract's other fee provisions.

Island Lake terminated Meisner's services in May 2010, after paying all fees due under the contract's hourly and "wrapping up" provisions. Meisner asserted a charging lien for the contingency portion of its fee against any recovery obtained from Toll Brothers. Island Lake then brought this declaratory action seeking a judgment that it owed Meisner no additional fees for legal services.

Island Lake moved for summary disposition of the fee issue pursuant to MCR 2.116(C)(10). Meisner countered with a summary disposition motion filed under MCR 2.116(I)(2), claiming that it, not Island Lake, was entitled to summary disposition. Island Lake contended that ¶ 13 of the contract specified the fees that it would owe on termination of Meisner's services, and did not mention a contingency fee. Meisner argued that the express contract terms called for payment of an hourly rate plus the contingency fee, and insisted that the fee aspects of the agreement survived its termination as counsel. Meisner also moved to amend its answer to assert a counterclaim for breach of contract.

The circuit court denied both parties' motions for summary disposition in a bench ruling, reasoning:

> The court has reviewed the parties' briefs and listened to the arguments presented here this morning and finds that plaintiff's motion and defendant's counter motion

under (I)(2) must be denied. This is because any recovery rights defendant may have are ambiguous under the conflicting language found in paragraph ten, which provides that the association is bound by the terms of the agreement, beyond discharge of counsel, and paragraph 13, which states that upon termination, the costs involved would simply involve wind-up fees.

Where there is an ambiguity, ascertainment of the meaning of the contractual language presents a question of fact that must be decided by a jury, [Klapp] v United Insurance Group Agency, [Inc,] 468 Mich 459[; 663 NW2d 447 (2003).]

Accordingly, the motions are denied and this matter will proceed according to the schedule.

The circuit court subsequently granted Meisner's motion to file a counterclaim.

Meanwhile, Island Lake's new legal counsel confidentially settled the condominium association's claims against Toll Brothers. Island Lake refused to share the settlement details with Meisner, who then moved to compel discovery of the settlement agreement. The circuit court decided to bifurcate trial of the declaratory action and the counterclaim and denied Meisner's motion with the following explanation:

I believe that once the court makes a determination on the language . . . of the contract, the retainer agreement, then would be the time, if discovery is necessary, to do that and, of course . . . the decision of the court is to find that you are entitled to the contingency fee, then the court would have no problem with . . . allowing discovery and setting forth parameters, with respect to the settlement agreement that was reached in the other case.

But at this point in time, I think that the one thing that needs to be done is the issue of the intent of the agreement to be determined by this Court. So I'm denying your request.

The circuit court concluded that if it found in favor of Meisner on the declaratory action and counterclaim, it would permit discovery on the issue of damages. We granted Meisner's application for leave to appeal. *Island Lake Arbors Condo Ass'n v Meisner & Assocs, P.C.*, unpublished order of the Court of Appeals, entered August 10, 2012 (Docket No. 307353).

II. ANALYSIS

Meisner first contests the circuit court's ruling that the retainer agreement qualifies as ambiguous. According to Meisner, summary disposition should have been granted in its favor. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A contract is ambiguous only if its terms are unclear or are reasonably susceptible to more than one meaning. *Farm Bureau Mut Ins Co Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999); *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008). The plain language of the attorney-fee contract admits to only one interpretation: on Island Lake's recovery of damages against Toll Brothers, Meisner would earn a contingency fee even if discharged before the case concluded. Longstanding principles of Michigan law supply a general rule predicating the amount of Meisner's fee on the reasonable value of his services. We hold that Meisner may not recover more than the contract's 12 percent contingency fee.

A. THE CONTRACT AND ITS MEANING

We begin by considering whether the attorney-fee contract harbors ambiguity concerning Meisner's entitlement to fees if discharged by Island Lake. We interpret the parties' retainer agreement according to its plain and ordinary meaning. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611-612; 792 NW2d 344 (2010). A contract is clear and unambiguous if, "however inartfully worded or clumsily arranged," it "fairly admits of but one interpretation." *Farm Bureau Mut Ins Co*, 460 Mich at 566 (citation and quotation marks omitted). On the other hand, a contract is ambiguous if "its words may reasonably be understood in different ways." *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982). When contractual language is unambiguous reasonable people cannot differ concerning the application of disputed terms to certain material facts, and summary disposition should be awarded to the proper party. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

The retainer agreement clearly requires Island Lake to pay Meisner an hourly rate in addition to a contingency fee. The parties stipulated that the hourly rate was "less than what the Law firm would otherwise seek . . . for such complex and unusual litigation." Attachment A reiterated this premise, stating that the reduced, nonmodifiable hourly fee was "intended to be intertwined with the contingent fee payable to the Law firm with regard to the litigation, which contingent fee itself is substantially and materially lower than what the Law firm has stated it would otherwise seek[.]" On its face, this language supports that Meisner agreed to work at a reduced hourly rate in exchange for a promise that it would share the recovery when (and if) the case

successfully concluded. This arrangement offers a reasonable alternative to a substantial retainer coupled with an hourly rate, and places an economic risk on the attorney. Moreover, "The measure of the compensation of members of the bar is left to the express or implied agreement of the parties subject to the regulation of the supreme court." MCL 600.919(1). Island Lake has raised no ethical challenge to this type of hybrid fee arrangement, and we discern none.

In ¶ 10, the contract acknowledges a legal truism: Island Lake may "discharge" Meisner at any time.[1] "Nonetheless," the agreement continues, Island Lake "represents and agrees that it shall pay the Law firm all amounts i[t] has agreed to pay under this Agreement, by which it has induced the Law firm to perform services for it." By asserting that the discounted hourly rate served as the carrot for the firm's deferred contingency fee payment, the contract unambiguously required Island Lake to pay a contingency fee regardless of the hourly charges. And by endorsing Attachment A, Island Lake affirmed Meisner's characterization of the dual fee structure as "full compensation" for the work to be performed. Read together, these provisions demonstrate the parties' intent that Meisner's complete compensation would consist of both an hourly rate plus 12 percent of any recovery.

---

[1] "[A] client has an absolute right to discharge an attorney[.]" *Reynolds v Polen*, 222 Mich App 20, 25; 564 NW2d 467 (1997). A client's right to discharge counsel is an implied term of an attorney-client contract. MRPC 1.16(a)(3). Island Lake's contention that ¶ 10 is invalid because it "restricts the client's right to discharge its counsel" is partially correct. We discuss this question later in this opinion. Notwithstanding ¶ 10's enforceability, its language creates no ambiguity. Rather, ¶ 10 clearly reflects the parties' intent that Meisner would have a contingency interest in the outcome whether or not he represented Island Lake when the case concluded.

We turn now to the controverted paragraph, which contains three sentences concerning "termination." The first sentence posits that if Island Lake wishes to terminate Meisner it must do so in writing. The second sentence states, "However, it is understood that there will be costs incurred in wrapping up our representation of you should we be terminated or if the firm chooses to terminate our representation of you, which are chargeable billings to you depending upon the reason and source of termination." We first observe that this sentence uses the phrase "costs incurred in wrapping up our representation of you." The third sentence contains examples of such "costs," including "the preparation of a Substitution of Counsel and/or Motion hearing and Order of Withdrawal if we are terminated by you, and other costs and time incurred in regard to the transfer and/or closing of the files including collating and copying."

We find nothing in this paragraph suggesting that Meisner agreed to forfeit the right to a contingency fee if its services were terminated. Rather, the second sentence describes the potential charges that may be incurred as part of the termination process, and the third sentence augments and clarifies that the "costs" relate solely to "wind-up" expenditures. Construed in the context of the entire fee agreement, this paragraph lends itself to only one reasonable interpretation: termination of Meisner's employment would occasion *additional* fees. Nothing in the paragraph supports that the additional fees would thereby nullify Meisner's contractual right to claim a fee contingent on Island Lake's recovery.[2] Accordingly, the circuit court erred by

---

[2] The Restatement provides:

> A contingent-fee contract is one providing for a fee the size or payment of which is conditioned on some measure of the client's

finding the contract ambiguous and by failing to grant summary disposition in favor of Meisner.

B. QUANTUM MERUIT, APPLIED

Having determined that Meisner is entitled to a contingency fee, we consider the manner in which that fee should be calculated on remand. Meisner suggests that its fee should be determined according to its "contribution toward the eventual recovery in the underlying litigation[.]" Island Lake simply reasserts that ¶ 13 "effectively serves as a waiver" of Meisner's right to a quantum meruit recovery. We adopt the spirit of Meisner's argument, and hold that the quantum meruit approach described in *Morris v Detroit*, 189 Mich App 271; 472 NW2d 43 (1991), and *Reynolds v Polen*, 222 Mich App 20; 564 NW2d 467 (1997), provides the proper equitable framework for calculating Meisner's fee. Meisner's contract with Island Lake establishes a 12 percent contingency ceiling on the amount of the recovery ascribed to Meisner's efforts. In this case of first impression, we hold that the quantum meruit recovery of a discharged attorney is capped by the contingency-fee percentage set forth in the contract, applied to the amount of the recovery attributable to the attorney's work.

We begin by observing that Island Lake has not claimed that it terminated Meisner's employment on account of misconduct. Hence, no basis exists to deviate

---

> success. Examples include a contract that a lawyer will receive one-third of a client's recovery and a contract that the lawyer will be paid by the hour but receive a bonus should a stated favorable result occur. [1 Restatement Law Governing Lawyers, 3d, § 35, comment a, p 257.]

Meisner's fee qualifies as contingent despite that it incorporated a noncontingent aspect.

from the rule set forth in *Reynolds* endorsing a quantum meruit approach. This Court has explained, "Where an attorney's employment is prematurely terminated before completing services contracted for under a contingency fee agreement, the attorney is entitled to compensation for the reasonable value of his services on the basis of quantum meruit, and not on the basis of the contract . . . ." *Plunkett & Cooney, PC v Capitol Bancorp LTD*, 212 Mich App 325, 329-330; 536 NW2d 886 (1995). In two other cases involving the vitality of contingency-fee contracts after an attorney's discharge, this Court has echoed that quantum meruit principles, rather than the contractual language, govern the attorney's entitlement to additional fees. *Reynolds*, 222 Mich App at 26; *Morris*, 189 Mich App at 278.

Morris and *Reynolds* examined the method for calculating an attorney's quantum meruit recovery in personal injury cases. The plaintiff in *Morris* originally retained Richard Durant as his counsel. Shortly before trial, the plaintiff discharged Durant and hired Frederick Jasmer on a contingency basis. Jasmer's attorney fee was capped by MCR 8.121(B) at $1/3$ of the net recovery. The plaintiff prevailed at the trial but fired Jasmer while the case was on appeal. After a tortuous appellate course, the jury's verdict was affirmed. The plaintiff refused to compensate Jasmer or Durant, insisting that he intended to pay only his third lawyer. *Morris*, 189 Mich App at 275.

The trial court had found that Jasmer's efforts constituted "a significant factor in achieving the jury verdict in plaintiff's favor," completing 99.44 percent of the work required of him under the contingency-fee agreement and awarded Jasmer the entirety of the $1/3$ fee. *Id*. at 275-277. The plaintiff appealed, arguing that given his obligation to compensate his newest lawyer,

the trial court's ruling awarded a fee in excess of the 1/3 recovery permitted by MCR 8.121. *Id*. at 277.

This Court held that while "the contingency fee agreement no longer operated to determine Jasmer's fee," Jasmer was nevertheless "entitled to compensation for the reasonable value of his services on the basis of quantum meruit[.]" *Id*. at 278. However, the trial court had abused its discretion by awarding Jasmer the entire contingent fee, because doing so "provided Jasmer with a benefit greater than that he had bargained for under the contingency fee agreement and greater than that which he was found to have earned." *Id*. at 279. This Court declared that based on the trial court's factual findings, Jasmer should have been awarded 99-44/100 percent of the 1/3 contingency fee. *Id*. at 280.

Reynolds reinforces the *Morris* approach to quantum meruit, which "compensates an attorney for completed work on the basis of evaluating as closely as possible the actual deal struck between the client and the attorney[.]" *Reynolds*, 222 Mich App at 30. In *Reynolds*, this Court located the discharged attorney's right to recover an attorney fee within the doctrine of quantum meruit rather than the contract itself: "[A]n attorney on a contingent fee arrangement who is wrongfully discharged, or who rightfully withdraws, is entitled to compensation for the reasonable value of his services based upon *quantum meruit*, and not the contingent fee contract." *Id*. at 24 (quotation marks and citation omitted). *Reynolds*, like *Morris*, was a personal injury case in which the attorney fee was governed by MCR 8.121 and thereby capped at 1/3 of the award.

Here, we consider a non-personal injury case involving an hourly fee blended with a contingent fee. Informed by *Morris* and *Reynolds*, we conclude that the contract alone does not dictate Meisner's recovery, as

Meisner failed to complete the work. Paying Meisner a full 12 percent contingency fee for partial completion of the legal work would overcompensate Meisner, allowing it to realize the full value of the contingency despite that it failed to fulfill its assigned task. *Morris* illuminates the impropriety of awarding the entire 12 percent; in *Morris*, a contribution percentage difference of only 56/100 percent required a quantum meruit award of less than the contracted fee.

Quantum meruit is an equitable doctrine that prevents a client's unjust enrichment while compensating an attorney for only those benefits actually generated by the attorney's work. Nevertheless, the contract may bear relevance to the computation of a lawyer's value to a case by defining the parties' expectations of that value. *Plunkett*, 212 Mich App at 330-331. In our view, limiting the discharged attorney's contingency fee to the percentage of the recovery called for in the retainer agreement preserves the client's freedom to substitute counsel without suffering an economic penalty while concomitantly honoring the parties' agreement to set an uppermost limit for the lawyer's value. The Florida Supreme Court reached the same conclusion in *Rosenberg v Levin*, 409 So2d 1016 (Fla, 1982). *Rosenberg* succinctly depicts the tension between the lawyer's interest and the client's as follows:

> There are two conflicting interests involved in the determination of the issue presented in this type of attorney-client dispute. The first is the need of the client to have confidence in the integrity and ability of his attorney and, therefore, the need for the client to have the ability to discharge his attorney when he loses that necessary confidence in the attorney. The second is the attorney's right to adequate compensation for work performed. [*Id*. at 1019.]

Restricting the wrongfully discharged attorney to a quantum meruit recovery capped at the maximum amount of attorney fees provided in the contingency-fee agreement appropriately elevates the client's interest in counsel of choice over the economic interests of the lawyer:

> The attorney-client relationship is one of special trust and confidence. The client must rely entirely on the good faith efforts of the attorney in representing his interests. This reliance requires that the client have complete confidence in the integrity and ability of the attorney and that absolute fairness and candor characterize all dealings between them. These considerations dictate that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships. We approve the philosophy that there is an overriding need to allow clients freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession. Failure to limit quantum meruit recovery defeats the policy against penalizing the client for exercising his right to discharge. However, attorneys should not be penalized either and should have the opportunity to recover for services performed. [*Id*. at 1021.]

Other jurisdictions have similarly emphasized that a contingency fee "cap" protects the client's absolute right to discharge his or her attorney. In *Plaza Shoe Store, Inc v Hermel, Inc*, 636 SW2d 53, 59 (Mo, 1982), the Missouri Supreme Court stated:

> To allow the attorney unlimited recovery under quantum meruit loses sight of the rationale of the modern rule favoring a client's freedom to discharge his attorney without unreasonable burden.
>
> The better rule, undoubtedly, would be to use the contract price as an upper limit or ceiling on the amount the discharged attorney could recover.

This approach comports with Michigan case law in personal injury cases, which prohibits recovery exceeding the public policy limit stated in MCR 8.121. Logically, even in non-personal injury cases, a fee limitation flowing directly from the contract itself respects both the parties' freedom of contract and the client's ability to change counsel. Accordingly, Meisner's quantum meruit recovery must be capped consistent with the maximum percentage he would have received under the contract: 12 percent.[3]

On remand, the fact finder must determine how much money Meisner is owed. The *Reynolds* Court instructed, "[Q]uantum meruit is generally determined by simply multiplying the number of hours worked by a reasonable hourly fee." *Reynolds*, 222 Mich App at 28. However, the *Reynolds* Court then specifically referred to the portions of *Morris* and *Plunkett* directing that the contractual terms must also govern reasonable compensation for services rendered. In this case, as in *Morris*, those terms included a contingency arrangement. Thus, we emphasize that it would be inappropriate to calculate Meisner's quantum meruit recovery on the basis of the number of hours worked multiplied by a reasonable hourly fee. In their contract, the parties deliberately spurned an arrangement based solely on an hourly fee, and instead agreed that if it completed the work, Meisner would share a percentage of the recovery. Since Meisner's hourly fees have been paid, the

[3] Notably, subsequent counsel's fee agreement in this case set forth strictly an hourly fee. We leave for another day an analysis of the competing interests when both old and new counsel have entered into contingency agreements.

remaining fact to be determined is the portion of the ultimate recovery attributable to Meisner's contribution.

After the cash value of the settlement has been determined according to the method set forth in Meisner's contract with Island Lakes, the fact finder must consider and compare the contributions to that recovery made by both Meisner and successor counsel. Once that determination has been made, Meisner is entitled to 12 percent of the recovery attributable to Meisner. This method comports with the meaning of quantum meruit: " 'as much as deserved.' " *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 359; 657 NW2d 759 (2002), quoting Black's Law Dictionary (6th ed), p 1243. It also compensates Meisner according to the "actual deal struck between the client and the attorney[.]" *Reynolds* 222 Mich App at 30. The bargained-for-value percentage memorialized in the contract governs Meisner's recovery, which flows from Meisner's contribution to the outcome.

C. THE SETTLEMENT AGREEMENT

Our decision renders highly relevant the cash value of the settlement between Island Lakes and Toll Brothers. The amount of money at issue in the litigation and the results ultimately achieved are factors which should be considered when determining whether Meisner is entitled to additional attorney fees. While Island Lake and Toll Brothers have agreed to keep the terms of their settlement confidential, we have been presented with no information suggesting that the settlement terms are subject to any privilege from disclosure, or were officially sealed by the circuit court. See MCR 8.119(I). On remand, the circuit court may consider whether to release the information to Meisner subject to a protec-

tive order pursuant to MCR 2.302(C). The party seeking protection, in this case Island Lake, bears the burden of demonstrating good cause for the order to prevent "annoyance, embarrassment, oppression, or undue burden or expense . . . ." *Id*.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Meisner may tax its costs pursuant to MCR 7.219.

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

BARROW v CITY OF DETROIT ELECTION COMMISSION

Docket No. 316695. Submitted June 17, 2013, at Detroit. Decided June 18, 2013, at 9:20 a.m.

Tom Barrow, a candidate for the position of Mayor of Detroit in the August 2013 primary election, brought an action for mandamus in the Wayne Circuit Court, Lita M. Popke, J., seeking a declaratory judgment that Michael Duggan was ineligible to appear on the August 2013 primary ballot for the same position because he failed to comply with certain provisions of the Detroit City Charter that required Duggan to be a resident and a registered voter for one year at the time of filing for office. Named as defendants were the City of Detroit Election Commission and the city clerk. The Election Commission had decided that Duggan had fulfilled the charter requirements, apparently because he had been a registered voter in Detroit for one year before the filing deadline applicable to all candidates, although he had filed 10 days before the one-year anniversary of his registering to vote. The court allowed Duggan and the Michael Duggan for Mayor Committee to intervene as defendants. The court ruled that defendants had a clear legal duty to determine whether Duggan met the charter's requirements on the date he filed the nominating petitions, not the filing deadline. The court held that the one-year residency requirement was not unconstitutional per se and concluded that there were multiple bases upon which the requirement could be construed as constitutional. The court entered an order granting declaratory relief, declaring that Duggan was ineligible to be listed as a candidate, and directing defendants to remove Duggan's name from the list of eligible candidates on the ballot. Intervening defendants appealed.

The Court of Appeals *held*:

1. Plaintiff established that mandamus is the proper method of raising his legal challenge to Duggan's candidacy. Plaintiff established his entitlement to a writ of mandamus.

2. The use of the phrase "the time of filing" in Detroit City Charter § 2-101 contemplates only one time, the time a particular candidate files for office.

3. No language within § 2-101 allows substantial compliance with the time period requirement. The doctrine of substantial

compliance is not applicable in this matter. A plain reading of the relevant provisions of the charter does not lead to an absurd result.

4. The plain and unambiguous language of the charter requires a candidate to be a resident and a registered voter of Detroit for one year before filing for office. It is undisputed that Duggan was not.

5. The United States Supreme Court has expressly disclaimed the idea that states cannot impose durational residency requirements.

6. Strict scrutiny does not apply to this case. The compelling-state-interest test is inappropriate here. It does not matter whether intermediate or rational basis review is utilized in this case because under intermediate scrutiny (and thus rational basis as well) the charter provisions survive constitutional scrutiny.

7. The governmental interests asserted in support of the durational residency requirements support the charter's requirement that candidates must be registered voters for one year when filing for office.

8. The charter does not require a citizen to choose between travel and the basic right to vote, and there is no basic right to candidacy. Although Duggan is penalized because he may not run for mayor for a year after registering to vote, his right to travel was not infringed and his candidacy is not a fundamental right.

9. Dugan did not meet the qualifications for inclusion of his name on the ballot under the plain language of the charter. The durational residency requirement neither implicates nor violates the constitutionally based right to travel.

Affirmed.

STEPHENS, P.J., concurring in part and dissenting in part, concurred with the majority in all respects with regard to Duggan's nonconstitutional arguments but dissented from the conclusion that the charter's durational residency requirements are constitutional. The trial court's opinion and order should be reversed and Duggan's name should be placed on the ballot because the charter's durational residency requirements impermissibly classify Duggan and other candidates on the basis of the candidate's exercise of the fundamental right to travel. Sections 2-101 and 3-111 of the charter are subject to strict scrutiny. Application of strict scrutiny to statutes that impede intrastate and interstate travel is appropriate. The charter's durational residency requirements are not narrowly tailored to serve a compelling governmental interest.

1. ELECTIONS — WORDS AND PHRASES — DETROIT CITY CHARTER — MUST — AT THE TIME OF FILING FOR OFFICE.

The language of § 2-101 of the Detroit City Charter that specifies that a person seeking elective office "must" be a registered voter of the city for one year "at the time of filing for office" contemplates only one time: the time a particular candidate files for office; the charter's use of the term "must" denotes that the conditions of the provision are mandatory, therefore precluding application of the doctrine of substantial compliance when analyzing whether the procedural requirements of the charter have been met.

2. CONSTITUTIONAL LAW — BALLOT ACCESS RESTRICTIONS.

Questions related to ballot access restrictions do not automatically require heightened equal protection scrutiny.

3. CONSTITUTIONAL LAW — RIGHT TO TRAVEL.

A state law implicates the right to travel when it actually deters travel, when impeding travel is its primary objective, or when it uses a classification that serves to penalize the exercise of the right to travel.

4. CONSTITUTIONAL LAW — RIGHT TO TRAVEL — DETROIT CITY CHARTER.

Detroit City Charter § 2-101 does not penalize the exercise of the right to travel; the provision does not sufficiently infringe upon the right to travel to such an extent that strict scrutiny analyses must be applied to the provision.

5. ELECTIONS — DURATIONAL RESIDENCY REQUIREMENTS — STATE INTERESTS — DETROIT CITY CHARTER.

Durational residency requirements for candidates for elective office serve the principal state interests of ensuring that a candidate is familiar with his or her constituency, ensuring that the voters have been thoroughly exposed to the candidate, and preventing political carpetbagging; these interests support the requirement of Detroit City Charter § 2-101 that candidates for elective office must be registered voters for one year when filing for office.

6. CONSTITUTIONAL LAW — ELECTIONS — RIGHT TO CANDIDACY.

The right to candidacy for elective office is not a fundamental right.

Andrew A. Paterson for plaintiff.

Melvin Butch Hollowell, Esq, PC (by *Melvin Butch Hollowell*), *Bodman, PLC* (by *Thomas P. Bruetsch*), and

Honigman Miller Schwartz & Cohn (by *John D. Pirich* and *Andrea L. Hansen*) for the intervening defendants.

Before: STEPHENS, P.J., and TALBOT and MURRAY, JJ.

MURRAY, J. Intervening defendants-appellants, Michael Duggan and the Michael Duggan for Mayor Committee, appeal as of right an order granting declaratory relief in regard to plaintiff's complaint for mandamus, declaring that Duggan was ineligible to be a candidate for the position of Mayor of Detroit, and directing that defendants, City of Detroit Election Commission and Detroit City Clerk Janice Winfrey, remove his name from the list of eligible names to run in the August 2013 primary election for mayor. We affirm.

I. BACKGROUND

This case concerns whether Michael Duggan is eligible to be placed on the primary ballot for mayor under the City of Detroit's Charter, which requires that a candidate for mayor be a resident and a registered voter for one year "at the time of filing for office . . . ." The material facts are undisputed. Duggan, formerly of Livonia, moved to Detroit in March 2012. Duggan registered to vote in Detroit on April 12, 2012. Duggan filed his nominating petitions with the requisite number of signatures for the August mayoral primary on April 2, 2013.

Plaintiff Tom Barrow, himself a candidate for the mayoral election, thereafter contacted Detroit City Clerk Janice Winfrey, challenging whether Duggan met the residency requirements set forth in the Detroit City Charter to be placed on the ballot. At issue was Detroit City Charter § 2-101, "Qualifications for Elective Officers and Appointive Officers," which provides, in pertinent part:

> A person seeking elective office must be a citizen of the United States, a resident and a qualified and registered voter of the City of Detroit for one (1) year at the time of filing for office, and retain that status throughout their tenure in any such elective office.

The above provision applies to persons seeking election as mayor pursuant to charter provision § 2-105(A)(13) (defining "elective officers" to include the Mayor of Detroit, among others).

Plaintiff contended that Duggan had not been a registered voter in Detroit for one year before the filing of his petitions on April 2, 2013. Duggan countered that he had been a registered voter in Detroit for one year before the mayoral primary filing deadline, which was May 14, 2013. It is undisputed that had Duggan filed his petitions on or after April 12, 2013, he would have met the durational voter registration requirement.

The three-member Detroit Election Commission, comprised of Winfrey, Detroit City Council President Charles Pugh, and Acting Corporation Counsel Edward Keelean, met to certify the names of candidates for placement on the ballot for the August 2013 primary election in accordance with their statutory duties under MCL 168.323[1] and MCL 168.719.[2] On May 23, 2013, a divided Election Commission decided that Duggan fulfilled the charter requirements to file for office. Voting to certify were Winfrey and Keelean, apparently on the basis that Duggan was qualified because he had been a registered voter in Detroit for

---

[1] MCL 168.323 provides, in relevant part, that "[i]t shall be the duty of the board of city election commissioners to prepare the primary ballots to be used by the electors."

[2] In pertinent part, MCL 168.719 provides that "[t]he election commission of each city, township and village shall perform such duties relative to the preparation, printing and delivery of ballots as are required by law of the boards of election commissioners of counties."

one year before the filing deadline applicable to all candidates. Pugh dissented.

Plaintiff then brought an action for mandamus in circuit court, seeking a declaratory judgment that Duggan was ineligible to appear on the ballot because he did not comply with the charter. Plaintiff argued that because Duggan had not been a registered voter in Detroit for one year at the time he filed his petitions to run for mayor, his name should not be placed on the August ballot. Plaintiff also moved for injunctive relief.

Duggan answered that mandamus was inappropriate. He contended that in instances of technical defects, access to the ballot should be granted, particularly if absurd results would otherwise occur. He also maintained that the durational residency requirement was unconstitutional.

Defendants asserted that the circuit court should give deference to the Detroit Election Commission's interpretation of the charter. Defendants averred that Michigan caselaw was inconclusive regarding durational residency requirements for candidates. Finally, defendants urged the court to apply the doctrine of substantial compliance.

In a thorough and well-written opinion, the circuit court decided that the language of § 2-101 was plain and unambiguous and, utilizing the common meaning of the terms, opined that the phrase "at the time of filing for office" meant the "specific point in time when the candidate has delivered his or her non-partisan nomination petitions and affidavit of identity to the City Clerk." The court ruled that defendants had a clear legal duty to determine whether Duggan met the qualifications for inclusion of his name on the ballot on April

2, 2013, the date he filed his nominating petitions, not the date of the filing deadline.

With regard to Duggan's constitutional arguments, the circuit court ruled that the cases he cited were distinguishable and therefore were not binding. The court cited federal caselaw and observed that rarely has a one-year residency requirement been struck down. The court ruled that the charter's one-year residency requirement was not unconstitutional per se and concluded that there were multiple bases upon which the provision could be construed as constitutional.

On appeal, Duggan argues that the language of the Detroit City Charter, which he claims is poorly drafted, is ambiguous. Thus, the Election Commission did not have a clear legal duty to conclude that he was not qualified. Duggan calculates his one-year residency requirement from the petitions' filing deadline, May 14, 2013. He contends that he was a resident of Detroit and a registered voter since at least May 14, 2012, such that the Election Commission was correct in certifying him. Further, any ambiguity on this point should weigh in favor of access to the ballot and letting the electorate decide the issue, particularly where he merely filed his petitions early. Had he waited until the filing deadline, this issue would be moot. He adds that the charter's durational residency requirements are unconstitutional under a strict scrutiny standard.

Plaintiff answers that the language of § 2-101 is clear and unambiguous and provides that Duggan must have been a registered voter in Detroit for at least one year at the time he filed for office. To accept Duggan's reading of § 2-101 would require this Court to substitute "by the filing deadline" for "at the time of filing for office," an unwarranted reading of the plain words of the charter.

Further, plaintiff asserts that the circuit court correctly determined that § 2-101 was constitutional.

II. ANALYSIS

A. STANDARD OF REVIEW

The issues presented are subject to review de novo. Courts review questions of law under a de novo standard. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Specifically, in a mandamus action this Court reviews de novo as questions of law whether a defendant has a clear legal duty to perform and whether a plaintiff has a clear legal right to performance. See *In re MCI Telecom Complaint*, 460 Mich 396, 442-443; 596 NW2d 164 (1999).[3] As in other cases, in a declaratory judgment action this Court reviews de novo a trial court's decision regarding a motion for summary decision. See *Mich Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000). The interpretation of a city charter provision is a question of law. *In re Storm*, 204 Mich App 323, 325; 514 NW2d 538 (1994), overruled in part on other grounds *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 342 n 2 (1996). Constitutional issues also receive review de novo. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008).

B. MANDAMUS

Duggan challenges the grant of mandamus to plaintiff. A plaintiff has the burden of establishing entitle-

[3] See also *Rhode v Dep't of Corrections*, 227 Mich App 174, 178; 578 NW2d 320 (1997) (ruling that review of a decision on a writ of mandamus is for an abuse of discretion except where the central issue in the appeal involves statutory interpretation, and that question of law is reviewed de novo).

ment to the extraordinary remedy of a writ of mandamus. *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 519-520; 810 NW2d 95 (2011). The plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgment, and (4) the plaintiff has no other adequate legal or equitable remedy. *Vorva v Plymouth-Canton Community Sch Dist*, 230 Mich App 651, 655-656; 584 NW2d 743 (1998).

It is undisputed that defendants have the statutory duty to submit the names of the eligible candidates for the primary election, see MCL 168.323 and MCL 168.719. The inclusion or exclusion of a name on a ballot is ministerial in nature. Here, plaintiff himself is a candidate for mayor, as well as a citizen of Detroit. Aside from the instant action, plaintiff has no other adequate legal remedy, particularly given that the election is mere weeks away and the ballot printing deadline is imminent. Plaintiff thus has established that mandamus is the proper method of raising his legal challenge to Duggan's candidacy. See, generally, *Sullivan v Secretary of State*, 373 Mich 627; 130 NW2d 392 (1964); *Wojcinski v State Bd of Canvassers*, 347 Mich 573; 81 NW2d 390 (1957).

The circuit court accepted plaintiff's challenges to Duggan's candidacy, thus, plaintiff established his entitlement to a writ of mandamus. Upon review, if we in turn likewise determine that Duggan did not meet the qualifications to be a candidate for elected office under the charter, plaintiff would have a clear legal right to have Duggan's name removed from the list of candidates, the Election Commission would have a clear legal duty to remove Duggan's name, the act would be

ministerial because it would not require the exercise of judgment or discretion, and plaintiff would have no other legal or equitable remedy. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 291-292; 761 NW2d 210 (2008), aff'd in result only 482 Mich 960 (2008). Accordingly, we must consider whether Duggan complied with the charter provisions to establish his qualifications to be among the candidates for mayor.

C. CHARTER LANGUAGE

Michigan statutory law provides that a city's charter governs qualifications for persons running for office, MCL 168.321(1).[4] As noted, the Detroit City Charter sets forth qualifications to be a candidate for elective office in § 2-101, which specifies that a "person seeking elective office must be a . . . registered voter of the City of Detroit for one (1) year ***at the time of filing for office*** . . . ." (Emphasis added.) Plaintiff argues, and the circuit court determined, that the emphasized language means that a candidate must be a registered voter one year prior to filing his or her papers for office, while Duggan argues that the phrase refers to the filing deadline applicable to all candidates.

To support his position, Duggan argues that the phrase "at the time of filing for office" in § 2-101 is ambiguous. When reviewing the provisions of a home rule city charter, we apply the same rules that we apply to the construction of statutes. *Detroit v Walker*, 445 Mich 682, 691; 520 NW2d 135 (1994). The provisions are to be read in context, with the plain and ordinary

---

[4] MCL 168.321(1)provides: "Except as provided in subsection (3) and sections 327, 641, 642, and 644g, the qualifications, nomination, election, appointment, term of office, and removal from office of a city officer shall be in accordance with the charter provisions governing the city."

meaning given to every word. *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011). Judicial construction is not permitted when the language is clear and unambiguous. *Id*. Courts apply unambiguous statutes as written. *Id*.

Alternately, when we "interpret" a statute, the primary goal must be to ascertain and give effect to the drafter's intent, and the judiciary should presume that the drafter intended a statute to have the meaning that it clearly expresses. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). This Court determines intent by examining the language used. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

At issue here is the phrase "at the time of filing for office." Notably, the charter employed the term "the," rather than the term "a," to modify the noun "time." As explained by our Supreme Court, the terms "the" and "a" have distinct functions:

> "The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an). . . ." *Random House Webster's College Dictionary*, p 1382. [*Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000).]

Where the Legislature wishes to refer to a particular item, not a general item, it uses the word "the," rather than "a" or "an." See *Johnson v Detroit Edison Co*, 288 Mich App 688, 699; 795 NW2d 161 (2010). The charter's use of "the time of filing," with "the" being a definite article and "time" being a singular noun, contemplates only one time. That time is unquestionably the time a particular candidate files for office. The language of the

charter could not be any more clear or unambiguous.[5] And, Duggan does not dispute that he filed his nominating petitions on April 2, 2013, which was less than one year from the date he registered to vote.

Duggan argues, however, that the phrase could be interpreted as referring to the deadline for filing nominating petitions. The difficulty with that argument is the actual language of the charter, which does not contain the term deadline. To accept Duggan's argument would require this Court to add the word "deadline" to the charter, but we must instead adhere to our limited constitutional role and refrain from adding language that the drafters neither included nor intended. *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). We may not assume that the drafters inadvertently made use of one word or phrase instead of another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931).

The "substantial compliance" doctrine as enunciated in *Meridian Charter Twp v East Lansing*, 101 Mich App 805, 810; 300 NW2d 703 (1980), does not affect our analysis of the charter provision. Under the substantial compliance doctrine, " '[a]s a general principle, all doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements are resolved in favor of permitting the people to vote and express their will on any proposal subject to election.' " *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich

[5] In other contexts this Court has held that an individual becomes a candidate on the date he or she files for election to office. *Okros v Myslakowski*, 67 Mich App 397, 401; 241 NW2d 223 (1976), citing *Grand Rapids v Harper*, 32 Mich App 324, 329-330; 188 NW2d 668 (1971). This Court more recently adopted that precept in *Gallagher v Keefe*, 232 Mich App 363, 373-374; 591 NW2d 297 (1998), when ruling that the defendant's eligibility for county commissioner was "determined as of the date that the candidate files for election to the office . . . ."

App 1, 21; 654 NW2d 610 (2002), quoting *Meridian Twp*, 101 Mich App at 810. However, in *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 594; 822 NW2d 159 (2012), our Supreme Court overruled *Bloomfield Charter Twp*. In *Stand Up*, the Court reviewed the certification of petitions under a statute that used the mandatory term "shall." The Court decided that, where the statute did not, by its plain terms, permit the certification of deficient petitions, the doctrine of substantial compliance did not apply. Here, the charter provision's use of the term "must," like the term "shall," denotes that the conditions following it are mandatory. See *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008). There is also no language within the charter provision at issue that allows for substantial compliance with the time period requirement. We therefore are precluded from applying the doctrine of substantial compliance in this matter.

We reject the notion that a plain reading of the charter language leads to an absurd result. Under the absurd-results rule, "a statute should be construed to avoid absurd results that are manifestly inconsistent with legislative intent . . . ." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008) (quotation marks and citation omitted). Our Supreme Court, however, has commented that the absurd results "rule" of construction typically is merely " ' "an invitation to judicial lawmaking." ' " *Casco Twp v Secretary of State*, 472 Mich 566, 603; 701 NW2d 102 (2005) (YOUNG, J., concurring in part and dissenting in part) (citation omitted). Justice YOUNG added that the role of the Court was not to rewrite the law to obtain a more "logical" or "palatable" result, but instead was to give effect to the Legislature's intent by enforcing the provision as it was written. *Id*. Enforcing the charter provision as it was drafted does not end in

an absurd result. Rather, it is the logical outcome expected from application of the clear, straightforward charter language, and is much like enforcing a statute of limitations when a party has missed the statutory deadline by 10 days. It is done not infrequently in Michigan courts because there is no "wiggle room" when applying a clear and definite time period to an undisputed set of facts. Consequently, to be eligible to be placed on the ballot, a candidate must have been a registered voter in Detroit for one year before filing his or her petitions.

Duggan also raises charter provision § 3-111, "Residency Requirement for Elective Officers," which requires that candidates must have resided in the city for one year at the time of filing:

> 1. *Elected Officials Generally*.
>
> All candidates for elective office and elected officials shall be bona fide residents of the City of Detroit and must maintain their principal residence in the City of Detroit for one (1) year at the time of filing for office or appointment to office, and throughout their tenure in office.

This residency provision of the charter is not dispositive to our analysis or conclusion, though we note that it reinforces the plain language of 2-101 that a candidate be a Detroit resident for one year at the time of filing for office.

For the reasons expressed, the plain and unambiguous language of the charter requires a candidate to be a registered voter of Detroit one year prior to filing for office. As noted, it is undisputed that Duggan was not. Hence, unless there is some independent impediment to enforcing this charter provision against Duggan, he is ineligible to be placed on the ballot for mayor in the August 2013 primary.

D. CONSTITUTIONAL ISSUES

Duggan argues that the durational voter registration requirement of the charter provision violates his equal protection rights under our state Constitution. Const 1963, art 1, § 2. However, the Equal Protection Clauses of the United States and Michigan Constitutions are coextensive. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003). The right to *intra*state travel under the Michigan Constitution was abruptly declared in *Musto v Redford Twp*, 137 Mich App 30, 34 & n 1; 357 NW2d 791 (1984), which cited our state's parallel provision to the United States Constitution: "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation." Const 1963, art 1, § 2.[6]

At the outset, we observe that the United States Supreme Court has noted that it has "expressly disclaimed" the idea that states cannot impose durational residency requirements. *Sosna v Iowa*, 419 US 393, 406; 95 S Ct 553; 42 L Ed 2d 532 (1975). Indeed, the United States Constitution imposes durational residency requirements on representatives (7 years), senators (9 years) and presidents (14 years), US Const, art I, § 2, cl 2; art I, § 3, cl 3; and art II, § 1, cl 5. Our own state Constitution requires that the Governor be "a regis-

---

[6] Duggan also discusses, in passing, infringement on the right to vote and the First Amendment rights of freedom of speech and association. However, he merely mentions those rights in a single footnote. Appellants may not give cursory treatment to issues, *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008), and by doing so, Duggan has abandoned a constitutional challenge under the First Amendment or the right to vote. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

tered elector in this state for four years . . . ." Const 1963, art 5, § 22. Accordingly, all durational residency requirements are not unconstitutional, a proposition that was not clear at the time we decided *Grano v Ortisi*, 86 Mich App 482; 272 NW2d 693 (1978).

In undertaking constitutional analysis, we are mindful—as was the circuit court—that legislation challenged on equal protection grounds is presumed constitutional and the challenger has the burden to rebut that presumption. *Boulton v Fenton Twp*, 272 Mich App 456, 467; 726 NW2d 733 (2006). Courts examine three factors when determining whether a law violates the Equal Protection Clause: "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v Blumstein*, 405 US 330, 335; 92 S Ct 995; 31 L Ed 2d 274 (1972).

When evaluating an equal protection challenge to a provision, courts apply one of three traditional levels of review.[7] *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 18; 714 NW2d 664 (2006). Traditionally, the rational basis test applies where no suspect factors are present or where no fundamental right is implicated. *Kyser v Kasson Twp*, 486 Mich 514, 522 n 2; 786 NW2d 543 (2010). Under this test, a statute is constitutional if it furthers a legitimate governmental interest and if the challenged statute is rationally related to

---

[7] Those standards include strict scrutiny, intermediate scrutiny, and rational basis. To pass intermediate scrutiny, a law must be substantially related to an important governmental interest. *Clark v Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988); *Phillips v Mirac, Inc*, 470 Mich 415, 433; 685 NW2d 174 (2004). In other words, the challenged law must be found reasonably necessary to the accomplishment of the state's legitimate election interests. *Lubin v Panish*, 415 US 709, 718; 94 S Ct 1315; 39 L Ed 2d 702 (1974).

achieving that interest. *Boulton*, 272 Mich App at 467. Thus, restrictions are set aside only if they are based on reasons unrelated to the state's goals and no grounds can be conceived to justify them.

The most heightened review, strict scrutiny, applies when the provision interferes with a fundamental right or classifies based on factors that are suspect, such as race, national origin, or ethnicity. *Rose v Stokely*, 258 Mich App 283, 300; 673 NW2d 413 (2003). Under a strict scrutiny analysis, the government may not infringe upon a fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. *In re B & J*, 279 Mich App 12, 22; 756 NW2d 234 (2008).

In *Grano* we held that strict scrutiny applied to an equal protection challenge to a two-year durational residency requirement. The decision to employ strict scrutiny was largely premised upon federal caselaw, in particular *Green v McKeon*, 468 F2d 883 (CA 6, 1972). We are not bound by *Grano*, a pre-1990 decision, and we conclude it improperly employed the strict scrutiny standard of review.[8] *Green* was disavowed by the United States Court of Appeals for the Sixth Circuit long ago, and is no longer considered controlling precedent, see *City of Akron v Bell*, 660 F2d 166, 169 (CA 6, 1981).[9] Additionally, for reasons the Court did not explain, *Grano* chose not to follow the two decisions issued by the United States Supreme Court summarily affirming

---

[8] Under MCR 7.215(J)(1), panels must follow this Court's published decisions issued on or after November 1, 1990.

[9] Additionally, *Green* relied on *Dunn* for its conclusion that the right to travel was penalized, but *Dunn* involved the right to travel of the voting populace, not a perspective candidate's right to travel, and, as we have observed, there is no constitutional right to candidacy. The difference between what was involved in *Dunn* and what was involved in *Green* is constitutionally significant.

durational residency requirements, *Chimento v Stark*, 353 F Supp 1211 (D NH, 1973), aff'd 414 US 802 (1973), and *Sununu v Stark*, 383 F Supp 1287 (D NH, 1974), aff'd 420 US 958 (1975). Yet it was in large part those Supreme Court decisions, along with *Bullock v Carter*, 405 US 134; 92 S Ct 849; 31 L Ed 2d 92 (1972), that the federal courts took as signifying a change in the legal landscape for these durational residency challenges. See, e.g., *Bell*, 660 F2d at 168-169; *Joseph v City of Birmingham*, 510 F Supp 1319, 1329-1330 (ED Mich, 1981); *In re Contest of November 8, 2011 General Election*, 210 NJ 29, 53; 40 A3d 684 (2012). For those reasons, we do not follow *Grano*. Duggan also relies on *Musto*, 137 Mich App at 34, but that case is distinguishable because it did not involve a durational residency requirement for candidates for elective office.

Caselaw since *Grano* compels a conclusion that strict scrutiny does not apply to this case.[10] Notably, questions related to ballot access restrictions do not automatically require "heightened" equal protection scrutiny. *Erard v Johnson*, 905 F Supp 2d 782, 798 (ED Mich, 2012). Residency is also not one of the suspect classifications, *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218

[10] Our decision to question and not follow *Grano*'s use of a strict scrutiny test under these circumstances does not require prospective application. Court decisions are almost always applied retroactively. *In re Hill*, 221 Mich App 683, 690; 562 NW2d 254 (1997). Additionally, when they are not—or when cases that are wrongly decided are not reversed—it is typically because of reliance factors that are not at issue here. *Joseph v Auto Club Insurance Ass'n*, 491 Mich 200, 219-220; 815 NW2d 412 (2012). For one, the charter provision has never been declared unconstitutional, and thus there could be no reliance that the provision would not be applied. Second, the charter provision is crystal clear, and it is the consistency of enforcing that clear language that reinforces reliance on the laws established by the lawmaking branches of government. *Robinson v Detroit*, 462 Mich 439, 467-468; 613 NW2d 307 (2000). Third, Duggan relied on the charter provision when filing for office; he did not make a blanket challenge to the provision's constitutionality.

(2000), so our review is confined to whether the charter provision impedes a fundamental right.[11] With regard to the character of the classification and the individual interests affected, the alleged infringement of the right to travel in this case relates to Duggan's move from Livonia to Detroit.[12] A state law implicates the right to travel when it actually deters travel, when impeding travel is its primary objective, or when it uses a classification that serves to penalize the exercise of the right. *Attorney General of New York v Soto-Lopez*, 476 US 898, 903; 106 S Ct 2317; 90 L Ed 2d 899 (1986).

We find that the charter provision will have a minor effect, if any, on intrastate travel, as it applies only to individuals who wish to run for elected office as described in charter § 2-105(A)(13). It does not prohibit anyone from moving into or out of Detroit, and was not designed to discourage intrastate travel. Rather, according to the charter's commentary to § 2-101, it was meant to "make[] it more likely that elected officials will be intimately familiar with the unique issues impacting their communities." We also consider that "the benefit denied is not itself a fundamental right (such as voting) nor a basic necessity of life (such as welfare benefits for the poor) . . . ." *Bell*, 660 F2d at 169. The charter provision thus does not "penalize" the exercise of the right to travel, it merely places an insignificant impediment to *running for office* once moving into the city. The charter provision does not sufficiently infringe upon the right to travel such that strict scrutiny must be applied. See *Mem Hosp v Maricopa Co*, 415 US 250, 256-262; 94 S Ct 1076; 39 L Ed 2d 306 (1974) (considering the right to travel in the context of "vital" government benefits).

---

[11] Note that there is no fundamental right to candidacy. *Bullock*, 405 US 134; *Carver v Dennis*, 104 F3d 847, 850-851 (CA 6, 1997).

[12] Interstate travel is not involved in this case.

Accordingly, the compelling-state-interest test is inappropriate here. See *In re Contest of November 8, 2011 General Election*, 210 NJ at 53 ("Since the Supreme Court's decision in *Bullock*, there has been general consensus that strict scrutiny should not apply to requirements that candidates live in a district or municipality for a particular duration."). Indeed, since *Bullock* "courts that have applied strict scrutiny to durational residency requirements have done so only when those requirements imposed a burden on the right to interstate travel and have based the strict scrutiny analysis on that interference, not on the requirement's asserted interference with the right to run for office." *Id*. at 54. As such, strict scrutiny does not apply and we must apply either intermediate or rational basis review to the durational voter registration requirement.[13] In the end, however, it does not matter which is utilized, for under intermediate scrutiny (and thus rational basis as well) the charter provision survives constitutional scrutiny. See *Bell*, 660 F2d at 169 (upholding one-year durational residency provision under intermediate scrutiny); *Joseph*, 510 F Supp at 1333 (upholding one-year durational residency provision under rational basis); *In re Contest of November 8, 2011 General Election*, 210 NJ at 53 (collecting cases and upholding a one-year durational residency provision under intermediate scrutiny).[14]

---

[13] This conclusion finds support from the United States Supreme Court, which specifically stated that "insignificant interference" with ballot access need have only a rational predicate to survive an equal protection challenge. *Clements v Fashing*, 457 US 957, 968; 102 S Ct 2836; 73 L Ed 2d 508 (1982) (plurality opinion) (the Court referencing its upholding of a seven-year durational residency requirement in *Chimento v Stark*, 414 US 802; 94 S Ct 125; 38 L Ed 2d 39 [1973], summarily aff'g 353 F Supp 1211 [D NH, 1973]).

[14] We offer a couple of points to the dissent. First, we do not doubt that there is a right to travel protected by the state Constitution, as was

We now turn to the governmental interests asserted in support. Aside from the language in the charter commentary, we consider that durational residency requirements serve three principal state interests: " 'first, to ensure that the candidate is familiar with his constituency; second, to ensure that the voters have been thoroughly exposed to the candidate; and third, to prevent political carpetbagging[.]' " *Lewis v Guadagno*, 837 F Supp 2d 404, 414 (D NJ, 2011) (citation omitted). Stated differently, the significant governmental interests include:

> (1) the interest in exposing candidates to the scrutiny of the electorate, so voters may make informed choices; (2) the interest in protecting the community from outsiders who are interested only in their own selfish ends and not seriously committed to the community; and (3) the interest in having officeholders who are familiar with the problems, interests, and feelings of the community. [*Joseph*, 510 F Supp at 1336.]

These justifications—which were in part cited by the city in establishing the provision—support the charter's requirement that candidates must be registered voters for one year when filing for office. We further observe that the people of Detroit recently considered the durational residency requirement when adopting the latest

---

declared in *Musto*. But, that does not automatically result in a strict scrutiny analysis, as the question to answer is whether the charter penalizes Duggan from exercising a fundamental right, and seeking public office is not one. See *Hankins v Hawaii*, 639 F Supp 1552, 1555 (D Hawaii, 1986); *Carver v Dennis*, 104 F3d 847, 850-851 (CA 6, 1997). Thus, the fact that strict scrutiny was applied in cases like *Gilson v Dep't of Treasury*, 215 Mich App 43; 544 NW2d 673 (1996), which did not involve a durational residency provision for public office, does not help an analysis of this case. Second, we are not the only court to conclude that the *Green* decision, though not reversed, is no longer persuasive or valid precedent on which to rely. See *Bell*, 660 F2d at 168 (Sixth Circuit called its own decision in *Green* "no longer controlling precedent"), and *Joseph*, 510 F Supp at 1327.

version of the charter in the November 2011 election and chose to include it.[15] The interests of the people in adopting the charter must be balanced with the interest of voters to have their choice of candidates. In this instance, the former need not give way to the latter where Duggan asserts that he may be a write-in candidate under state law, citing MCL 168.737a,[16] and there is no constitutional right to vote for an individual who did not meet the eligibility requirements to have their name placed on the ballot. Indeed, voters have the right to expect that the candidates appearing on ballots have met the requirements set by the citizens in the charter.

The substantial interest of the city in prescribing candidate eligibility requirements also weighs in favor of the charter provision. The United States Supreme Court indicated that the interests of the state of Texas in a durational residency requirement for elected officials were sufficient to warrant the "*de minimis*" interference with the individual's interests in candidacy. *Clements v Fashing*, 457 US 957, 971-972; 102 S Ct 2836; 73 L Ed 2d 508 (1982) (plurality opinion). The charter does not require a citizen to "choose between travel and the basic right to vote," see *Dunn*, 405 US at 342, because no analogous basic right to candidacy exists. Therefore, although Duggan is "penalized" in that he may not run for mayor for a year after registering to vote, his right to travel was not and his candidacy

---

[15] No durational residency requirement was contained in the 1997 Detroit City Charter.

[16] MCL 168.737a(1) provides, in pertinent part: "The write-in candidate shall file the declaration of intent to be a write-in candidate with the filing official for that elective office on or before 4 p.m. on the second Friday immediately before the election." Section 3-106 of the charter allows for state law to apply to the filing for office by candidates except as otherwise provided in the charter. Thus, the voters remain free to "cast their votes effectively." *Williams v Rhodes*, 393 US 23, 30; 89 S Ct 5; 21 L Ed 2d 24 (1968).

is not a fundamental right. See *Hankins v Hawaii*, 639 F Supp 1552, 1555 (D Hawaii, 1986).[17] Duggan points to no specific text in the parallel provisions of the Michigan Constitution to warrant a different result than in the federal cases.[18] He has not provided sufficient justification for this Court's intrusion into the charter adopted by the people of Detroit.

III. CONCLUSION

We hold that Duggan has not met the qualifications for inclusion of his name of the ballot by the plain terms contained in the charter. We also hold that the durational residency requirement neither implicates, nor violates, the constitutionally based right to travel. Consequently, because Duggan has failed to meet the charter requirements, his name may not appear on the ballot. Plaintiff thus has a clear legal right to have Duggan's name removed from the list of candidates and the Election Commission has a clear legal duty to perform this ministerial act.

Affirmed. This opinion is given immediate effect pursuant to MCR 7.215(F)(2).

No costs, a public question being involved. MCR 7.219(A). We do not retain jurisdiction.

TALBOT, J., concurred with MURRAY, J.

---

[17] The *Hankins* court concluded: "The fact that, under the Constitution of the State of Hawaii, an individual must set aside his plans to become Governor for five years after moving to the State cannot seriously be said to constrict the freedom of interstate travel. This court finds that the relationship between the requirement at issue and the right to travel is " 'too attenuated to warrant invocation of the strict standard of scrutiny.' " *Id*. at 1555-1556 (citation omitted). The same is true in this case.

[18] We thus decline to adopt a more stringent standard than that adopted by the United States Supreme Court.

STEPHENS, P.J. (*concurring in part and dissenting in part*). I concur with the majority in all respects with regard to Duggan's nonconstitutional arguments. I write separately to respectfully dissent from the majority's conclusion regarding the constitutionality of the Detroit City Charter's durational residency requirements.[1] Consistent with both Michigan and federal caselaw, on the record that currently exists, I conclude that the durational residency requirements are unconstitutional. Accordingly, I would reverse the trial court and order that Duggan's name be placed on the ballot.

The right to travel from state to state and from county to county is a fundamental right. *Gilson v Dep't of Treasury*, 215 Mich App 43, 50; 544 NW2d 673 (1996) (interstate travel); *Grace v Detroit*, 760 F Supp 646, 651 (ED Mich, 1991) (intrastate travel). It is well established that classifications that are based upon the exercise of a fundamental right offend the Equal Protection Clauses of both the United States and the Michigan Constitutions, Const 1963, art 1 § 2; US Const, Am XIV. See *Doe v Dep't of Social Servs*, 439 Mich 650, 662; 487 NW2d 166 (1992). See also *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982). The case cited by the majority to support their assertion that the Michigan equal protection standard is coextensive with the federal Equal Protection Clause, *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003), expressly adopted the strict scrutiny ana-

[1] Duggan has challenged the constitutionality of two portions of the Charter: §§ 2-101 and 3-111. I recognize that strictly speaking, § 2-101 is a voter registration requirement and not a durational residency requirement. However, in order to vote one must be a resident, and by imposing a one-year voter registration requirement, § 2-101 arguably imposes a de facto durational residency requirement. In any event, it is undisputed that § 3-111 by its express terms imposes a durational residency requirement of one year for prospective candidates for elected city office.

lytical framework for cases involving any suspect class or fundamental right. This Court has held:

> The constitutional guarantee of equal protection mandates that persons in similar circumstances be treated alike. In order to perform an equal protection analysis, we must first determine which constitutional test applies, strict scrutiny or the rational basis test. Because the right to interstate travel is a fundamental right, we will review a statute that penalizes the right to travel under the strict scrutiny test . . . . [*Gilson*, 215 Mich App at 49-50 (citations omitted).]

Generally speaking, if a law or regulation is determined to be subject to strict scrutiny, "the government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 319; 783 NW2d 695 (2010); *Gilson*, 215 Mich App at 50.

This Court has held in the past that durational residency requirements infringe on the right to travel and are therefore subject to strict scrutiny. In *Grano v Ortisi*, 86 Mich App 482, 495; 272 NW2d 693 (1978), a case strikingly similar to the one at bar, this Court rejected durational residency requirements for candidates seeking elected office. Durational residency requirements for applicants for nonelected public-sector employment were rebuffed in *Musto v Redford Twp*, 137 Mich App 30, 34; 357 NW2d 791 (1984). No distinction has been made between inter- and intrastate travel.

In *Grano*, 86 Mich App at 495, this Court concluded that a city's two-year residency requirement for candidates for municipal judgeships "substantially affect[s] the fundamental right of free travel . . . thus requiring [the government] to demonstrate that the provision

serves a compelling state interest." The *Grano* Court noted that durational residency requirements had been declared unconstitutional with regard to candidates for the office of city commissioner in Pontiac, *Alexander v Kammer*, 363 F Supp 324, 327 (ED Mich, 1973), and mayor in the city of Warren, *Bolanowski v Raich*, 330 F Supp 724, 731 (ED Mich, 1971). The *Grano* Court relied heavily on *Green v McKeon*, 468 F2d 883, 885 (CA 6, 1972).[2] In *Green*, the United States Court of Appeals for the Sixth Circuit concluded that a two-year residency requirement as a condition of eligibility to hold elective office in the city of Plymouth's charter was subject to strict scrutiny, and that the durational residency requirement was not narrowly tailored to a compelling government interest. *Id*. The *Grano* Court similarly determined that the city's justification for the municipal judgeship durational residency requirement, "to insure that candidates are knowledgeable about local procedures and laws and known to the electorate," was not compelling, and that even if it were, the durational residency requirement was not narrowly tailored to effectuate that interest. *Grano*, 86 Mich App at 495. Similarly, in *Musto*, 137 Mich App at 34, this Court relied on *Grano* to conclude that a state statute that imposed a requirement that applicants for local police and fire departments be residents of the locality for one year before applying was subject to strict scrutiny because it imposed "a penalty on the exercise of [the right to travel]." Similarly, in 1991, the United States District Court for the Eastern District of Michigan, relying not only on *Grano* and *Musto*, but on a number of federal right-to-travel cases, concluded that the requirement of the city of Detroit that applicants to the

---

[2] I disagree with the majority that *Green* is no longer good law upon which we can rely. It has never been reversed or vacated.

Detroit Police Department be residents of the city for 60 days before applying was subject to strict scrutiny under the Equal Protection Clauses of both the Michigan and the United States Constitutions, because the requirement classified applicants on the basis of their exercise of the right to travel. *Grace*, 760 F Supp at 651.

Grano and *Musto* are not unique. Any number of federal courts have reached the same conclusion—that durational residency requirements infringe on the right to travel and are therefore subject to strict scrutiny. See, e.g., *Westenfelder v Ferguson*, 998 F Supp 146, 151 (D RI, 1998) (durational residency requirement for welfare benefits); *Robertson v Bartels*, 150 F Supp 2d 691, 696 (D NJ, 2001), motion to intervene granted, motion to vacate order denied, motion to modify order granted 890 F Supp 2d 519 (2012) (durational residency requirement for elected office); *Walsh v City & Co of Honolulu*, 423 F Supp 2d 1094, 1101 (D Hawaii, 2006) (residency requirement to apply for public employment). Although I acknowledge that these cases are not binding on us, because the Michigan and federal Equal Protection Clauses are indeed coextensive, *Harvey*, 469 Mich at 6, they are nonetheless persuasive.

On the basis of *Grano* and *Musto* alone, I would conclude that §§ 2-101 and 3-111 of the Detroit City Charter are subject to strict scrutiny, rather than some lower standard of constitutional review. First, although I acknowledge that these cases predate November 1, 1990, and we are therefore not bound by them, MCR 7.215(J)(1), these cases have also never been overruled. I would not conclude that merely because these cases are old they are wrong. Rather, I would conclude that we should follow our prior cases, particularly when no contrary Michigan authority has arisen in the intervening years. Two post-1990 cases, *Gilson*, 215 Mich App at

50, and *People v Ghosh*, 188 Mich App 545, 547; 470 NW2d 497 (1991), reiterated that the application of strict scrutiny to statutes that impede intra- and interstate travel is appropriate. Moreover, I find the rationale of *Grano* and *Musto* persuasive. In those cases, the panels found that the very creation of separate classifications of persons based solely on whether they had exercised their right to travel either within a state or between states subjected that decision to strict scrutiny because it implicated a fundamental right. In that regard, there is no principled distinction between the residency requirements at issue in *Grano*, *Musto*, or *Grace*, and the provisions of the Detroit City Charter at issue in this case. The majority opines that the charter provision has only a minor effect on intrastate travel. In *Maldonado v Houstoun*, 177 FRD 311, 331 (ED Pa, 1997), citing *Mem Hosp v Maricopa Co*, 415 US 250, 256-257; 94 S Ct 1076; 39 L Ed 2d 306 (1974), the court rejected a durational residency requirement that deprived persons of some but not all welfare benefits, noting that the Supreme Court has never made clear the "amount of impact required to give rise to the compelling-state interest test . . . ." Even an unjustified minor impingement on a constitutional right is abhorrent to the law. I concede that in a hierarchy of rights and benefits the right to travel may pale against a liberty interest of an accused or need of a critically ill recipient of governmental health insurance. However, the right to travel inter- or intrastate remains one of the fundamental rights under the Michigan Constitution and is worthy of protection.

Because the challenged provisions of the Detroit City Charter are subject to strict scrutiny, it is defendants' burden to establish that the provisions are narrowly tailored to serve a compelling governmental interest. *Shepherd Montessori Ctr*, 486 Mich at 319. However,

defendants have not filed an appellate brief in the instant case.[3] I am therefore left to rely on the record below to glean what compelling interest defendants believe justifies the durational residency requirements here. Defendants cited the charter commentary in their circuit court brief. The commentary to § 2-101 states that "[r]equiring that candidates for elective office reside for a specified period of time in the community they seek to serve makes it more likely that elected officials will be intimately familiar with the unique issues impacting their communities."[4] Similarly, the commentary to § 3-111 states that the residency requirement "is a significant means of assuring that [candidates] have a demonstrable commitment to the City of Detroit and first-hand familiarity with issues confronting the City." Defendants relied on both these provisions in the circuit court; accordingly, it is reasonable to conclude that these are the governmental interests defendants believe justify the requirements. I disagree.

Even assuming, arguendo, that familiarity with the community and the issues confronting it is a compelling governmental interest; defendants have not established that the charter's residency and voter registration requirements are narrowly tailored to serve that interest. Indeed, the governmental interest asserted by de-

---

[3] Ordinarily, if a party bearing the burden of proof declined altogether to file an appellate brief in this Court, I would conclude on that basis alone that it had failed to meet its burden. However, given the unique circumstances of this case, particularly the expedited manner in which it has arrived at this Court; I am willing to conclude that while this Court would benefit from further briefing from defendants on the strict scrutiny issue we can look to the record below which includes the Detroit City Charter and its commentary.

[4] Language such as this is strongly indicative that the drafters of the Detroit City Charter intended for § 2-101 to serve principally as a residency requirement.

fendants in this case is not materially different from the governmental interests asserted in *Grano*, or in *Green*, the case upon which *Grano* heavily relied. As the *Grano* Court correctly held:

> "The [residency] restriction is in no way "tailored" to achieve the stated municipal goal [of ensuring familiarity with the community and the problems facing it]. It permits a two year resident of [the city] to hold public office regardless of his lack of knowledge of the governmental problems of the city. On the other hand, it excludes more recent arrivals who have had experience in local government elsewhere or who have made diligent efforts to become well acquainted with the municipality." [*Grano*, 86 Mich App at 493, quoting *Green*, 468 F2d at 885.]

Similarly, there is no reason to believe that the charter's durational residency requirements are an effective proxy for community familiarity or knowledge of the problems facing the community. Mere presence in a community is no more indicative of civic consciousness than mere presence at a crime scene is indicative of guilt. A person who has been a long term Detroit resident may be politically disengaged, lacking all knowledge of the community and its problems. By contrast, a politically and socially active resident who has lived in the community for only months may learn and know a great deal about the community and its problems in a short period. The durational residency requirements at issue here would permit the former to seek public office, but prevent the latter from doing so.[5] As noted in *Grano*, 86 Mich App at 495, "[w]e also have

[5] Moreover, even if I were to construe § 2-101 as distinguishing between the imposition of a durational voter registration requirement and a durational residency requirement, I would still conclude that § 2-101 is not narrowly tailored to serve the governmental interest most likely advanced by defendants. Perhaps obviously, being a registered voter is not narrowly tailored to community familiarity and engagement. It does

confidence, as expressed in [our] previous opinions, that the normal processes of our elective system will sufficiently insure that only qualified and knowledgeable candidates will gain office." Accordingly, I conclude that the charter's durational residency requirements are not narrowly tailored to serve a compelling governmental interest.

For the foregoing reasons I would conclude that the charter's durational residency requirements are unconstitutional, because they impermissibly classify Duggan and other candidates on the basis of the candidate's exercise of the fundamental right to travel. I would reverse the trial court's opinion and order that defendants place Duggan's name on the ballot.

---

not follow that candidates will be familiar with the community simply because they have registered to vote a year before filing for office.

In re ESTATE OF GEORGE EUGENE STAN

Docket No. 309958. Submitted June 11, 2013, at Detroit. Decided June 20, 2013, at 9:00 a.m. Leave to appeal sought.

George Eugene Stan died on July 21, 2011. He was survived by two children, Georgiann Stan and Christine Stan. Georgiann petitioned for formal administration of the decedent's estate in the Wayne County Probate Court, requesting that she be appointed as sole personal representative pursuant to her nomination in the decedent's will. Christine filed an objection to Georgiann's appointment as sole personal representative, alleging that Georgiann had refused to disclose the disposition of the decedent's properties in Michigan, Ohio, and Florida and that Georgiann had taken all the personal property of the decedent for her own use without providing Christine an accounting of those items. The probate court, June E. Blackwell-Hatcher, J., determined that Georgiann had acted outside the law when she began acting as personal representative before she was officially appointed by the court, but that Christine had not presented evidence establishing that Georgiann was unfit or unsuitable for the position of personal representative. The court proceeded to appoint Georgiann as sole personal representative. Georgiann petitioned to enforce an *in terrorem* clause in the decedent's trust against Christine, asserting that Christine had unsuccessfully challenged a provision of the decedent's will within the meaning of the clause by contesting Georgiann's appointment as sole personal representative and that Christine should therefore receive nothing under the decedent's trust. The court denied the petition, ruling that, under the circumstances, the *in terrorem* clause was not enforceable against Christine. Georgiann appealed.

The Court of Appeals *held*:

In Michigan, *in terrorem* clauses are generally valid and enforceable, but they must be strictly construed by the courts. In this case, the question was whether Christine had unsuccessfully challenged or contested any provision of the will or the trust within the meaning of the *in terrorem* clause when she objected to Georgiann's appointment as sole personal representative. Christine's objection came within the express terms of the *in terrorem*

clause. Her objection to her sister's appointment qualified as a challenge to that provision of the decedent's will that nominated Georgiann to serve as personal representative. The *in terrorem* clause, however, was unenforceable in this instance because Christine had probable cause to object to Georgiann's appointment. MCL 700.2518 and MCL 700.3905 both restrict the enforceability of an *in terrorem* clause contained in a will when an interested person has probable cause to challenge the will or institute another proceeding relating to the estate. Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. MCL 700.2518 and MCL 700.3905 were applicable because the decedent's will expressly incorporated his trust by reference and the *in terrorem* clause in the trust explicitly addressed challenges to the will. Thus, the *in terrorem* clause in the trust was made part of the will. Any ground that would justify the removal of a personal representative under MCL 700.3611(2) is equally sufficient to support an interested person's objection to the initial appointment of a personal representative under MCL 700.3203(2). Christine's allegations, that Georgiann had mismanaged the decedent's property and failed to keep interested persons reasonably informed concerning the affairs of the estate, were sufficient to warrant Christine's objection to Georgiann's appointment. Given the evidence that Georgiann took control of the decedent's assets and may have failed to account for estate property before her appointment as personal representative, Christine had probable cause to object to Georgiann's appointment as sole personal representative, and the *in terrorem* clause was unenforceable under MCL 700.2518 and MCL 700.3905. The probate court reached the correct result when it denied Georgiann's petition to enforce the *in terrorem* clause.

Affirmed.

1. WILLS — TRUSTS — *IN TERROREM* CLAUSES — ENFORCEABILITY.

In terrorem clauses are generally valid and enforceable, but they must be strictly construed by the courts; MCL 700.2518 and MCL 700.3905 both restrict the enforceability of an *in terrorem* clause contained in a will when an interested person has probable cause to challenge the will or institute another proceeding relating to the estate; probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.

2. WILLS — PERSONAL REPRESENTATIVES — GROUNDS FOR OBJECTION TO THE APPOINTMENT OF A PERSONAL REPRESENTATIVE.

Any ground that would justify the removal of a personal representative under MCL 700.3611(2) is equally sufficient to support an interested person's objection to the initial appointment of a personal representative under MCL 700.3203(2).

Deana L. Beard for Georgiann Stan.

Pentiuk, Couvreur & Kobiljak, P.C. (by *Joseph G. Couvreur*) for Christine Stan.

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

JANSEN, P.J. Petitioner Georgiann Stan (Georgiann) appeals by right the probate court's order denying her petition to enforce the *in terrorem* clause in her late father's trust against her sister, Christine S. Stan (Christine). We affirm, albeit for different reasons than those relied on by the probate court.

I

George Eugene Stan (the decedent) died on July 21, 2011, in Wayne County, Michigan. He was survived by two children, Georgiann and Christine. At the time of the decedent's death, most of his real and personal assets were situated in Florida and Ohio. The only assets in Michigan that were subject to probate were various pieces of jewelry and other household effects.[1]

In the decedent's last will, dated October 19, 2010, Georgiann was nominated to act as sole personal rep-

[1] Although the decedent owned real estate in Put-in-Bay, Ohio, and a mobile home in Florida, it appears that he was domiciled at the home of his daughter Christine in Allen Park, Michigan, at the time of his death. At oral argument on November 1, 2011, the probate court observed that, in light of the decedent's other assets, ancillary probate proceedings would likely be required in Ohio and Florida.

resentative of the decedent's estate. By his will, the decedent devised his tangible personal property to various persons, and directed that the residue of his estate pour over into the George E. Stan Trust (trust). The decedent's will did not contain an *in terrorem* clause.

In the trust instrument, most recently restated on October 19, 2010, Georgiann was appointed to act as sole, successor trustee upon the decedent's death. The trustee was directed, upon the decedent's death and after the payment of taxes and claims, to distribute $175,000 plus the decedent's Ohio real estate to Georgiann, and $325,000 to Christine. The trust instrument divided the remaining trust property equally between Georgiann and Christine, provided they survived the decedent.[2] In addition, the trust instrument contained the following *in terrorem* clause:

> ***7.5 IN TERROREM CLAUSE***. If any beneficiary under this Agreement or any heir of mine, or any person acting, with or without court approval, on behalf of a beneficiary or heir, shall unsuccessfully challenge or contest the admission of my will to probate, or unsuccessfully challenge or contest any provision of my will or of this Agreement, the beneficiary or heir shall receive no portion of my estate, nor any benefits under this Agreement. However, it will not be a "challenge or contest" if [the] Trustee or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in this Agreement.

On September 9, 2011, Georgiann opened her late father's estate by filing a petition for formal administration in the Wayne County Probate Court. Georgiann

[2] Under the trust instrument, the aforementioned specific distributions were to lapse in the event that Georgiann or Christine predeceased the decedent. Moreover, if either Georgiann or Christine predeceased the decedent, that daughter's share of the trust's remaining property was to pass to the other, surviving daughter. However, as explained previously, both Georgiann and Christine survived the decedent.

requested appointment as sole personal representative pursuant to her nomination in the will. She identified Christine, the trust, and herself as interested persons. Georgiann attached a copy of the decedent's will to her petition.

On September 19, 2011, Christine filed an objection to Georgiann's appointment as sole personal representative. Christine alleged that "Georgiann . . . has refused to disclose, despite repeated requests . . . the disposition of her father's properties located in the states of Michigan, Ohio, and Florida." Christine further alleged that "Georgiann . . . has taken all personal property of [the] deceased including jewelry, coin collection, and stamp collection for her own use" and that "[n]o accountings have ever been furnished . . . by Georgiann . . . for those items." Christine attached a letter dated August 16, 2011, purportedly from Georgiann, cautioning that if Christine unsuccessfully challenged any provision of the decedent's will or trust, she would "lose all inheritance . . . that [she] would have otherwise been entitled to." Christine requested that the probate court appoint her as a co-personal representative, to serve alongside her sister as a joint fiduciary of the estate.

The probate court held oral argument on November 1, 2011. The evidence established that although Georgiann had not yet been appointed to serve as personal representative, she had been acting in that capacity since the decedent's death and had already taken control of several of the decedent's assets. The probate court expressed its dissatisfaction. Counsel pointed out that Georgiann was nominated in the will, but the court observed that Georgiann should have waited to act until after she was officially appointed. Counsel responded that Georgiann had fulfilled all fiduciary duties with

respect to the decedent's estate and had "taken every effort to inform her sister of what is going on with the [e]state." Despite the probate court's belief that Georgiann had "act[ed] outside the law," the court noted that "the person nominated in a [w]ill is to be appointed [as personal representative] . . . unless I'm presented with evidence that they're unsuitable." The court further noted that it had heard no evidence to positively establish that Georgiann was unfit or unsuitable for the position of personal representative.

On November 1, 2011, the probate court entered an order admitting the decedent's will and appointing Georgiann to serve as sole personal representative of the decedent's estate.

On December 21, 2011, Georgiann filed a petition seeking to enforce the *in terrorem* clause in the decedent's trust against Christine. Georgiann argued that Christine had "unsuccessfully challenge[d] or contest[ed] [a] provision of [the] will" within the meaning of the *in terrorem* clause by contesting Georgiann's appointment as sole personal representative. The petition alleged that Christine had improperly challenged Georgiann's appointment, without cause, and that Christine should therefore receive nothing under the decedent's trust. Specifically, the petition alleged that Christine had challenged that portion of the decedent's will which nominated Georgiann to serve as personal representative. Georgiann argued that the decedent had intentionally included the *in terrorem* clause in his trust and that his intent should be enforced.

At oral argument on March 13, 2012, Georgiann's attorney argued that Christine did not have probable cause to challenge the provision of the decedent's will nominating Georgiann to act as sole personal representative. Counsel argued that, because Christine had

unsuccessfully challenged Georgiann's appointment as sole personal representative, Christine should be barred from receiving her share under the decedent's trust. Christine's attorney pointed out that the statute governing *in terrorem* clauses in trusts, MCL 700.7113, addresses only the effect of a proceeding brought to contest the trust, itself, and does not address the effect of contesting or challenging a will. Christine's attorney conceded that Christine had contested the decedent's will inasmuch as the will nominated Georgiann to serve as sole personal representative. However, counsel asserted that Christine was not challenging or contesting any of the specific devises under the decedent's will or any part of the decedent's trust. The probate court remarked that it would complete further legal research and take the issue under advisement.

On April 11, 2010, the probate court issued an opinion and order denying Georgiann's petition to enforce the *in terrorem* clause against Christine. The probate court first observed that, with respect to MCL 700.7113, Christine had not instituted a proceeding to contest or challenge any part of the decedent's trust. At most, Christine had challenged only the decedent's will, and specifically only that portion of the will that nominated her sister to serve as sole personal representative. Second, assuming that a challenge to the decedent's will was sufficient to trigger the *in terrorem* clause in the trust, the probate court observed that Christine had not challenged the admission of the will to probate, had not contested the will's validity, had not challenged the will on the ground of undue influence, had not argued that the decedent lacked testamentary capacity, and had not challenged any of the devises in the will. Instead, Christine had merely questioned her sister's appointment as sole personal representative, which she was legally entitled to do. Lastly, the probate court noted

that nearly all the decedent's assets were located in Florida and Ohio, very few of the decedent's assets were subject to probate in Michigan, and very little property had ever passed into the decedent's trust under the terms of his will. Accordingly, even if Christine's challenge to Georgiann's appointment was sufficient to trigger the *in terrorem* clause, Christine's forfeited share would be quite small with relatively little value. The probate court ruled that, under the circumstances, the *in terrorem* clause in the decedent's trust was not enforceable against Christine.

II

We review de novo the proper interpretation of a trust. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). When interpreting a trust, the probate court's objective is to ascertain and give effect to the intent of the settlor. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). "The intent of the settlor is to be carried out as nearly as possible." *Id*. We similarly review de novo the proper interpretation of a will. *In re Raymond Estate*, 276 Mich App 22, 27; 739 NW2d 889 (2007), aff'd 483 Mich 48 (2009). When interpreting a will, "[t]he probate court's role is to ascertain and give effect to a testator's intent, which it gleans solely from the plain language of the will unless there is an ambiguity." *Id*.

We review de novo issues of statutory interpretation. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). Statutory words and phrases must be interpreted according to their commonly understood meanings. MCL 8.3a; *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 36; 783 NW2d 515 (2010).

III

In Michigan, *in terrorem* clauses are generally valid and enforceable. *Schiffer v Brenton*, 247 Mich 512, 520; 226 NW 253 (1929); *In re Perry Trust*, 299 Mich App 525, 530; 831 NW2d 251 (2013). However, such clauses must be strictly construed by the courts. *Id*.; see also *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962).

As noted, the *in terrorem* clause in the decedent's trust purports to apply whenever a distributee or beneficiary "unsuccessfully challenge[s] or contest[s] the admission of [the] will to probate, or unsuccessfully challenge[s] or contest[s] any provision of [the] will or of this [trust] . . . ." It is undisputed that Christine did not unsuccessfully challenge or contest the admission of the will to probate. Thus, the salient question is whether Christine "unsuccessfully challenge[d] or contest[ed] any provision of [the] will or of this [trust]" within the meaning of the *in terrorem* clause when she objected to Georgiann's appointment as sole personal representative.

It appears that Christine's objection to Georgiann's appointment as sole personal representative did come within the express terms of the *in terrorem* clause. As noted, the *in terrorem* clause expressly forbade, among other things, an unsuccessful "challenge or contest [to] *any* provision of [the] will[.]" (Emphasis added). The word "any" is all-inclusive and "is defined as 'every; all.' " *Dep't of Agriculture v Appletree Marketing, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010), quoting *Random House Webster's College Dictionary* (1997). Christine's objection to her sister's appointment certainly qualified as a challenge to that provision of the decedent's will that nominated Georgiann to serve as personal representative. See *In re Wojtalewicz Estate*, 93 Ill App 3d 1061, 1062-1063; 418 NE2d 418 (1981) (observing that

the *in terrorem* clause in the testator's will "forbade any proceeding to challenge any of the provisions of the will," and that "[t]he provision of the will naming the executor obviously was within the ambit of this clause"); see also *In re Kubick Estate*, 9 Wash App 413, 419; 513 P2d 76 (1973) (observing that the *in terrorem* clause in the decedent's will "specifically applie[d] to any person who shall 'contest this will or object to any of the provisions hereof,' " and concluding that a beneficiary's petition to remove the executor nominated in the will fell within the scope of this clause).

Nevertheless, we conclude that the *in terrorem* clause at issue in this case was unenforceable as a matter of law because Christine had probable cause to object to Georgiann's appointment. The Michigan Legislature has enacted MCL 700.2518 and MCL 700.3905,[3] both of which restrict the enforceability of an *in terrorem* clause contained in a will when an interested person has "probable cause" to challenge the will or institute another proceeding relating to the estate. " 'Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.' " *In re Griffin Trust*, 281 Mich App 532, 540; 760 NW2d 318 (2008), rev'd on

[3] The Michigan Legislature has also enacted MCL 700.7113, which pertains solely to the enforceability of an *in terrorem* clause contained "in a trust[.]" It is true that the *in terrorem* clause at issue in the present case was contained in the decedent's trust. However, MCL 700.7113 applies only when an interested person "contest[s] the trust or institut[es] another proceeding relating to the trust[.]" We note that Christine did not contest or challenge any provision of the decedent's trust; nor did she institute any other proceeding relating to the decedent's trust. Instead, Christine challenged only that provision of the decedent's will that nominated Georgiann to serve as sole personal representative of the decedent's estate. Therefore, MCL 700.7113 does not apply in this case.

other grounds 483 Mich 1031 (2009), quoting 2 Restatement Property, 3d, Wills & Other Donative Transfers, § 8.5, comment *c*, p 195.

MCL 700.2518 provides:

> A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

MCL 700.3905 provides:

> In accordance with section 2518, a provision in a will purporting to penalize an interested person for contesting the will or instituting another proceeding relating to the estate shall not be given effect if probable cause exists for instituting a proceeding contesting the will or another proceeding relating to the estate.

Of course, MCL 700.2518 and MCL 700.3905 pertain only to the enforceability of an *in terrorem* clause "in a will[.]" This might appear problematic on first glance because, as explained previously, the *in terrorem* clause at issue in the present case was contained solely in the decedent's trust and not in the decedent's will. Even so, we conclude that MCL 700.2518 and MCL 700.3905 apply because the decedent's will expressly incorporated the decedent's trust by reference, and the *in terrorem* clause in the trust explicitly addressed challenges to the will. See *Vanderlinde v Bankers Trust Co of Muskegon*, 270 Mich 599, 604; 259 NW 337 (1935). In other words, the *in terrorem* clause contained in the decedent's trust was "made part of the will," *id*., and MCL 700.2518 and MCL 700.3905 therefore apply in this case.

As already explained, Georgiann had taken control of the decedent's assets before she was appointed to serve as personal representative. The probate court was

clearly troubled by this conduct. We acknowledge that Georgiann was first in priority for appointment as personal representative because she was nominated in the decedent's will. MCL 700.3203(1)(a). But "[a] personal representative's . . . powers commence upon appointment." MCL 700.3701; see also MCL 700.3103. Thus, the probate court was correct when it observed that Georgiann had "act[ed] outside the law" by taking control of estate property before her appointment.

In addition, Christine was legally entitled to object to Georgiann's appointment as sole personal representative of the decedent's estate. Although Michigan law provides that an interested person may object to the appointment of a personal representative in a formal proceeding, MCL 700.3203(2), the Legislature has not specified the grounds that would support such an objection. The Legislature has, however, enumerated the grounds for which a personal representative may be removed. These grounds include, among other things, that "[r]emoval is in the best interests of the estate," MCL 700.3611(2)(a), that the personal representative has "[m]ismanaged the estate," MCL 700.3611(2)(c)(*iii*), and that the personal representative has "[f]ailed to perform a duty pertaining to the office," MCL 700.3611(2)(c)(*iv*).[4] It would be a futile act, indeed, for the probate court to appoint an individual who has already been acting without authority, merely because he or she has priority for appointment under MCL 700.3203(1), only to immediately thereafter remove that same individual for mismanagement of the estate, failure to perform a duty, or other misconduct under MCL 700.3611(2). See *In re Moss' Estate*, 183 Neb 71, 74-75; 157 NW2d 883 (1968). We are compelled to

[4] We note that "[a]n interested person may petition for removal of a personal representative for cause at any time." MCL 700.3611(1).

conclude that any ground which would justify the removal of a personal representative under MCL 700.3611(2) is equally sufficient to support an interested person's objection to the initial appointment of a personal representative under MCL 700.3203(2).

In her objection to Georgiann's appointment as sole personal representative, Christine essentially asserted that her sister had mismanaged the decedent's property and had failed to keep the interested persons reasonably informed concerning the affairs of the estate.[5] Had Georgiann already been appointed to serve as personal representative, Christine's allegations surely would have been sufficient to justify the filing of a petition for Georgiann's removal under MCL 700.3611(1) and (2). We conclude that these same allegations constituted sufficient grounds to warrant Christine's objection to Georgiann's appointment pursuant to MCL 700.3203(2). In view of Georgiann's actions, it was reasonable for Christine to challenge her sister's appointment as sole personal representative and to request the appointment of co-personal representatives to serve as joint fiduciaries of the estate.

Given the evidence that Georgiann took control of the decedent's assets and may have failed to account for estate property prior to her appointment as personal

---

[5] A personal representative owes a fiduciary duty to each devisee, heir, and beneficiary. MCL 700.1212(1); see also MCL 700.1104(e) and MCL 700.3703(1). A personal representative must "discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; [and] care and prudence in actions . . . ." MCL 700.1212(1). He or she "shall keep each presumptive distributee informed of the estate settlement," and must regularly "account to each beneficiary by supplying a statement of the activities of the estate and of the personal representative . . . ." MCL 700.3703(4).

representative, we reach the inescapable conclusion that Christine had "probable cause" to object to Georgiann's appointment as sole personal representative of the decedent's estate. See MCR 7.216(A)(6).[6] Thus, even though Christine's objection to her sister's appointment constituted an unsuccessful challenge to a provision of the decedent's will within the meaning of the *in terrorem* clause, the *in terrorem* clause was unenforceable as a matter of law. MCL 700.2518; MCL 700.3905. The probate court reached the correct result when it denied Georgiann's petition to enforce the *in terrorem* clause against Christine. It is axiomatic that we will not reverse when the probate court has reached the right result, even if it has done so for the wrong reasons. See *Neville v Neville*, 295 Mich App 460, 470; 812 NW2d 816 (2012).

IV

Georgiann appears to argue that the probate court somehow erred by concluding that it was without jurisdiction over the decedent's trust. Contrary to Georgiann's argument, however, the probate court did not determine that it lacked jurisdiction. It is true that the probate court observed that the decedent's trust was not subject to continuing judicial supervision. See MCL 700.7201(2). But after receiving Georgiann's petition, the court proceeded to hold oral argument, consider the evidence, interpret the *in terrorem* clause, and decide the question on the merits. Georgiann's argument in this regard is accordingly without merit.

---

[6] It is of little consequence that Christine's challenge was ultimately unsuccessful. There existed sufficient grounds to support Christine's challenge to Georgiann's appointment at the time it was made, and it was not unreasonable for Christine to believe that her challenge would be successful. See *In re Griffin Trust*, 281 Mich App at 540.

V

We affirm the probate court's order denying Georgiann's petition to enforce the *in terrorem* clause against Christine.

In light of our conclusions, we need not address Georgiann's argument that the probate court erred by determining that there were very few assets under its jurisdiction and that, even if Christine's objection had triggered the *in terrorem* clause, her forfeited share would have been small with relatively little value.

Affirmed. As the prevailing party, appellee Christine S. Stan may tax costs pursuant to MCR 7.219.

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

In re DANIELS ESTATE

Docket No. 311310. Submitted June 11, 2013, at Lansing. Decided June 25, 2013, at 9:00 a.m.

Tonya Asbury, the decedent Richard J. Daniels' biological daughter, petitioned the Arenac Probate Court to be appointed personal representative of her father's estate, which the court, Richard E. Vollbach, Jr., J., granted. Jamie Leonard thereafter alleged that he was decedent's son and requested to be appointed personal representative of the estate. Following a hearing, the court concluded that Leonard and decedent had a mutually acknowledged parent-child relationship and that he was decedent's natural child pursuant to MCL 700.2114(1)(b)(*iii*). The court granted Leonard's petition to remove Asbury as the personal representative of the estate and Leonard was appointed the successor personal representative. Asbury appealed.

The Court of Appeals *held*:

1. MCL 700.2114(1)(b)(*iii*) provides that if a child is born out of wedlock, a man is considered to be the child's natural father for purposes of intestate succession if the man and child have: (1) a mutually acknowledged relationship of parent and child, (2) that began before the child became 18, and (3) that continued until terminated by the death of either. The plain language of the statute indicates that a man considered to be a child's natural father is someone who is regarded, deemed, believed, supposed, or thought of as the child's natural father. The statutory provisions under which a man is considered a child's natural father for purposes of intestate succession, MCL 700.2114(1)(b)(*i*) – (*vi*), do not require an underlying and preliminary determination that the child is the father's biological child. In this case, the probate court correctly determined that Leonard was not required to prove he was decedent's biological child before presenting evidence that he had a mutually acknowledged parent-child relationship for purposes of intestate succession under MCL 700.2114(1)(b)(*iii*); Asbury did not challenge the probate court's determination that Leonard presented sufficient evidence to establish that decedent was Leonard's natural father for purposes of MCL 700.2114(1)(b)(*iii*).

2. MCR 7.211(C)(8) provides that a request for sanctions for a vexatious appeal must be made by motion; raising the issue in a brief on appeal is insufficient to request sanctions. In this case, sanctions were not allowed because Leonard failed to file a motion separate from the appeal and to provide appropriate legal authority.

Affirmed.

DESCENT AND DISTRIBUTION — INTESTATE SUCCESSION — CHILDREN BORN OUT OF WEDLOCK — NATURAL FATHER — MUTUALLY ACKNOWLEDGED PARENT-CHILD RELATIONSHIP.

Under MCL 700.2114(1)(b)(*iii*), if a child is born out of wedlock, a man is considered to be the child's natural father for purposes of intestate succession if the man and child have: (1) a mutually acknowledged relationship of parent and child, (2) that began before the child became 18, and (3) that continued until terminated by the death of either; the plain language of the statute indicates that a man considered to be a child's natural father is someone who is regarded, deemed, believed, supposed, or thought of as the child's natural father; the statutory provisions under which a man is considered a child's natural father for purposes of intestate succession, MCL 700.2114(1)(b)(*i*) – (*vi*), do not require an underlying and preliminary determination that the child is the father's biological child.

Tonya Asbury *in propria persona*.

Garner F. Dewey for Jamie Leonard.

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

PER CURIAM. Petitioner, Tonya Asbury, appeals as of right the probate court's order, which removed her as personal representative of the Richard J. Daniels estate and replaced her with respondent, Jamie Leonard. We affirm.

The decedent, Richard Daniels, died on April 13, 2012. Asbury is the decedent's biological daughter and was the initial personal representative. Leonard filed a petition alleging that he was decedent's son and requesting that he be appointed the personal representa-

tive. The probate court held an evidentiary hearing to determine: (1) whether Leonard was an heir within the meaning of MCL 700.2114(1)(b)(*iii*); and (2) whether to replace Asbury as the personal representative of the decedent's estate.

At the hearing, the evidence established that Leonard was born while the decedent and Leonard's mother were cohabiting; the two were subsequently married. Leonard's birth certificate does not indicate the name of his father, but Leonard testified that the decedent was his father and that he believed he was the decedent's biological child. In addition, respondent Ronda Custer, the decedent's live-in girlfriend, testified that the decedent had introduced Leonard as his son and that Leonard referred to the decedent as "dad." She said that she had lived with the decedent from about 2001 until his death and that during that time the decedent had never indicated that there was not a parent-child relationship between him and Leonard. The decedent allegedly told Leonard that it did not matter that the certificate was blank because Leonard was his son.

Both Asbury and her mother testified that the decedent had raised Leonard like he was his son, and Asbury also testified that Leonard called the decedent "dad." However, she "truly and wholly" believed that Leonard was not the decedent's biological child. She testified that the decedent never referred to Leonard as his biological child and that several family members had told her that Leonard was not the decedent's child. Further, Asbury's mother testified that the decedent once told her that Leonard was not his biological child. To determine paternity, a DNA test was conducted; at the time of the hearing the results were still pending.

At the conclusion of the hearing, the probate court did not find that Leonard was the decedent's biological

child, but concluded that "the relationship, that the elements, as set forth by the statute have been satisfied in terms of determining that Mr. Leonard is the natural child of Mr. Daniels" because all the witnesses, including Asbury's,

> confirm[ed], unequivocally, that the decedent and Mr. Leonard have mutually acknowledged a relationship of parent and child that began, indeed, from the time that Mr. Leonard was a young child right through the death of the decedent. That fact is, and has not been refuted in any way, shape, or form, by any of the witnesses.

The probate court then granted the petition to remove Asbury as the personal representative and Leonard was appointed as the successor personal representative. Asbury appealed.

Asbury does not contest that there was sufficient evidence to establish that the decedent and Leonard had a mutually acknowledged relationship for the requisite time period. Instead, she argues that to establish a parent-child relationship pursuant to MCL 700.2114(1)(b)(*iii*), the court must first find that the man and the child have a biological relationship. Accordingly, we must interpret under what circumstances a person may be declared an heir pursuant to MCL 700.2114(1)(b)(*iii*), which is an issue of first impression.

"To determine the statute's intent, the specific language of the statute must be examined." *In re Turpening Estate*, 258 Mich App 464, 465; 671 NW2d 567 (2003). "In construing a statute, this Court should give every word meaning, and should seek to avoid any construction that renders any part of a statute surplus or ineffectual." *Id*. "[T]o discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*,

486 Mich 1, 15; 782 NW2d 171 (2010). Provisions not included by the Legislature should not be included by the courts. *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010).

MCL 700.2114 provides in relevant part:

> (1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:
>
> (a) If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and a woman participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their child for purposes of intestate succession.
>
> (b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:
>
> * * *
>
> (*iii*) The man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.

Asbury argues that a probate court must first determine that the child attempting to establish the parent-child relationship is a biological child before the court may then consider evidence of the mutually acknowledged relationship. This argument is inconsistent with the language of the statute.

MCL 700.2114(1)(b) provides that "[i]f a child is born out of wedlock . . . a man is considered to be the child's natural father for purposes of intestate succession" if any of the circumstances in subsections (*i*) through (*vi*) apply. The word "considered" is not defined in the statute. If a word is undefined by the statute, it must be given its plain and ordinary meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). This Court may consult a dictionary if the Legislature has not provided a definition for a word used in a statute. *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). According to *Random House Webster's College Dictionary* (1997), "consider" means "to regard as or deem to be" or "to think, believe, or suppose." Thus, a man "considered" to be a child's natural father is someone who is regarded, deemed, believed, supposed, or thought of as the child's natural father. Therefore, the plain language of the statute contemplates that, in some situations, a man may not *be* the child's biological father, but he will nevertheless *be considered* the child's natural father.

MCL 700.2114(1)(b)(*iii*) provides that a man is considered a child's natural father if "[t]he man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either." Nothing in the text of this section suggests that the man must have a biological relationship with the child. Instead, this section requires (1) a mutually

acknowledged relationship of parent and child, (2) that the relationship was established before the child becomes age 18, and (3) that the relationship continues until either the man or the child dies. Asbury essentially requests that this Court insert the word "biological" into the statute so that it reads, in effect: "the man and *his biological* child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either." Because that interpretation is contrary to the plain language of the statute, we must reject it.

Moreover, the other five subsections of MCL 700.2114(1)(b) also contain circumstances that do not require an underlying finding that the decedent is the child's biological father. MCL 700.2114(1)(b)(*i*) provides that a man is considered the child's natural father if "[t]he man joins with the child's mother and acknowledges that child as his child by completing an acknowledgment of parentage as prescribed in the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013." Nothing in the Acknowledgement of Parentage Act requires that the man completing the acknowledgement form actually be the child's biological father. See *id*. Indeed, MCL 722.1007(g) expressly provides that the acknowledgement form must include notice that signing the form waives the following:

> (*i*) Blood or genetic tests to determine if the man is the biological father of the child.
>
> (*ii*) Any right to an attorney, including the prosecuting attorney or an attorney appointed by the court in the case of indigency, to represent either party in a court action to determine if the man is the biological father of the child.
>
> (*iii*) A trial to determine if the man is the biological father of the child.

Thus, the Acknowledgement of Parentage Act does not prohibit a child from being acknowledged by a man who is not his or her biological father. By extension, MCL 700.2114(1)(b)(*i*) does not require an underlying finding that the decedent is the child's biological father.

MCL 700.2114(1)(b)(*ii*) provides that a man is considered a child's natural father if "[t]he man joins the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the child's birth." Pursuant to MCL 333.2831(b):

> The state registrar shall establish a new certificate of birth for an individual born in this state when the registrar receives the following:
>
> * * *
>
> (b) A request that a new certificate be established and the evidence required by the department proving that the individual's paternity has been established.

Thus, MCL 700.2114(1)(b)(*ii*) similarly does not require an underlying finding that the decedent is the child's biological father.

MCL 700.2114(1)(b)(*iv*) provides that a man is considered the child's natural father if "[t]he man is determined to be the child's father and an order of filiation establishing that paternity is entered as provided in the paternity act, 1956 PA 205, MCL 722.711 to 722.730." MCL 722.717(1) provides:

> (1) In an action under this act, the court shall enter an order of filiation declaring paternity and providing for the support of the child under 1 or more of the following circumstances:
>
> (a) The finding of the court or the verdict determines that the man is the father.

(b) The defendant acknowledges paternity either orally to the court or by filing with the court a written acknowledgment of paternity.

(c) The defendant is served with summons and a default judgment is entered against him or her.

Thus, under the Paternity Act, a man who is not the biological father of a child can nevertheless have an order of filiation entered against him that would declare him the child's father. Therefore, MCL 700.2114(1)(b)(*iv*) does not require an underlying finding that the decedent is the child's biological father.

MCL 700.2114(1)(b)(*v*) provides that a man is considered the child's natural father if "[r]egardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730." As indicated, the procedures under the Paternity Act allow a man who is not the biological father of a child to have an order of filiation entered against him that would declare him the child's father. Therefore, by extension, MCL 700.2114(1)(b)(*v*) does not require an underlying finding that the decedent is the child's biological father.

Finally, MCL 700.2114(1)(b)(*vi*) provides that a man is considered the child's natural father if "[t]he man is determined to be the father in an action under the revocation of paternity act." The Revocation of Paternity Act, MCL 722.1431 *et seq*., provides methods that allow an individual to set aside an acknowledgement of parentage, MCL 722.1437, or an order of filiation, MCL 722.1439. It also governs actions to determine that a

presumed father is not a child's father, MCL 722.1441, which does focus on the biological father.

Thus, examining MCL 700.2114(1)(b) as a whole, there is nothing in the statute that requires a preliminary finding that a child is the biological child of the decedent before subsections (*i*) through (*vi*) may be considered and adding such a requirement would be inconsistent with the nature and purpose of the statute.

Asbury asserts that *In re Quintero Estate*, 224 Mich App 682; 569 NW2d 889 (1997) supports her position. However, that case is inapposite. First, it dealt with a challenge brought under the Revised Probate Code, MCL 700.1 *et seq.*, which was repealed and replaced with the Estates and Protected Individuals Code (EPIC), MCL 700.2101 *et seq. In re Quintero Estate*, 224 Mich App at 685. More important, it dealt with intervenors who asserted that they were the decedent's children as the result of an extramarital affair between their mother and the decedent, but who were born during their mother's marriage to her former husband. *Id*. at 684-685. On the basis of statutory language not present in the current statute, the trial court concluded that only the intervenors' parents (their mother and her former husband) had standing to challenge the presumption of parentage. *Id*. at 685. It then concluded that, because the former husband was not present to disprove his presumption of paternity, and their mother was estopped from denying paternity on the basis of a divorce judgment that had named the intervenors as the former husband's children, the intervenors could not be heirs of the decedent. *Id*. This Court upheld the trial court's conclusion, holding that "because of the presumption of paternity, intervenors lack standing to disprove the paternity of their presumed parents, and [their mother] is precluded by her judgment of divorce,

which has res judicata effect with respect to the presumption of paternity by [her former husband].” *Id*. at 689.

In this case, Leonard was born while his mother and the decedent were living together prior to their marriage and his mother was not married to someone else. Thus, the MCL 700.2114(1)(a) presumption does not apply. Furthermore, MCL 700.2114 does not include a provision similar to MCL 700.111(2), which limited the pool of individuals who could challenge the presumption of parentage. Indeed, as discussed, the presumption that a child born during a marriage is the issue of that marriage is but one method of proving the existence of a parent-child relationship.

Asbury also argues that Leonard could hypothetically find his biological father and inherit from that estate, meaning that he would violate the statutory prohibition against allowing a stepchild to inherit. The problem with Asbury’s argument is that it does not account for the circumstances where a man is “considered” or “presumed” to be a child’s natural parent even if he is not actually the child’s biological parent.

Finally, Leonard has requested sanctions for a vexatious appeal. However, as this Court has previously held:

> Sanctions requested for a vexatious appeal are governed by MCR 7.216(C)(1). MCR 7.216(C)(1) indicates that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8). And MCR 7.211(C)(8) provides that a request for sanctions must be made by motion; a brief on appeal is insufficient to request sanctions. There is no indication that [the defendant] has separately filed a motion for sanctions at the appellate level. Moreover, no appropriate legal authority was cited to support sanctions. Therefore, [the] request for sanctions is denied.

> [*The Meyer & Anna Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005).]

Likewise, in this case Leonard has neither filed a motion separate from the appeal brief nor provided appropriate legal authority, thereby requiring denial of the request.

Affirmed. Leonard, as the prevailing party, may tax costs. MCR 7.219(A).

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

OSHTEMO CHARTER TOWNSHIP v KALAMAZOO COUNTY
ROAD COMMISSION

Oshtemo Charter Township v Kalamazoo County Road Commission, Docket No. 304986, originally published on pages 462-481 of the advance sheets has been vacated by the Court of Appeals. The new opinion is located at 302 Mich App ___.

The next page in this volume is 482.

BURRIS v KAM TRANSPORT, INC

Docket No. 303104. Submitted June 5, 2013, at Detroit. Decided June 25, 2013, at 9:10 a.m.

Karen Burris filed an action in the Wayne Circuit Court against K.A.M. Transport, Inc., M & Y Express, Inc., and Aly Mohamed Maarouf, to recover damages for injuries caused when Maarouf allegedly struck plaintiff's vehicle while driving a semi tractor-trailer in the course of his employment with K.A.M. Transport, Inc. and M & Y Express, Inc. Defendants filed a motion to compel plaintiff to appear for independent medical evaluations (IMEs) by a neuropsychologist, a psychiatrist, and a physical medicine and rehabilitation specialist. Plaintiff declined absent a court order to do so, arguing that she had already appeared for IMEs by numerous specialists in a no-fault benefits action against AAA arising out of the same accident. The circuit court, Prentis Edwards, J., denied defendants' motion to compel, concluding that the five IMEs conducted for the AAA action were available to and sufficient for defendants and that any additional examinations were overly burdensome and would put plaintiff in an unfair disadvantage. Defendants filed an application for leave to appeal, which the Court of Appeals denied. Unpublished order of the Court of Appeals, entered November 28, 2011 (Docket No. 303104). In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 493 Mich 873 (2012).

The Court of Appeals *held*:

1. MCR 2.311(A), which is similar to and interpreted in the same manner as FR Civ P 35, provides in part that when the mental or physical condition of a party is in controversy, the court in which the action is pending may for good cause order the party to submit to a physical or mental or blood examination by a physician or other appropriate professional. Good cause exists when there is a satisfactory, sound, or valid reason. A trial court has broad discretion to determine what constitutes good cause and the ability of the movant to obtain the desired information by other means is relevant, as is the passage of time since the original IME. A plaintiff in a negligence action who asserts mental or

physical injury places that mental or physical injury in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. The number of independent medical examinations in such an action is not limited by the court rule. Even when an examination has been previously ordered in the same or a related case, a subsequent examination may be ordered if the court deems it necessary; however needlessly duplicative, cumulative, or invasive exams are not generally permitted.

2. In this case, the trial court abused its discretion by denying defendants' request for an IME by a physical medicine and rehabilitation doctor. There was no finding that the IME would be duplicative or unnecessary and the three-year passage of time from the examinations for the AAA litigation constituted good cause because the persistence of plaintiff's impairment was at issue in the case. While the IME for the AAA case provided defendants with relevant information, defendants should be allowed to retain their own experts to assist in their own defense and normally should not be required to rely on experts retained by other parties in another case. The trial court's stated reasons for denying defendants' motion—that it would be overly burdensome and place plaintiff at an unfair disadvantage at trial—do not support the denial because the evidence can be restricted at trial through motions in limine, objections, and by limiting the presentation of cumulative evidence and the number of expert witnesses.

Reversed and remanded for further proceedings.

M. J. KELLY, P.J., dissenting, would have held that the trial court did not abuse its discretion by denying defendants' motion to compel. The court's stated reasons—that defendants had received adequate discovery on plaintiff's medical condition and did not need to subject her to additional discovery—were sufficient to support the denial because defendants failed to show good cause for the requested examinations.

1. COURT RULES — INDEPENDENT MEDICAL EXAMINATIONS — GOOD CAUSE — PASSAGE OF TIME.

MCR 2.311(A), which is similar to and interpreted in the same manner as FR Civ P 35, provides in part that when the mental or physical condition of a party is in controversy, the court in which the action is pending may for good cause order the party to submit to a physical or mental or blood examination by a physician or other appropriate professional; good cause exists when there is a satisfactory, sound, or valid reason; a trial court has broad discretion to determine what constitutes good cause and the ability of the movant to obtain the

desired information by other means is relevant, as is the passage of time since the original IME; a plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury; the number of independent medical examinations in such an action is not limited by the court rule; even when an examination has been previously ordered in the same or a related case, a subsequent examination may be ordered if the court deems it necessary; needlessly duplicative, cumulative, or invasive exams are not generally permitted.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*) and *Gursten, Koltonow, Gursten, Christensen & Raitt* (by *Steven Gursten* and *Ian M. Freed*), for Karen Burris.

Garan Lucow Miller, P.C. (by *Mark Shreve* and *Caryn A. Gordon*), for K.A.M. Transport, Inc., M & Y Express, Inc., and Aly Mohamed Maarouf.

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

MURRAY, J. We must decide whether the trial court abused its discretion under MCR 2.311(A) by denying defendants, K.A.M. Transport, Inc., M & Y Express, Inc., and Aly Mohamed Maarouf, an opportunity to have plaintiff, Karen Burris, submit to additional independent medical examinations (IMEs) when plaintiff had previously submitted to similar IMEs in another case involving the same alleged injuries. For the reasons articulated below, we hold that the trial court abused its discretion when it denied defendants' motion to compel IMEs. Accordingly, we reverse and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEEDINGS

This appeal originates from an automobile accident that occurred on September 28, 2009. On that date,

plaintiff was a passenger in a vehicle that was stopped for a red light at a turnaround on Southfield Road while Maarouf was driving a semi tractor-trailer in the course of his employment with K.A.M. Transport and M & Y Express. Allegedly, Maarouf turned left and struck plaintiff's vehicle with substantial force. Plaintiff alleged that she suffered a serious impairment of body function and/or permanent serious disfigurement, including a closed head injury, spinal injuries, additional external and internal injuries to the head, neck, shoulders, arms, knees, back, chest and other parts of her body, as well as traumatic shock and injury to her nervous system, causing severe mental and emotional anguish in addition to more general sickness and disability, all of which interfered with her enjoyment of life and required psychiatric treatment.

In March 2010, plaintiff filed a third-party action against defendants and in October 2010, plaintiff filed a separate, first-party no-fault benefits action against AAA.[1] On December 30, 2010, defendants filed a motion to compel plaintiff to appear for IMEs by a neuropsychologist, a psychiatrist, and a physical medicine and rehabilitation specialist. According to defendants, plaintiff indicated that she would not attend defendants' IMEs without a court order pursuant to MCR 2.311 because, as part of the AAA litigation, plaintiff had already appeared for IMEs by an orthopedic surgeon, a physical medicine and rehabilitation physician, a neuropsychologist, a neurosurgeon, and a dentist. Defendants argued that there was good cause to require their own IMEs because the existence and extent of plaintiff's alleged physical and mental injuries were in controversy and defendants' "ability to select the appropriate and most skilled individuals to assist in this

[1] The AAA litigation was settled and dismissed in April 2012.

case should not be hampered by someone else's choice." Moreover, defendants argued that AAA's IMEs "were conducted in the past," and defendants were entitled to current IMEs to determine plaintiff's present condition.

Plaintiff opposed defendants' motion to compel arguing that good cause to require additional IMEs did not exist because defendants were attempting to "duplicate testimony" by having plaintiff undergo additional IMEs that would unfairly provide defendants with two specialty doctors that disagreed with plaintiff's treating physicians. Plaintiff maintained that defendants were entitled to their own IMEs, or the use of AAA's IMEs, but not both.

After hearing oral argument, the trial court denied the motion and offered the following rationale for doing so:

> It appears that at least five independent medical examinations have already been conducted plus the other medical involved in this case. It seems to me that should be sufficient for all of the parties on the Defense side. This [sic], any additional examinations appear to be overburdensome and really puts the Plaintiff in an unfair disadvantage.

Subsequently, defendants filed an application for leave to appeal this order. Initially, we denied the application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." *Burris v KAM Transp Inc*, unpublished order of the Court of Appeals, entered November 28, 2011 (Docket No. 303104). However, on October 24, 2012, our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *Burris v KAM Transp, Inc*, 493 Mich 873; 821 NW2d 570 (2012).

While the application for leave to appeal with this Court was pending, the AAA neuropsychologist who had examined plaintiff died, prompting defendants to file a motion to compel an IME by a neuropsychologist. The trial court granted the motion. Additionally, plaintiff's counsel has conceded to this Court that defendants may have an IME performed on plaintiff by a psychiatrist. Thus, only the trial court's denial of an IME by a doctor with expertise in physical medicine and rehabilitation is at issue on appeal.

II. ANALYSIS

MCR 2.311(A) provides a trial court with discretion to order a party to submit to a physical or mental examination. See *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 190-191; 732 NW2d 88 (2007) (contrasting MCR 2.311(A) and MCL 500.3151). This Court reviews the trial court's exercise of its discretion for an abuse of discretion. *Swagler v Sinai Hosp of Greater Detroit*, 461 Mich 959; 609 NW2d 184 (2000); *Dierickx v Cottage Hosp Corp*, 152 Mich App 162, 170; 393 NW2d 564 (1986) (applying GCR 1963, 311.1). The interpretation and application of court rules present a question of law that is reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

MCR 2.311(A) states:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner,

conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

Here, there is no dispute that plaintiff's mental and physical conditions are in controversy. Thus, according to the plain language of the court rule, the court "may" order plaintiff to submit to physical and mental examinations by medical professionals if the court finds good cause to do so. We now turn to whether good cause existed to order the IMEs under MCR 2.311.

"In the context of our court rules, '[g]ood cause simply means a satisfactory, sound or valid reason[.]' The trial court has broad discretion to determine what constitutes 'good cause.' " *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 264; 833 NW2d 331 (2013),[2] (citation omitted). Because we have not located a Michigan case that discusses good cause under this rule in the context of a request for additional medical examinations, and because the language of that court rule is similar to its federal counterpart, FR Civ P 35, we look to the cases interpreting the federal rule. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004) (the decisions of the lower federal courts may provide persuasive reasoning). FR Civ P 35 states, in pertinent part:

(a) Order for an Examination.

(1) *In General*. The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a

[2] In the context of no-fault benefits, "good cause" under MCL 500.3159 for a trial court to limit mental or physical examinations in a dispute "may only be established by a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Muci*, 478 Mich at 192 (quotation marks and citations omitted).

> physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.
>
> **(2)** ***Motion and Notice; Contents of the Order***. The order:
>
> **(A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and
>
> **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

The seminal case interpreting FR Civ P 35, and in particular the "good cause" and "in controversy" requirements of that rule, is *Schlagenhauf v Holder*, 379 US 104, 118-119; 85 S Ct 234; 13 L Ed 2d 152 (1964), in which the Supreme Court explained that the "good cause" and "in controversy" requirements of FR Civ P 35

> are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. Obviously, what may be good cause for one type of examination may not be so for another. *The ability of the movant to obtain the desired information by other means is also relevant.*
>
> Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of "in controversy" and "good cause," which requirements, as the Court of Appeals in this case itself recognized, are necessarily related. This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination.

> Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.
>
> Of course, there are situations where the pleadings alone are sufficient to meet these requirements. *A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.* [Citations omitted; emphasis added.]

The precise question here is whether the trial court abused its discretion when it found no good cause under the court rule to order an additional IME because: (1) the IMEs already performed for a different defendant in a related case were sufficient for defendants to use in this case and (2) the general unfairness to a plaintiff in having to oppose more than one defense expert at trial.

Turning to the federal decisions addressing whether good cause exists to order a plaintiff to undergo an additional examination, in *Vopelak v Williams*, 42 FRD 387 (ND Ohio, 1967), the district court ordered the plaintiff to submit to examinations by a local doctor and dentist, even though before filing suit she had previously submitted to examinations by a New York doctor and dentist at the request of the defendants' insurance carrier. The district court noted that although FR Civ P 35 did not limit the number of examinations, a court should "require a stronger showing of necessity before it will order such repeated examination." *Id*. at 389. In granting the second examinations, the *Vopelak* Court recognized the practical difficulty that the defendants faced in having out-of-state doctors testify, noted the

passage of time since the initial examination, and that there had been representations of changes in the plaintiff's physical condition. *Id*.

In *Lewis v Neighbors Constr Co*, 49 FRD 308 (WD Mo, 1969), the plaintiff—like the plaintiff in this case—contended that a second examination would unfairly benefit the defense at trial. The plaintiff filed an action against the defendant in state court and submitted to an IME under the state discovery rules. Once the action was removed to federal court, the defendant moved for another medical examination by a different physician under FR Civ P 35. While the plaintiff was willing to undergo reexamination by the same doctor who had conducted the IME two years earlier, he argued that an examination by a second physician was unfair and would allow the defendant "to obtain 'an advantage in the Medical testimony.' " *Id*. at 309. The court granted the defendant's request for another IME, reasoning that:

> The fact that plaintiff has, in another state two years ago, been subjected to a previous examination of the same condition in another case is no bar to the granting of a second examination. Rule 35 does not limit the number of examinations. Even when an examination has been previously ordered in the same case, a subsequent examination may be ordered if the Court deems it necessary. . . . This [proposed] examination should not result in any evidentiary prejudice to the plaintiff when any cumulative evidence may be the subject of objection, comment, or both, by the plaintiff at the trial. [*Id*. at 309 (citation omitted).]

In *Peters v Nelson*, 153 FRD 635 (ND Iowa, 1994), the plaintiff sued the defendants, alleging intentional torts and negligence related to mental injuries suffered from child abuse. In the course of discovery, the plaintiff disclosed her medical expert, a licensed psychologist, and provided the defendants with a copy of the evalua-

tion. In response, the defendants sought IMEs by a psychiatrist and a neuropsychologist. Plaintiff submitted to the examination by the psychiatrist, but refused to submit to an examination by the neuropsychologist, arguing that the defendants were only entitled to one IME related to the alleged mental injuries, not two. The plaintiff also argued that there was not good cause to require a second IME and a second mental examination would be duplicative and potentially painful and dangerous. *Id*. at 636-637.

In granting the defendants' request for a second IME, the trial court noted that while Rule 35 required showing good cause, the ultimate decision to order an examination, as well as which expert conducts the examination, was in the discretion of the trial court. But, the rule also did not place a limit on the number of examinations. *Id*. at 637, 639. Rather, "[e]ach request for an independent medical examination must turn on its own facts, and the number of examinations to which a party may be subjected depends solely upon the circumstances underlying the request. Even when an examination has been previously ordered in the same case, a subsequent examination may be ordered if the court deems it necessary." *Id*. at 637-638. The trial court also noted that while "needlessly duplicative, cumulative, or invasive" examinations are generally not permitted, in this case, good cause to order a second IME existed because the plaintiff had placed her mental condition in controversy, there was no evidence of expert witness shopping, and the second examination was not duplicative because it was a different evaluation by a different expert who evaluated the plaintiff's alleged mental injuries. *Id*. at 638-639.

We conclude that the trial court abused its discretion by denying defendants' request for an IME by a doctor

with expertise in physical medicine and rehabilitation. While there can be cases where it is not an abuse of discretion for a trial court to decline ordering a second IME, such as where the second examination would be duplicative, *Peters*, 153 FRD at 638-639, under the facts of this case, it was an abuse. Plaintiff does not argue—and the trial court did not find—that defendants request for IMEs by a doctor with expertise in physical medicine and rehabilitation would be duplicative or unnecessary. Additionally, the exams were taken in the AAA case almost three years ago, and the passage of time has been found to constitute good cause for ordering an IME, and the persistence of plaintiff's impairment is a critical issue in this case. See *Vopelak*, 42 FRD at 389. While it is true that AAA's IME by a doctor with expertise in physical medicine and rehabilitation provided defendants with some ability to obtain relevant information produced for another case, *Schlagenhauf*, 379 US at 118, in the ordinary course defendants should be able to retain their own experts to assist in the defense of their own case, and should not normally be required to rely on experts retained by other parties in another case.

Just as importantly, the trial court's reasoning—that allowing the examinations would be overly burdensome and place plaintiff at an unfair disadvantage at trial—does not support its conclusion. As observed by the *Lewis* court, plaintiff's concern about restricting the evidence presented to the jury can be addressed through motions in limine, objections, and by limiting the presentation of cumulative evidence at trial, *Lewis*, 49 FRD at 309, without deterring discovery. There is also a ceiling on the number of expert witnesses that a party can call at trial. See MCL 600.2164(2). Hence, precluding defendants from obtaining IMEs of plaintiff by their own expert medical physicians was not sup-

ported by the trial court's reasoning. For these reasons we hold that the trial court abused its discretion by denying defendants' motion to compel an IME.

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

No costs to either party. MCR 7.219(A).

BOONSTRA, J., concurred with MURRAY, J.

M. J. KELLY, P.J. (*dissenting*). On appeal, the majority concludes that the trial court abused its discretion when it determined that defendants, K.A.M. Transport, Inc., M & Y Express, Inc., and Aly Mohamed Maarouf, had not established grounds for subjecting plaintiff Karen Burris to additional invasive medical examinations and, on that basis, denied defendants' motion to compel Burris to submit to the requested examinations. Under the facts of this case, I cannot agree that the trial court abused its discretion. Therefore, I must respectfully dissent.

Our Supreme Court has long recognized that Michigan courts have the discretion to direct a party to submit to examination when the party's injuries are at issue. See *Logan v Agricultural Society of Lenawee Co*, 156 Mich 537, 541-542; 121 NW 485 (1909) (holding that the trial court did not abuse its discretion when, relying on the plaintiff's physician's affidavit that it would be detrimental to plaintiff's wellbeing, it denied the defendant's motion to compel the plaintiff to submit to a medical examination); *Graves v City of Battle Creek*, 95 Mich 266, 268; 55 NW 886 (1893) (holding that trial courts have the discretion to order a party to submit to bodily examination, but cautioning that this includes the discretion to refuse such a request where "the necessities of the case are not such as to call for it", or

where the party's "sense of delicacy . . . may be offended", or where the examination is "cumulative" or is otherwise unnecessary). Our Supreme Court eventually codified this procedure by court rule.

The modern discovery practice has its origins with GCR 1963, 311.1, which was modeled on Fed R Civ P 35. See 2 Honigman & Hawkins, Mich Court Rules Annotated (2d ed), p 207, comment 3 (noting that Rule 311 was "written in the language" of Fed R Civ P 35). Although the Supreme Court expanded the availability of physical and mental examinations as a discovery tool with the adoption of GCR 1963, 311.1, see 2 Honigman, p 207, it also provided limitations designed to protect litigants from abusive discovery practices. Specifically, GCR 1963, 311.1 provided that a party could only be compelled to submit to an examination by order and then only if the party's physical or mental condition was "in controversy" and the moving party showed "good cause" for the examination. The rule also clarified that the trial court had the discretion to impose reasonable restrictions on the conduct of the examination. *Id*. By adopting this rule, our Supreme Court entrusted trial courts with the discretion—and the duty—to carefully balance a party's right to be free from abusive or excessive invasions of privacy with the opposing party's right to seek the truth through reasonable discovery. And these limitations on the unfettered use of physical and mental examinations remain materially unchanged in the current rule. See MCR 2.311(A).

Under MCR 2.311(A), a trial court may order—but is not required to order—a party "to submit to a physical or mental or blood examination." However, the trial court's authority to order a party to submit to an examination is not unlimited. The trial court may only make such an order when the party's "mental or

physical condition . . . is in controversy." MCR 2.311(A). Additionally, the court may not sua sponte order a party to submit to an examination; rather, the court's order "may be entered only on motion" after the moving party demonstrates "good cause" for the request. *Id*. Thus, a trial court only has the discretion to order a party to submit to a physical or mental examination if the party's physical or mental condition is in controversy and the opposing party requests such an order by motion and after showing good cause for the examination. Even if these criteria are met, however, MCR 2.311(A) still provides the trial court with wide discretion to deny or reasonably limit the request. Therefore, it is beyond reasonable dispute that litigants do not have a "right" to conduct a physical or mental examination of the opposing party however often they might like and under whatever conditions they might like.[1]

Here, although the basis for the trial court's decision is not entirely clear, it appears that the trial court determined that defendants did not establish good cause. Therefore, I shall first address whether defendants established good cause sufficient to trigger the trial court's discretion to order Burris to submit to further examination. Because Michigan's former and current court rule was patterned after Fed R Civ P 35, Michigan courts have turned to federal authorities for guidance.[2] Specifically, Michigan courts have relied on *Schlagenhauf v Holder*, 379 US 104; 85 S Ct 234; 13 L

---

[1] The record in this case illustrates what I perceive to be a long-abused practice that is clearly prohibited under MCR 2.311(A): the scheduling of medical examinations without first moving for permission and demonstrating good cause.

[2] Michigan courts may rely on federal authorities that interpret analogous provisions of the federal rules. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 378 n 7; 775 NW2d 618 (2009).

Ed 2d 152 (1964) in determining the proper construction of both GCR 1963, 311.1 and its successor, MCR 2.311(A). See *LeGendre v Monroe Co*, 234 Mich App 708, 723-726; 600 NW2d 78 (1999); *Brewster v Martin Marietta Aluminum Sales, Inc*, 107 Mich App 639, 642-645; 309 NW2d 687 (1981).

In *Schlagenhauf*, the Court noted that although trial courts have the inherent authority to limit discovery so as to prevent bad faith use or undue annoyance, embarrassment, or oppression,[3] Rule 35 contained an explicit limitation on the use of physical and mental exams: the matter to be discovered must be in controversy and the movant must affirmatively demonstrate good cause. *Schlagenhauf*, 379 US at 117. The "good cause" requirement, the Court explained, was not a mere formality, but rather an express limitation on the use of the rule. *Id*. at 118. As such, a party could not establish good cause by asserting that the party's physical or mental condition is relevant to the matter in controversy; the moving party must instead affirmatively show good cause for the *particular* examination that he or she desires. *Id*.

In examining what will constitute good cause, the Court in *Schlagenhauf* stated that there are "situations where the pleadings alone are sufficient to" establish good cause, such as where a plaintiff in a negligence action asserts a mental or physical injury. *Id*. at 119. However, it did not frame that statement as an absolute rule—that is, it did not provide that a trial court must, as a matter of course, determine that a defendant has good cause for conducting a physical or mental examination in a negligence action where the plaintiff has alleged a physical or mental injury. Rather, the Court explained that the motion must be evaluated in light of

[3] Michigan courts have a similar authority. See MCR 2.302(C).

the unique facts underlying the specific request: "Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant." *Id*. at 118. And it is the movant's burden to "produce sufficient information, by whatever means, so that the [] judge can fulfill his function mandated by the Rule." *Id*. at 119.

In this case, rather than rely on the extensive medical records already available to defendants, defendants' lawyer scheduled Burris for so-called "independent medical examinations" with three physicians: one specializing in physical medicine and rehabilitation, one specializing in psychiatry, and one specializing in neuropsychology. Defendants' lawyer did this without first obtaining a stipulation from Burris' lawyer and without moving for permission from the trial court.

On December 20, 2010, Burris' lawyer rejected defendants' lawyer's attempt to unilaterally schedule these examinations without any restrictions:

> You have requested three defense medical evaluations to evaluate my client. As previously indicated, my position is that you would be entitled to your own, but not also the PIP IME completed by my client within the same specialty. I will not get into the specifics . . . .
>
> Additionally, you have requested an evaluation with Dr. Benedek and I have requested that the same be videotaped. I discussed these reasons with Mr. Davis.

After Burris' lawyer's refusal, defendants filed a motion to compel the examinations under MCR 2.311(A). In response, Burris' lawyer pointed out that defendants' *own* no-fault carrier had already submitted Burris to *five* separate examinations, including one by a physical medicine and rehabilitation physician, and one by a neuropsychologist, and that their

reports were all provided to defendants' lawyer. In addition, defendants already had Burris' medical records. Burris' lawyer asserted that defendants' requests were excessive and duplicative in light of the examination records and medical records already available to defendants. Burris further claimed that she was not treating with a psychiatrist, and that Dr. Benedek, who was defendants' proposed psychiatrist, was a well-known defense expert who allegedly had written reports and testified contrary to events that took place in past examinations, which would warrant some protective measure. Burris further argued that defendants failed to demonstrate good cause to "double up on defense experts." Notwithstanding these objections, Burris indicated that she had no objection to the additional examinations if defendants were not allowed the benefit of the additional no-fault experts' testimony and if the trial court allowed her to videotape the evaluation with Dr. Benedek.

At the hearing, defendants' lawyer responded to Burris' objections by noting that Burris had a list "of some 25 doctors" that might be called to testify. Defendants' lawyer also asserted that defendants "have the right to pick our experts." Defendants' lawyer noted too that the examinations from the no-fault case were older.

In denying defendants' motion, the trial court explained that defendants had already received adequate discovery on Burris' medical condition and did not need to subject Burris to further examinations:

> It appears that at least five independent medical examinations have already been conducted plus the other medical [records] involved in this case. It seems to me that that should be sufficient for all of the parties on the Defense

> side. [Thus], any additional examinations appear to be overburdensome and really puts the Plaintiff [at] an unfair disadvantage.

I conclude that the trial court properly denied the motion because defendants failed to show good cause for the requested examinations. The record shows that they already had the reports from examinations conducted by five doctors, which included a physical medicine and rehabilitation physician and a neuropsychologist. They also had Burris' own medical records. Aside from baldly asserting a supposed right to pick their own experts and an oblique reference to the time elapsed since the last examinations, defendants failed to state why they needed these specific examinations by these specific experts. *Schlagenhauf*, 379 US at 118-119. Defendants also refused to acquiesce to any of Burris' proposed compromises. The trial court apparently took all these matters into consideration and, on that basis, determined that defendants had not met their burden to establish good cause.

Even if defendants minimally established good cause, the trial court still had the authority to deny the motion or grant it on a limited basis depending on the facts unique to the case. See MCR 2.311(A). Here, the trial court determined that defendants had adequate discovery on the disputed evidence and the ability to call the experts who had conducted the original examinations. Moreover, following the trial court's original order denying defendants' request for the examinations, the trial court entered an order compelling Burris to undergo an independent neuropsychological examination because the neuropsychologist from the original no-fault lawsuit had died. Consequently, the record shows that the trial court took reasonable steps to balance

defendants' right to discovery and Burris' right to be free from burdensome and invasive examinations.

On this record, I cannot conclude that the trial court's decision to deny the motion fell outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

For these reasons, I would affirm.

INDEPENDENT BANK v HAMMEL ASSOCIATES, LLC

Docket No. 306813. Submitted March 6, 2013, at Detroit. Decided July 2, 2013, at 9:00 a.m.

Independent Bank brought an action in the Oakland Circuit Court against Hammel Associates, LLC, Norbert A. Boes, the estate of James D. Lee, and the James D. Lee Revocable Living Trust, seeking to collect a commercial debt secured by a promissory note signed by David Wood as attorney-in-fact for Lee and by Boes and commercial guaranties signed by Boes, Lee, and the trust. Wood had signed the guaranty on behalf of both Lee and the trust. Boes and Lee were members/managers of Hammel. Hammel defaulted on the loan, and Lee subsequently died. Wood published a notice to creditors that stated that Lee had died, that there was no probate estate, and that creditors should present all claims against the trust to Wood as trustee. Wood sent a notice to known creditors to an Independent Bank vice president that contained the loan number for the commercial loan guaranteed by Lee and the trust and had attached the notice that Wood published in the newspaper. The notice to known creditors identified Wood as successor trustee. Later, Wood sent a substantially similar notice to known creditors to Independent Bank senior vice president and general counsel Mark L. Collins. Collins submitted a statement and proof of claim that referred to obligations under the commercial guaranties of Lee and the trust. Wood subsequently mailed to the bank a notice of disallowance of the claim in whole. That notice referred only to the estate and did not indicate that the disallowance was by or from the trust. The estate and trust moved for summary disposition, arguing that the bank's claims against the estate and trust were barred by the statute of limitations under MCL 700.7611(a) because no estate existed; Wood had sent the notice of disallowance of claim for the trust, not the estate; and the bank had failed to file its complaint within 63 days after the disallowance was mailed or delivered. The bank argued that its statement and proof of claim preserved claims against both the estate and trust and that because the notice of disallowance sent by Wood referred only to the estate, the period of limitations had not run on its claim against the trust. The court, Martha D. Anderson, J., granted summary disposition in favor of the trust and dismissed

the claims against the estate, ruling that no estate had been opened and that the bank had been obligated to file a claim against the trust within 63 days.

The Court of Appeals *held*:

1. The Estates and Protected Individuals Code (EPIC) and the Michigan Trust Code (MTC) (which is article VII of EPIC and was effective April 1, 2010) applied. Under a former EPIC provision, MCL 700.7504, as enacted by 1998 PA 386, and an MTC provision, MCL 700.7608, if no estate exists, a trustee must nonetheless comply with the publication and notice requirements that apply to estates under MCL 700.3801. Wood complied with these obligations. The bank also properly complied with statutory requirements that it submit a statement and proof of claim. The bank was seeking to preserve any rights to payment from both the estate, which was Lee's successor, and the trust because both Lee and his trust entered into the guaranty agreements. At issue was whether the notice of disallowance of claim that Wood had sent in response to the bank's statement and proof of claim was a disallowance by the trust. For the trust to have properly disallowed a claim, Wood would have had to comply with former MCL 700.7507(a), as amended by 2000 PA 54, which is identical to MTC provision MCL 700.7611(a). Both provisions allow a trustee to give notice to a claimant that the claim has been disallowed in whole or in part and provide that a disallowed claim is barred unless the claimant commences a proceeding against the trustee not later than 63 days after the mailing of the notice of disallowance. Under MCL 700.3806(1), the procedure for disallowing a claim against a trust is the same as the procedure for disallowing a claim against an estate.

2. The trial court erred by granting summary disposition in favor of the trust. The court ruled that the trust had properly disallowed the claim and that the bank's complaint was time-barred because it had failed to file it within 63 days after Wood sent the disallowance, reasoning that the bank should have known that Wood intended to disallow the claim with respect to the trust and that this was sufficient to trigger the filing deadline. While the publication of the notice of Lee's death stated that there was no probate estate and the notice to known creditors identified Wood as successor trustee, the publication occurred almost immediately after Lee's death and the notices were sent shortly thereafter. It is not unusual for an estate to be opened in the weeks or months following a person's death. Moreover, the bank's statement and proof of claim specifically preserved its right to file claims against both the estate and the

trust, which is permitted under MCL 700.7609(2). By operation of law, the estate was Lee's successor, Lee obligated himself to secure the loan by personally entering into the guaranty, and it was logical and prudent for the bank to act to preserve all claims that might be available to it. Additionally, Wood represented both Lee personally as well as his trust and, thus, would likely have represented both the trust and estate, had one been opened, following Lee's death. Thus, that Wood signed and sent the disallowance would not have put the bank on notice of the trust's intentions given that the disallowance itself did not identify Wood as trustee or fiduciary. Disallowances by a trust and an estate are distinct under the statutes. MCL 700.7609(2) states that a claim presented against a decedent's estate is sufficient to also assert liability against a trust without an additional, separate presentation of claim against the trustee, but the MTC does not contain a mirror provision stating that a disallowance of claim by an estate is sufficient to disallow a claim against a trust. A separate and distinct disallowance of claim by the trust is required, regardless of whether or not an estate existed.

Reversed and remanded.

TRUSTS — CLAIMS AGAINST TRUSTS — DISALLOWANCE.

MCL 700.7611(a), a provision of the Michigan Trust Code (MTC) (MCL 700.7101 through 700.7913), which is article VII of the Estates and Protected Individuals Code (EPIC) (MCL 700.1101 *et seq.*), allows a trustee to give notice to a claimant that its claim against the trust has been disallowed in whole or in part and provides that the disallowed claim is barred unless the claimant commences a proceeding against the trustee not later than 63 days after the mailing of the notice of disallowance; MCL 700.7609(2), which is a provision of EPIC, states that a claim presented against a decedent's estate is sufficient to also assert liability against a trust without an additional, separate presentation of a claim against the trustee, but neither EPIC nor the MTC contains a mirror provision stating that a disallowance of claim by an estate is sufficient to disallow a claim against a trust; a separate and distinct disallowance of claim by the trust is required, regardless of whether an estate exists.

Dawda, Mann, Mulcahy & Sadler, PLC (by *Wayne S. Segal*, *Alfredo Casab*, and *Earl R. Johnson*), for plaintiff.

Wood, Kull, Herschfus, Obee & Kull, P.C. (by *Brian H. Herschfus*), for defendants.

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

SAAD, J. Plaintiff, Independent Bank, appeals by delayed leave granted, the trial court's order that granted summary disposition to defendant James D. Lee Revocable Living Trust. For the reasons set forth in this opinion, we reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

This case arises out of a commercial loan issued by Independent Bank to defendant Hammel Associates, LLC, for $199,547.87 on March 16, 2009. Defendant Norbert Boes and attorney David Wood, as attorney-in-fact for James D. Lee, signed a promissory note for the loan. On the promissory note, Boes and Lee were identified as members/managers of Hammel Associates. On the same date, Boes, Lee, and the James D. Lee Revocable Living Trust signed commercial guaranty documents in which each "absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents." Again, Wood signed the guaranty on Lee's behalf, and also on behalf of Lee's trust.

Hammel defaulted on the loan on an unspecified date, and Lee died on May 25, 2009. On May 31, 2009, the *Livingston County Daily Press and Argus* published a notice to creditors drafted by Wood. The notice stated that Lee had died and that "[t]here is no probate estate." It further notified creditors that all claims against the trust should present claims to Wood as "[t]rustee." On June 1, 2009, Wood sent a "Notice to Known Creditors" to a vice president of Independent

Bank in Troy. The notice contained the loan number for the commercial loan guaranteed by Lee and the trust and stated that Wood had attached the notice published in the *Livingston County Daily Press and Argus*. The notice to known creditors identified Wood as "Successor Trustee." On August 11, 2009, Wood sent a substantially similar notice to known creditors to senior vice president and general counsel Mark L. Collins at Independent Bank in Ionia.

On August 18, 2009, Collins submitted a "Statement and Proof of Claim." The document identified the deceased as James Davis Lee and, under "Description of Claim," the document referred to "obligation pursuant to commercial guaranties of James D. Lee and James D. Lee Revocable Living Trust, as amended and restated November 20, 1997; both guaranties dated March 16, 2009 with respect to the indebtedness of Hammel Associates LLC to Independent Bank in connection with Loan No. 4345004283-1087[.]" (Some capitalization changed for consistency.) The statement further indicated that the amount due on the claim as of August 18, 2009, was $199,603.30.

On January 15, 2009, Wood mailed to Independent Bank a "Notice of Disallowance of Claim." The top of the page of the notice referred only to the "*Estate* of James Davis Lee, Deceased" and, importantly, did not identify or otherwise indicate that the disallowance was by or from the James D. Lee Revocable Living Trust. (Emphasis added.) The disallowance stated that Independent Bank's statement of claim was disallowed "in whole."

On September 1, 2010, Independent Bank filed a complaint against Hammel, Boes, the estate of James D. Lee, and the James D. Lee Revocable Living Trust, seeking to collect the commercial debt secured by the

promissory note and commercial guaranties. On October 12, 2010, the estate and trust filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and argued that Independent Bank's claims against the estate and trust are barred by the statute of limitations. Defendants asserted that no estate exists and that Wood sent a notice of disallowance of claim for the trust, not the estate, on January 15, 2010. Because Independent Bank failed to file its complaint within 63 days after the disallowance was mailed or delivered, the trust argued that the claim was untimely pursuant to MCL 700.7611(a).

In response, Independent Bank acknowledged that it "has been advised" that no probate estate was opened for Lee and that its claim against the estate should be dismissed without prejudice on the ground that it was not ripe for review, though an estate could be opened at some time in the future. However, Independent Bank further argued that its statement and proof of claim preserved claims against both the estate and trust but, importantly in its opinion, the notice of disallowance of claim sent by Wood cited only the estate and "[n]owhere on the Notice of Disallowance of Claim is the Lee Trust cited." (Emphasis omitted.) Because the trust had failed to file a disallowance as to the trust, Independent Bank argued that the period of limitations had not run on its claim against the trust.[1]

---

[1] Independent Bank filed a motion for summary disposition against Hammel and Boes and argued that they had failed to comply with their obligations under the promissory note and guaranty. The trial court granted summary disposition to Independent Bank and ultimately entered a judgment against Hammel and Boes for $225,446.83, plus interest. In his appeal brief, defense counsel argues that the trial court erred by granting Independent Bank's motion for summary disposition. However, Hammel and Boes did not file a claim of cross-appeal in this case and, therefore, the arguments asserted on behalf of Hammel and Boes are not properly before the Court.

At the hearing on the motions, the trial court ruled from the bench that Independent Bank had acknowledged that no estate was opened and, regardless of whether there was "a conflict in the identification in the forms," Independent Bank was nonetheless obligated to file a claim against the trust within 63 days. Accordingly, the court granted summary disposition to the trust and dismissed the claims against the estate.

II. DISCUSSION

Independent Bank argues that the trial court erred by granting summary disposition to the trust because the disallowance of claim indicated that it pertained to the estate only and Independent Bank's complaint against the trust was, therefore, not barred by the statute of limitations.

The trial court stated that it decided to grant the trust's motion pursuant to MCR 2.116(C)(7), (8) and (10). However, because the trial court ruled that Independent Bank's claim was untimely, and because the court relied on documents outside the pleadings, it appears that the court granted summary disposition pursuant to MCR 2.116(C)(7). As this Court explained in *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010):

> This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) (claim is barred by statute of limitations). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery.

This case also involves the interpretation and application of various statutes. We also review these issues de novo. *Id*.

> The goal in interpreting a statute is to ascertain the Legislature's intent. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The first step in doing so is looking to the language used. *Id*. at 549. Effect must be given to each word, reading provisions as a whole, and in the context of the entire statute. *Green v Ziegelman*, 282 Mich App 292, 301-302; 767 NW2d 660 (2009). If the language is clear and unambiguous, the statute must be applied as written. *Id*. at 302. [*Hopkins v Duncan Twp*, 294 Mich App 401, 410; 812 NW2d 27 (2011).]

The Estates and Protected Individuals Code (EPIC) applies to this case. EPIC became effective April 1, 2000, and it applies to a "governing instrument executed by a decedent dying after that date." MCL 700.8101(1) and (2)(a). Provisions of the Michigan Trust Code (MTC), MCL 700.7101 through 700.7913, became effective on April 1, 2010, and are contained in amendments of and additions to article VII of EPIC. MCL 700.8204. The MTC applies to trusts created before its enactment, but does not impair accrued rights or affect an act done before its effective date. MCL 700.8206(1)(a) and (2). The parties agree that the statutory provisions at issue are substantively the same in EPIC and the MTC, and we agree.

In both the former EPIC provision, MCL 700.7504, as enacted by 1998 PA 386, and the MTC, MCL 700.7608, if there is no estate, a trustee must nonetheless comply with the publication and notice requirements that apply to estates under MCL 700.3801. The parties agree that Wood complied with these obligations. Independent Bank also properly complied with statutory requirements that it submit a statement and proof of claim. The statement shows that Independent

Bank was seeking to preserve any rights to payment from both the estate, which is the successor to Lee, and the trust because both Lee and his trust entered into the guaranty agreements.

At the heart of this dispute is the following question—was the disallowance of claim Wood sent in response to Independent Bank's statement and proof of claim a disallowance by the trust? For a claim to be properly disallowed by the trust, Wood had to comply with former MCL 700.7507(a), as amended by 2000 PA 54, which was identical to MTC provision MCL 700.7611(a), both of which provide:

> The trustee may deliver or mail a notice to the claimant stating that the claim has been disallowed in whole or in part. If, after allowing or disallowing a claim, the trustee changes a decision concerning the claim, the trustee shall notify the claimant. The trustee shall not change a decision disallowing a claim if the time for the claimant to commence a proceeding for allowance expires or if the time to commence a proceeding on the claim expires and the claim has been barred. A claim that is disallowed in whole or in part by the trustee is barred to the extent not allowed unless the claimant commences a proceeding against the trustee not later than 63 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure by the trustee to deliver or mail to a claimant notice of action on the claim within 63 days after the time for the claim's presentation has expired constitutes a notice of allowance.

As Independent Bank points out, the procedure for disallowing a claim against a trust is the same as the procedure for disallowing a claim against an estate. See MCL 700.3806(1).

As discussed, Independent Bank argues that the disallowance sent by Wood only identified Lee's estate and never indicated that the trust was disallowing the

claim. The trust takes the position that Independent Bank knew or should have known that no estate had been opened and that, therefore, the disallowance had to be on behalf of the trust. The trial court agreed with the trust and, despite what the court characterized as "a conflict in the identification in the forms," the court ruled that the trust properly disallowed the claim and Independent Bank's complaint was time-barred because it failed to file the complaint within 63 days after Wood sent the disallowance. We hold that that trial court's ruling was erroneous.

We reject the trial court's reasoning that Independent Bank should have known that Wood intended to disallow the claim as to the trust and that this was sufficient to trigger the 63-day filing deadline. While the publication of the notice of Lee's death stated that "[t]here is no probate estate" and the notice to known creditors identified Wood as "Successor Trustee," the publication was made almost immediately after Lee's death and the notices were sent shortly thereafter. It would not be unusual for an estate to be opened in the weeks or months following a person's death. Publication here occurred on May 31, 2009, the notices were sent in June and August 2009, and the disallowance was sent five or six months later. In one document, the statement and proof of claim, Independent Bank specifically preserved its right to file claims against both the estate and the trust, which is permitted under MCL 700.7609(2) and, again, it is not inconceivable that, in the time that lapsed between the initial notices and disallowance, an estate could have been opened. Indeed, when it is discovered that certain property was mistakenly omitted from a trust, probate may be necessary even long after the decedent passed away. Moreover, by operation of law the estate is the successor to Lee, Lee obligated himself to secure the loan by personally

entering into the guaranty, and it is logical and prudent that Independent Bank acted to preserve all claims that might be available to it.

Another flaw in the contention that Independent Bank should have known that Wood was acting only as a trustee is that Wood represented *both* Lee personally as well as Lee's revocable living trust and, thus, would likely have represented both the trust and estate, had one been opened, following Lee's death. Thus, that Wood signed and sent the disallowance would not place Independent Bank on notice of the intentions of the trust when the disallowance itself does not identify Wood as a trustee or fiduciary—again, it only refers to Lee's estate. Further, as Independent Bank argues, disallowances by a trust and by an estate are distinct under our statutes. While MCL 700.7609(2)[2] states that a claim presented against a decedent's estate is sufficient to also assert liability against a trust without an additional, separate presentation of claim against the trustee, EPIC and the MTC do not contain a mirror provision stating that a disallowance of claim by an estate is sufficient to disallow a claim against a trust. Our Legislature is presumed to be aware of the consequences of its use or omission of statutory language as well as its effect on new and existing laws. *In re MKK*, 286 Mich App 546, 556-557; 781 NW2d 132 (2009); see also *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448; 656 NW2d 366 (2002) ("When the Legislature enacts laws, it is presumed to

[2] MCL 700.7609(2) specifically states:

> If a personal representative is appointed for the settlor's estate, presentation of a claim against the settlor's estate shall be made in the manner described in [MCL 700.3804], and such a presentation is sufficient to assert liability against a trust described in [MCL 700.7605(1)] without an additional presentation of the claim against the trustee.

know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional."). Thus, a logical reading of the statutes suggests that the Legislature intended to require a separate and distinct disallowance of claim by the trust, whether or not an estate existed. The trust observes that the notice of disallowance of claim states that Independent Bank's claim of August 18, 2009, was disallowed "in whole" and the form also indicates the "entire claim" has been disallowed and will be barred if not filed within 63 days. The form document permits the entity to disallow a claim "in whole" or "in part," but this simply alerts creditors that the estate was disallowing the entire claim against it, not that it could legally also speak for another legal entity, the trust.

Most importantly, our holding is consistent with the plain language of the statute. As discussed, the notice of disallowance of claim refers only to Lee's estate and makes no mention of the trust. This was clearly counsel's error because no estate existed at the time he sent the disallowance and, indeed, no estate was ever opened. While this could be characterized as an oversight that plays to the advantage of Independent Bank, as between the parties, Independent Bank must prevail as a matter of law. And when a party seeks the strict application of a statute with a very brief limitations period in order to extinguish an otherwise lawful claim, that party should also be held to the very terms of the statute it seeks to invoke. Again, the disallowance, on its face, did not apply to the trust and did not trigger the 63-day filing deadline. Under the unambiguous language of former MCL 700.7507(a) and the new MTC provision, MCL 700.7611(a), the trust did not disallow the claim, and Independent Bank timely filed its action against the trust. Accordingly, the trial court erred by granting summary disposition to the trust.

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

CAVANAGH, P.J., and SHAPIRO, J., concurred with SAAD, J.

AUTO-OWNERS INSURANCE COMPANY v ALL STAR LAWN SPECIALISTS PLUS, INC

Docket No. 307711. Submitted April 2, 2013, at Detroit. Decided July 9, 2013, at 9:00 a.m. Order for the convening of a special panel pursuant to MCR 2.115(J), vacating part I, part II, ¶ 2, and part III, ¶ 2 entered July 26, 2013. 301 Mich App 801.

Joseph M. Derry 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 personal 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. It was undisputed that at the time of the accident, the mechanism attaching the machine to the truck was unlatched or unlocked and, had it been secured, the machine would not have tipped over. Derry claimed that Harrison 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 motor vehicle insurance 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 commercial automobile insurance 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 Derry 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 commercial general liability policy provided coverage for Derry's negligence claim against All Star and Harrison, and that the commercial automobile

insurance policy provided coverage for Derry's claim for no-fault benefits against Auto-Owners. Auto-Owners appealed.

The Court of Appeals *held*:

1. The WDCA specifically defines who is an "employee" under the act. The provisions pertinent to this case are MCL 418.161(1)(*l*) and (n). Sections 161(1)(*l*) and (n) must be read together as separate and necessary qualifications in establishing employee status. Accordingly, a determination must be made under § 161(1)(*l*) whether Derry was an employee at the time of his injury. If so, then it must be determined whether he was an employee under § 161(1)(n). The parties do not dispute that Derry was an "employee" as defined under § 161(1)(*l*), which involves an inquiry regarding whether the person was an employee under a contract of hire. Derry's entitlement to workers' compensation benefits is also dependent on satisfying the definition of an "employee" in § 161(1)(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."

2. The Court in *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569 (1992), held that if any one of the three statutory criteria in § 161(1)(n) are met the person is an "independent contractor" and not an "employee." MCR 7.215(J)(1) requires this panel of the Court of Appeals to follow the *Amerisure* interpretation. However, this panel disagrees with that interpretation and follows it only because it is obligated to do so. MCR 7.215(J)(2). Were this panel not obligated to follow *Amerisure*, it would reach a different conclusion.

3. The *Amerisure* panel focused on the word "not" in analyzing § 161(1), it should have focused on the word "and." The Legislature, in § 161(1), wrote the 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 listed the three criteria to determine if a person is an independent contractor, and its use of the word "and" indicates that all three criteria must be met in order to determine that someone is an "independent contractor."

4. The Legislature was attempting to accomplish three things in § 161(1)(n): (1) to make it clear that a person employing an independent contractor does not have to provide workers' compensation coverage to the 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 WDCA 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. The *Amerisure* interpretation of § 161(1)(n) potentially allows the improper reclassification of employees as independent contractors.

5. It is not disputed that Derry performed lawn mowing, snow removal, and leaf clearing services for both All Star and his neighbors. The trial court properly held that Derry performed precisely the same type of services for his neighbors that he did for All Star. Therefore, under the WDCA, Derry is not an employee if he held himself out to and rendered lawn maintenance and snow removal services to the public or maintained a separate business offering such services. The undisputed evidence established that Derry held himself out as someone who performed lawn maintenance and snow removal work to individuals in his neighborhood. Under the specific circumstances of this case, such holding himself out to individuals in his neighborhood constituted holding himself out to the public as rendering such services. Therefore, Derry does not meet the statutory definition of an employee entitled to workers' compensation benefits under § 161(1)(n), as interpreted by *Amerisure* and its progeny, and, as the trial court properly found, Derry qualified as an independent contractor at the time of the injury and is not entitled to workers' compensation benefits. Coverage under the workers' compensation policy was not triggered. Were this panel not bound to follow the *Amerisure* opinion, it 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. Under this interpretation, this panel would conclude that Derry was an employee of All Star because all three of the requirements to be considered an independent contractor stated in § 161(1)(n) were not met.

6. It is not disputed with regard to Derry's negligence claim against All Star, that Derry, who suffered accidental bodily injury, triggered potential coverage under the general liability policy. The workers' compensation exclusion in that policy did not apply to preclude coverage because, under § 161(1)(n), Derry was not an employee entitled to workers' compensation benefits for his injuries. If this panel was not bound to follow *Amerisure*, it would hold that Derry was an employee and that the workers' compensation exclusion in the general liability policy would apply.

7. The common-law economic reality test is properly applied in this action to determine whether the employer's liability exclusion

in the general liability policy negates coverage under the policy because the exclusion precludes coverage for bodily injury to an employee of the insured arising out of and in the course of employment by the insured, the term "employee" is not defined in the policy, and the parties dispute whether Derry was an employee or an independent contractor. Considering the testimony and affidavits in light of the economic reality test, conflicting inferences can be reasonably drawn from the evidence presented. Therefore, the trial court improperly summarily decided that Derry was not an employee at the time of his injury within the meaning of the general liability policy. The trial court's decision that the general liability policy provides liability coverage for Derry's injuries as a matter of law is reversed and the matter is remanded for further proceedings.

8. Because the leaf vacuum machine was not "attached," i.e., fastened, joined, or adhered, to the truck at the time of the accident, as required for the automobile exclusion contained in the general liability policy to apply, the trial court properly determined that the automobile exclusion was not applicable to preclude coverage under the general liability policy.

9. The workers' compensation exclusion contained in the commercial automobile insurance policy, which excludes liability coverage for any expenses that would be payable under the WDCA, is not applicable to preclude coverage because Derry's injuries are not compensable under the WDCA. The trial court's determination that the exclusion did not apply is affirmed. Were this panel not bound to follow *Amerisure* to reach that conclusion, it would conclude that Derry was covered under workers' compensation and that the workers' compensation exclusion in the policy applied.

10. There is conflicting evidence regarding Derry's employment status in light of the factors identified in the economic reality test. Therefore, the issue of liability coverage under the automobile policy should not be summarily decided. Summary disposition was improperly granted with regard to this issue.

11. The truck, which was temporarily stopped, was "parked" at the time of the accident within the meaning of the no-fault motor vehicle insurance act. Therefore, the injury arose out of the use of a parked vehicle and the policy does not provide no-fault coverage unless one of the exceptions to the parked vehicle exclusion applies.

12. Derry's injury occurred as a direct result of physical contact with the boom of the leaf vacuum machine not as a result of direct physical contact with the leaves he was loading with the

machine. The trial court erred by holding that the case fell within the policy's exception to the parked vehicle exclusion applicable where the bodily injury was a direct result of physical contact with property being lifted into or lowered from the motor vehicle in the loading or unloading process. The parked vehicle exclusion applies to preclude no-fault coverage. The trial court erred by holding that the exclusion did not apply.

13. Because the leaf vacuum machine was not permanently mounted to the truck, the exception to the parked vehicle exclusion in the automobile insurance policy providing coverage where the injury was a direct result of physical contact with equipment permanently mounted on the motor vehicle while the equipment was being operated or used is inapplicable. The parked vehicle exclusion precluded no-fault coverage under the facts of this case.

14. Collateral estoppel did not bar the relitigation of Derry's employment status.

15. The Chief Judge should poll the judges of the Court of Appeals, pursuant to MCR 7.215(J)(3) to determine if a special panel should be convened.

Affirmed in part, reversed in part, and remanded.

1. WORKERS' COMPENSATION — EMPLOYER-EMPLOYEE RELATIONSHIP — ECONOMIC REALITY TEST.

The economic reality test to determine the nature of an employment relationship considers four basis factors: (1) control of a worker's duties, (2) payment of wages, (3) the right to hire, fire, and discipline, and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal.

2. WORKERS' COMPENSATION — EMPLOYER-EMPLOYEE RELATIONSHIP — ECONOMIC REALITY TEST.

The following eight factors comprise the economic reality test to determine the nature of an employment relationship: First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?; second, is the work being performed an integral part of the employer's business that contributes to the accomplishment of a common objective?; third, is the position or job of such a nature that the employee primarily depends on the emolument for payment of his or her living expenses?; fourth, does the employee furnish his or her own equipment and materials?; fifth, does the individual seeking employment hold himself or herself out to the public as one ready and able to perform tasks of a given nature?; sixth, is the work or the

> undertaking in question customarily performed by an individual as an independent contractor?; seventh, control although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline, and the right to engage or discharge employees; and eighth, weight should be given to those factors that will most favorably effectuate the objectives of the Workers Disability Compensation Act, MCL 418.101 *et seq*.

Kallas & Henk PC (by *Constantine N. Kallas* and *Michele L. Riker-Semon*), for Auto-Owners Insurance Company.

Mark Granzotto, P.C. (by *Mark Grantzotto*), and *Thomas, Garvey, Garvey & Sciotti* (by *Daniel P. Beck*), for Joseph M. Derry.

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

PER CURIAM. In this declaratory judgment action, plaintiff, Auto-Owners Insurance Company, appeals as of right a circuit court opinion and order denying its motion for summary disposition and granting summary disposition in favor of defendant Joseph Derry. We affirm in part, reverse in part, and remand for further proceedings consistent with this 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 operated 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.

"This Court reviews a trial court's summary disposition decision de novo." *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *Id*. "The court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. "The motion is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 29-30. The trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Further, the interpretation of a statute presents a question of law subject to review de novo by this Court. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005) (opinion by TAYLOR, C.J.), citing *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999). Pertinent here, is whether an individual is an "employee" as statutorily defined in the workers' compensation act, which presents a question of law. *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610, 615; 640

NW2d 589 (2001). This Court's "fundamental obligation when interpreting statutes is 'to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.' " *Reed*, 473 Mich at 528 (opinion by TAYLOR, C.J.), quoting *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). "If the statute is unambiguous, judicial construction is neither required nor permitted." *Reed*, 473 Mich at 529 (opinion by TAYLOR, C.J.). The proper interpretation of a contract, such as the insurance contracts at issue here, also presents an issue of law subject to review de novo. *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997); *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005). In *Auto-Owners Ins Co v Churchman*, 440 Mich 560; 489 NW2d 431 (1992), the Michigan Supreme Court set forth the following guidelines in reviewing the language of an insurance policy:

> An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. Accordingly, the court must look at the contract as a whole and give meaning to all terms. Further, any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy. This Court cannot create ambiguity where none exists.
>
> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume. [*Churchman*, 440 Mich at 566-567 (quotation marks and citations omitted).]

Accordingly, the "[i]nterpretation of an insurance policy ultimately requires a two-step inquiry: first, a determi-

nation of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage." *Harrington*, 455 Mich at 382. We address the merits of the parties' claims with these standards in mind.

I. WORKERS' COMPENSATION POLICY

Auto-Owners first claims that the trial court erred by concluding that its workers' compensation policy did not provide coverage for Derry's injuries. The policy at issue provides insurance for accidental bodily injury when benefits are required under the workers' compensation law. "Michigan's Worker's Disability Compensation Act requires that employers provide compensation to employees for injuries suffered in the course of the employee's employment, regardless of who is at fault." *Hoste*, 459 Mich at 570, citing MCL 418.301. The threshold question, therefore, in determining whether an individual is entitled to coverage under the workers' compensation act is whether the individual is an "employee" as statutorily defined by the act. *Reed*, 473 Mich at 530 (opinion by TAYLOR, C.J.).

Section 161(1) of the workers' compensation act, MCL 418.161(1), specifically defines who is an "employee" under the act. *Hoste*, 459 Mich at 570, 572-573. The subsections pertinent to this case define an employee 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.

Sections 161(1)(*l*) and (n) "must be read together as separate and necessary qualifications in establishing employee status." *Hoste*, 459 Mich at 571, 573; see also *Reed*, 473 Mich at 530 (opinion by TAYLOR, C.J.). Accordingly, first it must be determined whether Derry was an employee at the time of his injury under § 161(1)(*l*). If so, then it must be determined whether he was an employee under § 161(1)(n). *Reed*, 473 Mich at 530 (opinion by TAYLOR, C.J.); *Hoste*, 459 Mich at 573.

The parties do not dispute that Derry was an "employee" as defined under § 161(1)(*l*), which "involves an inquiry regarding whether [an individual] was an employee under a 'contract of hire.' " *Hoste*, 459 Mich at 573; see also *Reed*, 473 Mich at 530-531 (opinion by TAYLOR, C.J.). All Star paid him an $11 hourly wage with overtime, which was clearly intended as "real and substantial" consideration, especially in light of the fact that he worked 24 to 40 hours a week during the lawn maintenance season. *Blanzy v Brigadier Gen Contractors, Inc*, 240 Mich App 632, 640-641; 613 NW2d 391 (2000), citing *Hoste*, 459 Mich at 576; see *Reed*, 473 Mich at 532 (opinion by TAYLOR, C.J.), quoting *Hoste*, 459 Mich at 576 ("[T]he linchpin to determining whether a contract is 'of hire' is whether the compensation paid for the service rendered was not merely a gratuity but, rather, 'intended as wages, i.e., real, palpable and substantial consideration[.]' ")

However, entitlement to workers' compensation benefits under the act is further dependent on satisfying the definition of an employee under § 161(1)(n), which "sets forth three criteria for determining whether a person performing services for an employer qualifies as what is commonly called an 'independent contractor'

rather than an employee." *Reed*, 473 Mich at 530, 535 (opinion by TAYLOR, C.J.). The pivotal question presented in this case is whether all three requirements in § 161(1)(n) must be met in order for a person to be considered an independent contractor, or whether a person is considered an independent contractor if any one of the three are met. There are a number of cases from this Court that hold that a person is not an employee under the workers' compensation act, but is an independent contractor, if any one or more of the statutory criteria set forth in § 161(1)(n) applies. *McCaul*, 248 Mich App at 616; *Blanzy*, 240 Mich App at 641; *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 725; 609 NW2d 859 (2000).[1] And all those cases based their holding on this Court's decision in *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569; 493 NW2d 482 (1992).

In *Amerisure*, *id*. at 574, this Court opined as follows in interpreting the statute:[2]

> The Legislature is presumed to have intended the meaning it plainly expressed. *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744; 453 NW2d 301 (1990). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Id*. 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

[1] Auto-Owners does not dispute that Derry himself is not an employer subject to the workers' compensation act, MCL 418.161(1)(n).

[2] At the time of the *Amerisure* opinion, the statutory language at issue was located in § 161(1)(d) rather than § 161(1)(n), and had only a slight change in wording that does not affect the interpretation of the statute.

> 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.

Although we are bound by the *Amerisure* Court's interpretation of the statute, MCR 7.215(J)(1), we respectfully disagree with that interpretation and follow it only because we are obligated to do so. MCR 7.215(J)(2). But for the requirement that we follow the prior decision, we would reach a different conclusion.

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).

Some guidance in reaching this interpretation is provided in the plurality opinion of Chief Justice TAYLOR in *Reed*. In *Reed*, Chief Justice TAYLOR restates the

statute in the positive, avoiding the cumbersome negative definition: "Subsection 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.

But unfortunately, it is only a suggestion. The opinion of Chief Justice TAYLOR in *Reed* was only a plurality opinion. And it focused on the requirement that the separate business be the same service as that provided to the employer. That is, for example, a person employed as a roofer can only be considered an independent contractor if his or her own business is also a roofing business. As Chief Justice TAYLOR stated, "Thus, for example, if the service that the person performs for the employer is roofing, to be an independent contractor and, thus, be ineligible for worker's compensation, the person must maintain a separate roofing business, which roofing business he holds himself or herself out to the public as performing." *Reed*, 473 Mich at 537 (opinion by TAYLOR, C.J.). Interestingly, while the plurality opinion in *Reed* ignored the third requirement, that the independent contractor must also be an employer under the workers' compensation act, the example of an independent contractor that it gave indicated that both of the first two requirements must be met, not just one of them. Nonetheless, this supports

the view that the Supreme Court's reading of the statute is that all three requirements must be met before a person is classified as an independent contractor rather than as an employee.

Moreover, we believe that this comports with the Legislature's intent behind this provision. In our view, the Legislature, despite somewhat cumbersome drafting, was attempting to accomplish three things in § 161(1)(n): (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. As the plurality opinion in *Reed* makes clear, the third purpose is addressed by examining whether the person is providing the same service as the employer or a different service.

Following the *Amerisure* interpretation, if only one of the three conditions set forth in § 161(1)(n) had to be met in order for a person to be classified as an independent contractor, it is easy to imagine any number of situations where a person who is truly an employee would suddenly be reclassified as an independent contractor. For example, a secretary who otherwise meets the definition of an employee would suddenly become an independent contractor, and no longer covered by workers' compensation, when the secretary runs an ad offering typing services that the secretary performs on evenings and weekends because he or she is holding his or her services out to the public (and it is the same service that he or she provides

for his or her employer). Or the "shade tree" mechanic who, after leaving his or her full-time job at an auto repair facility, works on cars at home for people who responded to a flyer that he or she posted at the local grocery store. Or the school music teacher who also offers private music lessons to earn a little extra money. To follow the *Amerisure* opinion, in all those cases these individuals would lose their protections under the workers' compensation act because, having held their services out to the public, they are now independent contractors and no longer employees.

But to follow the suggestion in the plurality opinion in *Reed* would achieve the purpose of the Legislature in writing this section. In each of the above examples, the individuals would not lose their status as employees (and coverage under the workers' compensation act) because, although they hold themselves out to render a service to the public and even arguably maintain their own separate business (depending on how "business" is defined), they are not employers under the act. And, therefore, they are not independent contractors. But it would also achieve the purpose of not requiring an employer to provide workers' compensation coverage for the true independent contractor, even where the independent contractor provides the same service. For example, in the case at bar, had All Star found itself in a position of having more work than it could handle, but wanted to retain a subcontractor rather than hire additional employees, it could retain another lawn care business (i.e., one that had its own business, held itself out as offering service to the public, and was an employer under the act) and not have to worry about providing workers' compensation coverage.

But what would not be possible under the suggestion in *Reed* would be for an employer to take a person who

is otherwise an employee and classify them as an independent contractor merely because it wants to so classify the person. Indeed, one of the coowners of All Star, Debra Harrison, stated in her affidavit that all of All Star's employees were "given the option of being paid on a W-2 or a 1099." That is to say, they were given the option of being classified by All Star as either an employee or an independent contractor. But neither employees nor employers have been given such classification authority. If they had, it would not have been necessary for the Legislature to have written a multipage definition of "employee." Rather, § 161 could simply read, " 'Employee' means a person classified as such by the employer at the time of hire." And workers' compensation coverage would become optional rather than mandatory. See MCL 418.111 ("Every employer, public and private, and every employee, unless herein otherwise specifically provided, shall be subject to the provisions of this act and shall be bound thereby.").

Turning to the case at bar, it is not disputed that Derry performed lawn mowing, snow removal, and leaf clearing services for both All Star and for his neighbors. During the time Derry worked for All Star, he provided lawn maintenance services, i.e., mowing, blowing, edging, trimming, and leaf removal, as well as occasional snow removal services for commercial properties, such as apartment complexes and industrial buildings. During that same period, Derry also shoveled snow, mowed lawns, and raked leaves for individuals in his neighborhood, work he obtained through word of mouth and personal solicitation by going door to door in his subdivision. The lawn maintenance and snow removal work performed by Derry for All Star, which involved commercial properties, was clearly on a much larger scale than the services performed for his neighbors. However, it is undisputed that Derry performed essentially the

same services for All Star that he provided his neighbors, i.e., mowing lawns, clearing leaves, and removing snow, just on a smaller scale. See *Reed*, 473 Mich at 537 (opinion by TAYLOR, C.J.). Therefore, we agree with the trial court's determination that the service Derry "performed on his own was precisely the same type of work that he performed for All Star." As such, under the workers' compensation act, Derry is not an employee if he held himself out to and rendered lawn maintenance and snow removal services to the public or maintained a separate business offering such services. *Amerisure*, 196 Mich App at 574; *Blanzy*, 240 Mich App at 641.

We agree with the trial court that the undisputed evidence establishes that Derry held himself out as someone who performed lawn maintenance and snow removal work to individuals in his neighborhood by going door to door and by word of mouth. The facts, although undisputed, present a close question because Derry only performed such services for his neighbors on an occasional basis and did not advertise to the public at large or solicit such work from any individuals beyond his subdivision. We conclude, under the specific circumstances of this case, however, that Derry's holding himself out to individuals in his neighborhood constitutes holding himself out to and rending service "to the public."

The workers' compensation act does not specifically define the term "public," and, thus, it is appropriate to consider the term "public" as it is ordinarily defined. *Martin v Dep't of Corrections*, 140 Mich App 323, 330; 364 NW2d 322 (1985), aff'd 424 Mich 553 (1986), citing *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937). In *Powell*, our Supreme Court defined the term "public" to mean "all those who have occasion to purchase, within the limits of the defendant's capacity or ability to furnish it." *Powell*, 280 Mich at 707. Within this meaning, "the

public," as recognized by our Supreme Court, can constitute the individuals in one's neighborhood, the individuals of a particular place, the community at large, the people of the state at large, or even all the people. *Id*. at 702-703, 707. Therefore, although Derry did not advertise his lawn maintenance and snow removal services to the public at large, but held himself out by word of mouth and door-to-door solicitation to only individuals in his neighborhood, one's neighborhood can constitute "the public." *Id*. at 702-703, quoting 50 CJ pp 844, 845; see also *Martin*, 140 Mich App at 329, quoting *Green v Dep't of Corrections*, 30 Mich App 648, 654 n 7; 186 NW2d 792 (1971) ("public" "has been defined or employed as meaning the inhabitants of a particular place; all the inhabitants of a particular place; the people of the neighborhood") (additional quotation marks and citation omitted). As our Supreme Court recognized in *Powell*, what constitutes a seller's "public" is dependent on the limits of the seller's capacity or ability to furnish a product. *Powell*, 280 Mich at 707. That is, selling "to the public" means selling "to all those who have occasion to purchase, within the limits of the defendant's capacity or ability to furnish it." *Id*. Our review of the record revealed that Derry did not own a vehicle and had not had a driver's license since 2005 because of a suspension of his license, and relied on his girlfriend for transportation, which likely seriously limited or impeded his capacity or ability to provide lawn maintenance and snow removal services on his own to individuals beyond his neighborhood. Derry's solicitation of lawn maintenance and snow removal services within the confines of his neighborhood under these circumstances, was sufficient, in light of *Powell*, to establish that he held himself out "to the public" as rendering such services. MCL 418.161(1)(n). *Reed*, 473 Mich at 537 (opinion by TAYLOR, C.J.); *Blanzy*, 240 Mich App at 641. Accordingly, we find that Derry does not meet the statu-

tory definition of an employee entitled to workers' compensation benefits under MCL 418.161(1)(n), as interpreted by *Amerisure* and its progeny, and, as the trial court properly found, Derry qualified as an independent contractor at the time of the injury and is not entitled to workers' compensation benefits under the act. Therefore, coverage under Auto-Owners' workers' compensation insurance policy, providing insurance for bodily injury when benefits are due as required under the workers' compensation law, was not triggered.

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, he is not an employer under the compensation act. Therefore, while we are constrained to conclude that Derry is an independent contractor under the *Amerisure* 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.

II. GENERAL LIABILITY POLICY

We next consider whether Auto-Owners' general liability policy provides coverage for Derry's negligence claim against All Star. It is not disputed that Derry, who suffered accidental bodily injury, triggered potential coverage un-

der Auto-Owners' general liability policy.[3] Auto-Owners relies on three policy exclusions that preclude liability coverage under the policy: the workers' compensation, employer's liability, and automobile exclusions. Derry maintains, and the trial court decided, that these exclusions do not apply and the general liability policy provides liability coverage for his injuries.

To negate coverage under its general liability policy, Auto-Owners first relies on the workers' compensation exclusion contained in its general liability policy, which excludes coverage for "[a]ny obligation of the insured under a workers compensation . . . law." Derry, however, was not an employee as defined in the workers' compensation act, MCL 418.161(1)(n), and, thus, is not entitled to workers' compensation benefits for his injuries. Accordingly, the workers' compensation exclusion, which plainly and unambiguously bars coverage for injury compensable under workers' compensation laws, does not apply to preclude coverage under the policy. See *Nat'l Ben Franklin Ins Co v Harris*, 161 Mich App 86, 90-91; 409 NW2d 733 (1987). We reach this conclusion, however, only because, as discussed above, we are required to follow the *Amerisure* interpretation of § 161(1)(n). If we were free to apply our interpretation of the statute, then we would hold that Derry was an employee and the workers' compensation exclusion would apply in this case.

---

[3] The general coverage provision of the general liability policy, provides:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking "bodily injury" or "property damage" to which this insurance does not apply.

Auto-Owners next relies on the employer's liability exclusion to negate coverage under the policy, which precludes coverage for bodily injury to "[a]n 'employee' of the insured arising out of and in the course of employment by the insured[.]" The policy provides a definition for the term "employee," but merely identifies two specific types of workers who would or would not be classified as employees under the policy. This Court in *Meridian Mut Ins Co v Wypij*, 226 Mich App 276, 278-281; 573 NW2d 320 (1997), analyzed an identical employee exclusion and found it appropriate to apply the common-law economic reality test in determining whether an individual is an employee within the meaning of the policy, concluding that "where the term 'employee' is not defined in the contract and where one party alleges that the business relationship was one of being an independent contractor rather than being an employee, a trial court may properly apply the economic reality test." We likewise find it appropriate to employ the economic reality test.[4]

"The economic-reality test considers four basic factors: (1) control of a worker's duties, (2) payment of wages, (3) right to hire, fire, and discipline, and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal." *Mantei v*

---

[4] We disagree with Derry's argument on appeal that the Court should not employ the economic reality test to determine if an individual was an employee within the meaning of the general liability policy. Derry contends the test under the workers' compensation act, MCL 418.161(1), is the appropriate test. However, because the employer's liability exclusion contained in the general liability policy does not refer to or is not based on the workers' compensation act, we do not believe that the definition of employee as provided for under MCL 418.161(1) should be used to determine whether coverage is precluded under the employer's general liability policy. See *People v Yamat*, 475 Mich 49, 54-58; 714 NW2d 335 (2006), suggesting that it is improper for courts to use cases interpreting insurance contract terms to interpret unambiguous statutory terms.

Michigan Pub Sch Employees Retirement Sys, 256 Mich App 64, 78; 663 NW2d 486 (2003). Our Supreme Court in *Hoste* set forth the following factors that comprise the economic reality test:

> "First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?
>
> "Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?
>
> "Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expense?
>
> "Fourth, does the employee furnish his own equipment and materials?
>
> "Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?
>
> "Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?
>
> "Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.
>
> "Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute." [*Hoste*, 459 Mich at 568 n 6, quoting *McKissic v Bodine*, 42 Mich App 203, 208-209; 201 NW2d 333 (1972).]

The economic reality test requires examination of the totality of the circumstances surrounding the work performed. *Mantei*, 256 Mich App at 79.

Considering the testimony and affidavits presented relevant to Derry's employment status, in light of the factors set forth under the economic reality test, we find

that conflicting inferences can be reasonably drawn from the evidence presented, and thus, the court improperly summarily decided that Derry was not an employee at the time of the injury within the meaning of the general liability policy. *Clark v United Technologies Auto, Inc*, 459 Mich 681, 694, 696; 594 NW2d 447 (1999), citing *Nichol v Billot*, 406 Mich 284, 302-303, 306; 279 NW2d 761 (1979).

Some evidence pointed to Derry being an employee under the economic reality test. For example, as a member of All Star's lawn crew, Derry performed an integral part of All Star's business and worked directly with All Star's owners toward the accomplishment of a single goal, i.e., completing the lawn maintenance jobs for properties under contract with All Star. All Star compensated Derry with an hourly wage, as opposed to paying him a fixed amount, which is consistent with the treatment of an employee (compare *Luster*, 239 Mich App at 722 and *McKissic*, 42 Mich App at 209). All Star had the apparent authority to terminate Derry's services and there was no indication that All Star had any liability if the relationship was terminated at will. All Star provided all the materials and equipment used and needed to complete the work. Finally, Derry performed his services under All Star's general supervision and direction. These facts support a finding that Derry was an employee.

However, other evidence pointed to Derry being an independent contractor under the economic reality test. It was undisputed that, given the routine and repetitive nature of the work, Harrison and All Star did not directly supervise the manner in which Derry completed his work. Derry relied on income from his side jobs in addition to his income from All Star, and he held himself out to individuals in his neighborhood to render

and perform the same services he performed for All Star. These facts support a finding that Derry was an independent contractor.

Clearly, the evidence presented factual issues regarding Derry's status as an employee or independent contractor that should be resolved by a trier of fact. Accordingly, because coverage under the general liability policy is dependent on Derry's employment status, we reverse the court's decision that Auto-Owners' general liability policy provides liability coverage for Derry's injuries as a matter of law and remand for further proceedings.

Finally, Auto-Owners relies on the auto exclusion contained in the general liability policy, which clearly and unambiguously precludes coverage for bodily injury arising out of the use, operation, loading, or unloading of an "auto." The policy defines the term "auto" as "a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any *attached machinery* or equipment" (emphasis added). Under the policy, the use of an auto includes "loading and unloading," which "does not include the movement of property by means of a mechanical device . . . that is *not attached* to the aircraft, watercraft, or 'auto'."

The term "attached" is not defined in the general liability policy. Where a term is not defined in an insurance policy, "[t]his Court must interpret the terms of the contract in accordance with their commonly used meanings." *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000). We "may refer to dictionary definitions when appropriate when ascertaining the precise meaning of a particular term." *Id*. The dictionary defines the verb "attach" as "to be fastened or joined; adhere" and "to fasten by sticking, tying, etc." *Webster's New World Dictionary*

(1984). Accordingly, the term "auto," as defined by the policy, includes machinery and equipment if it is "fastened," "joined" or "adhered" to the truck.

It is undisputed that Derry's injuries arose out of the use of a leaf vacuum machine that he was using to load leaves onto All Star's truck when the machine tipped over, causing the "boom" of the vacuum to strike him. The testimony, however, was also undisputed that the leaf vacuum machine was not "attached," i.e., "fastened," "joined," or "adhered," to the truck at the time of Derry's injuries, as required for the auto exclusion to apply to preclude coverage under the general liability policy. Instead, it is undisputed that the mechanism attaching the machine to the truck was not latched or locked, which caused the machine to tip. Accordingly, the trial court properly determined that the automobile exclusion is not applicable to preclude coverage under the general liability policy for Derry's accident.

III. COMMERCIAL AUTOMOBILE POLICY

We finally consider whether Auto-Owners' commercial automobile policy provides liability coverage or no-fault insurance coverage for Derry's injuries.[5] Again, to negate coverage under the policy, Auto-Owners relies on policy exclusions. However, Derry maintains, and the trial court decided, that the pertinent exclusions do not apply and the policy provides liability and no-fault insurance coverage for his injuries.

---

[5] Auto-Owners' automobile policy provides liability coverage, in pertinent part:

> We will pay damages for bodily injury and property damage for which you become legally responsible because of or arising out of the ownership, maintenance or use of your automobile (that is not a trailer) as an automobile. [Emphasis deleted.]

As in the context of the general liability policy, the workers' compensation exclusion contained in the automobile policy, which excludes liability coverage for "any expenses that would be payable under any workers' compensation law[,]" is not applicable to preclude coverage because Derry's injuries are not compensable under the workers' compensation act. But again we emphasize that we reach that conclusion only because of our obligation to follow *Amerisure*. Were we free to apply our own interpretaiton of MCL 418.161(1)(n), we would conclude that Derry was covered under workers' compensation and, therefore, the workers' compensation exclusion contained in the automobile policy would, in fact, apply.

Further, as in the employer's liability exclusion contained in the general liability policy, the employee exclusions contained in the automobile policy[6] are dependant on Derry's status as an employee or independent contractor. As discussed already, we believe there is conflicting evidence regarding Derry's employment status in light of the factors identified under the economic reality test. Accordingly, the issue of liability coverage under the automobile policy should not be

---

[6] Under the employee exclusions contained in Auto-Owners' automobile policy, liability coverage is not provided:

> l. to your employee for claims brought against him or her by another of your employees injured on the job.
>
> m. to any person or organization for bodily injury to:
>
> (1) an employee of that person or organization; or
>
> (2) a spouse, child, parent, brother or sister of the employee which results from the injury to the employee;
>
> when that injury arises out of and in the course of employment by that person or organization. [Emphasis deleted.]

summarily decided. Instead, Derry's employment status should be decided by a trier of fact, after which it can be determined if the employee exclusions apply to bar liability coverage under the automobile policy. Therefore, summary disposition of this issue was improper.

Auto-Owners next claims that the parked vehicle exclusion contained in its policy endorsement precludes no-fault coverage under the circumstances of this case.[7] The exclusion provides, in pertinent part:

> We will not pay personal injury protection benefits for:
>
> * * *
>
> c. bodily injury arising out of the ownership, operation, maintenance, or use of a parked motor vehicle unless:
>
> (1) the motor vehicle was parked in such a way as to cause unreasonable risk of the bodily injury; or
>
> (2) the bodily injury was a direct result of physical contact with:
>
> (a) equipment permanently mounted on the motor vehicle while the equipment was being operated or used; or
>
> (b) property being lifted onto or lowered from the motor vehicle in the loading or unloading process; or
>
> (3) the bodily injury was sustained by the injured person while occupying the motor vehicle. [Emphasis deleted.]

---

[7] The policy's "Michigan No-Fault Endorsement" provides:

> Subject to the provisions of this endorsement and of the policy to which this endorsement is attached, we will pay personal injury protection benefits to or on behalf of an injured person for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle, subject to the provisions of Chapter 31 of the Michigan Insurance Code. Ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle means that the involvement of the motor vehicle in the bodily injury was directly related to the transportation function of the motor vehicle. [Emphasis deleted.]

The insured motor vehicle at issue here is All Star's pickup truck. It is undisputed that, at the time of the incident, the truck was temporarily stopped, i.e., "there was no vehicular movement," *Winter v Auto Club of Mich*, 433 Mich 446, 455; 446 NW2d 132 (1989) (quotation marks omitted), because Jeffrey Harrison had stopped the truck while Derry unclogged the hose of the leaf vacuum machine and had not resumed driving it at the time of the accident. The truck, even though it was only temporarily stopped, was "parked" within the meaning of the no-fault act. See *Harris v Grand Rapids Area Transit Auth*, 153 Mich App 829, 832; 396 NW2d 554 (1986) (in the context of the parked vehicle exclusion under the no-fault law, parking " 'is merely one form of stopping' ") (citation omitted). Because All Star's truck was "parked" at the time of Derry's injury, the injury arose out of the use of a parked vehicle, and thus, the policy does not provide no-fault coverage unless one of the exceptions to the parked vehicle exclusion applies.

We disagree with the trial court's determination that this case fell within the policy's exception to the parked vehicle exclusion where the bodily injury was a direct result of physical contact with "property being lifted onto or lowered from the motor vehicle in the loading or unloading process[.]"[8] (Emphasis deleted.) Here, it is undisputed that Derry was loading leaves into the truck with the leaf vacuum machine at the time of his injury, but his injury was not a direct result of physical contact with the leaves he was loading. Instead, his bodily

[8] It is not argued that the exceptions to the parked vehicle exclusion (c)(1) and (c)(3) of the no-fault endorsement apply to this case. There is no evidence indicating that the truck was parked in such a manner so as to cause an unreasonable risk of injury. Further, it is undisputed that Derry did not sustain his injuries while occupying the truck.

injury was a direct result of physical contact with the boom of the leaf vacuum machine, which tipped over as he was loading leaves onto the truck. The exception's language requires that the injury must occur as a direct result of physical contact with the property being lifted into or lowered from the vehicle, i.e., the injured person's body must come into contact with the property being lifted onto or lowered from the vehicle. See *Winter*, 433 Mich at 458-460 ("the injury must directly result from actual physical contact"). Here, Derry's injuries were the direct result of his contact with the machine, not the leaves he was loading onto the truck. Accordingly, we find that the parked vehicle exclusion applies to preclude no-fault coverage under the automobile policy and the trial court erred, as a matter of law, in determining that the parked vehicle exclusion is inapplicable.

We next address Derry's argument on appeal that this case falls within the policy's exception to the parked vehicle exclusion providing no-fault coverage where the injury "was a direct result of physical contact with . . . equipment permanently mounted on the motor vehicle while the equipment was being operated or used[.]" (Emphasis deleted.) Derry sustained his injury from direct physical contact with the boom of the leaf vacuum machine when the machine tipped over. It is undisputed that the machine was not "permanently mounted" on the truck because the machine was not locked or latched to the truck at the time it tipped over causing the boom to strike Derry. Accordingly, this exception to the parked vehicle exclusion is inapplicable, and thus, the exclusion applies to preclude no-fault coverage under the facts of this case.

Finally, we decline to consider Derry's unpreserved argument on appeal that collateral estoppel bars Auto-

Owners from relitigating his employment status because the trial court previously determined the issue in Derry's negligence action against All Star and Derry's action against Auto-Owners seeking recovery of no-fault benefits. We conclude that Derry waived his defense of collateral estoppel because he failed to raise this defense in a responsive pleading as required under MCR 2.116(D)(2). In fact, there is nothing in the lower court record indicating that Derry ever specifically raised the defense of collateral estoppel before this appeal. Regardless, we note that collateral estoppel does not act to bar relitigation of Derry's employment status because, although both cases involved the same parties, and Derry's status as an employee or independent contractor, at issue in the instant case, was actually and necessarily determined in the prior proceedings, the prior proceedings did not culminate in a final judgment. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). Instead, the trial court's denial of Auto-Owners' summary disposition motion in the earlier action was interlocutory in nature and did not finally dispose of the case. *Indiana Ins Co v Auto-Owners Ins Co*, 260 Mich App 662, 671 n 8; 680 NW2d 466 (2004). In fact, the trial court's opinion in the prior proceedings specifically indicates that its order denying Auto-Owners' motion for summary disposition neither resolves the last pending claim nor closes the case. Accordingly, collateral estoppel did not bar the relitigation of Derry's employment status in the instant cause of action.

In sum, we conclude that Derry is not covered under workers' compensation only because we are obligated under MCR 7.215(J) to follow the decision in *Amerisure*. Were we free to apply our own interpretation of MCL 418.161(1)(n), we would conclude that Derry was, in fact, an employee and that his injuries were covered

under workers' compensation. And if we were permitted to reach that conclusion, we would also hold that the workers' compensation exclusions in the automobile and general liability policies would apply. Because our disagreement with *Amerisure* is outcome determinative in this case and because we believe the erroneous decision in *Amerisure* warrants the convening of a special panel, we request that, pursuant to MCR 7.215(J)(3), the Chief Judge poll the judges of this Court to determine if a special panel should be convened.

We do, however, agree with appellant that the trial court erred by granting summary disposition with respect to the applicability of other exclusions in the automobile and general liability policies because a genuine issue of material fact exists regarding whether those exclusions apply. Accordingly, we reverse that part of the trial court's decision and remand for further consideration of those exclusions.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

JANSEN, P.J., and SAWYER and SERVITTO, JJ., concurred.

ADAIR v STATE OF MICHIGAN (ON FOURTH REMAND)

Docket No. 230858. Submitted June 20, 2013, at Grand Rapids. Decided July 9, 2013, at 9:05 a.m. Leave to appeal sought.

Daniel Adair, the Fitzgerald Public Schools, and others brought an original action in the Court of Appeals against the state of Michigan, the Department of Education, the Department of Management and Budget, and the Michigan Treasurer. Plaintiffs consisted of 456 Michigan public school districts and a taxpayer from each. Plaintiffs alleged, among other claims, violations of the prohibition of unfunded mandates found in Const 1963, art 9, § 29, part of the so-called Headlee Amendment, by the imposition of numerous recordkeeping and reporting requirements on the school districts. The Court of Appeals, HOLBROOK, JR., P.J., and TALBOT, J. (SAAD, J., dissenting), granted defendants summary disposition on all claims. 250 Mich App 691 (2002). The Supreme Court granted plaintiffs' application for leave to appeal, 467 Mich 920 (2002), and thereafter reversed in part the Court of Appeals' judgment, concluding that plaintiffs' recordkeeping claim stated a claim on which relief could be granted, and remanded the case to the Court of Appeals for further proceedings on that claim, 470 Mich 105 (2004). On remand, the Court of Appeals, SAAD, P.J., and TALBOT and FORT HOOD, JJ., concluded that plaintiffs had not supported their recordkeeping claim and again granted summary disposition to defendants. 267 Mich App 583 (2005). Plaintiffs sought leave to appeal in the Supreme Court and moved to disqualify two of the justices. Those justices denied the motion for recusal, 474 Mich 1027 (2006), and the Supreme Court, in lieu of granting plaintiffs leave to appeal, vacated the judgment of the Court of Appeals and remanded the case for it to reevaluate plaintiffs' claims under both prongs of the unfunded mandate prohibition, 474 Mich 1073 (2006). On second remand, in an unpublished order entered April 18, 2006 (Docket No. 230858), the Court of Appeals appointed former Wayne Circuit Court Judge Pamela R. Harwood as a special master to determine the issue. She concluded that the recordkeeping requirements violated Const 1963, art 9, § 29. The Court of Appeals, SAAD, C.J., and TALBOT and FORT HOOD, JJ., then adopted the special master's conclusions of law and findings of fact with some modifications and entered a

declaratory judgment for plaintiffs. The Court of Appeals rejected plaintiffs' request for attorney fees under Const 1963, art 9, § 32, concluding that plaintiffs' suit had not been sustained as required by that constitutional provision. 279 Mich App 507 (2008). Plaintiffs and defendants filed separate applications for leave to appeal, and the Supreme Court granted both applications in part. 483 Mich 922 (2009). The Supreme Court affirmed the declaratory judgment for plaintiffs with regard to their recordkeeping claim and reversed the part of the judgment that held that plaintiffs' suit had not been sustained within the meaning of Const 1963, art 9, § 32, holding instead that plaintiffs were entitled to the costs incurred in maintaining the action, including an award of reasonable attorney fees incurred in litigating the recordkeeping claim only, and remanded the matter to the Court of Appeals for a determination of costs and attorney fees. 486 Mich 468 (2010). On third remand, in an unpublished order entered October 19, 2010 (Docket No. 230858), the Court of Appeals appointed A. David Baumhart, III, to serve as a special master and ordered him to review the reasonableness of plaintiffs' claim for costs (including attorney fees) and conduct fact-finding. The special master conducted hearings and issued a report to which plaintiffs and defendants raised objections. The Court of Appeals, SAAD, P.J., and TALBOT and FORT HOOD, JJ., held that plaintiffs were not entitled to an award of certain costs. The Court of Appeals also held that plaintiffs had failed to satisfy their burden of proving the number of hours their attorneys reasonably expended in litigating their recordkeeping claim during phases I and II of the case and that plaintiffs were not entitled to attorney fees for phase III of the case. 298 Mich App 383 (2012). Plaintiffs sought leave to appeal. In lieu of granting leave to appeal, the Supreme Court reversed the portion of the Court of Appeals' judgment that denied all attorney fees for phase II, concluding that plaintiffs had established that their attorneys performed reasonable and necessary recordkeeping work for the recordkeeping claim. The Supreme Court, citing *Smith v Khouri*, 481 Mich 519 (2008), remanded the case to the Court of Appeals for it to articulate on the record specific factual findings regarding the amount of attorney fees that were properly compensable for phase II and enter an award consistent with those findings. 494 Mich 852 (2013).

On fourth remand, the Court of Appeals *held*:

1. The party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested. The *Smith* framework for determining reasonable attorney fees requires a trial court to determine a base reasonable hourly or daily

fee rate derived from reliable surveys or other credible evidence showing the fee customarily charged in the locality for similar legal services and multiply this rate by the reasonable number of hours expended in the case. The product serves as the starting point for calculating a reasonable attorney fee. The court may make up-or-down adjustments to the fee after considering certain factors enumerated in MRPC 1.5(a) and *Wood v DAIIE*, 413 Mich 573 (1982), and any additional relevant factors. A reasonable fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, might differ from the actual fee charged or the highest rate the attorney might otherwise command. The reasonable hourly rate is reflected by the market rate for the attorney's work, which is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.

2. The Court of Appeals found the testimony of plaintiffs' expert witness unhelpful and disregarded his testimony. *Smith* requires that the market rate for an attorney's work be determined separately for each attorney who seeks to recover a reasonable fee. Plaintiffs' expert concluded that a base rate of $250 was appropriate for all eight attorneys seeking to recover their respective reasonable fees, treating an attorney who had been in practice for 42 years and had more than three decades of experience in Headlee Amendment litigation as having a similar ability and experience in the community as an attorney who had been in practice since 2007 and had little experience with the Headlee Amendment. The decision to treat each attorney as having equal ability and experience unequivocally established that the expert failed to correctly apply the *Smith* analysis.

3. The Court of Appeals found relevant to its determination of a reasonable hourly rate the fact that plaintiffs and their attorneys entered into a fee agreement in 2000 under which the school districts agreed to compensate all attorneys providing services at an hourly rate of $175. The hourly rate actually paid by plaintiffs, although clearly not dispositive of what constituted a reasonable fee, was a factor to be considered in determining market place value. Surveys of the economics of law practice in Michigan published by the State Bar of Michigan for 2000, 2003, 2007, and 2010 also provided some reliable empirical evidence of market rates. While plaintiffs relied heavily on State Bar data pertaining to appellate practice and the special master relied instead on data pertaining to municipal law practice, an action to enforce the Headlee Amendment is sui generis. If brought originally in the Court of Appeals, as allowed under MCL 600.308a(1), it is part

appellate proceeding and, to the extent that the services of a special master are employed, part trial proceeding in that it involves discovery, motion practice, and litigation. The practice areas listed and surveyed by the State Bar did not fully reflect the hybrid nature of the proceedings or the limited and specialized market for attorneys familiar with the Headlee Amendment. The Court of Appeals, sitting as the trial court in this action, exercised independent review and rejected any reliance on the data associated with surveys of practice areas, relying instead on the data collected statewide with regard to years in practice because plaintiffs' attorneys represented school districts and taxpayers located throughout the state and plaintiffs chose the Court of Appeals, with statewide jurisdiction, as the court in which to commence their original action, rather than a circuit court with limited territorial jurisdiction. The number of years in practice also reflected how experience and demand may be compensated on an hourly basis. Accordingly, the data reported in the 2003, 2007 and 2010 surveys regarding the years in practice was the most relevant available data, resulting in a determination of reasonable hourly rates of $210, $175, and $140 for various groups of plaintiffs' attorneys.

4. The special master found the number of hours expended by plaintiffs' attorneys during phase II of the recordkeeping claim to have been reasonable and necessary with some exceptions. The panel adopted those findings as its own. The motion for reconsideration of the Supreme Court's first decision, the motion to disqualify two justices, and the motion to reconsider those justices' decision to not recuse themselves were not reasonable and necessary to maintaining the recordkeeping claim, and the hours plaintiffs' attorneys expended on those motions were not compensable. For the same reason, the hours expended preparing for possible oral argument before the Supreme Court that was never scheduled, preparing a petition for costs that was never filed, and composing broadcast e-mails to update plaintiffs were unreasonable and not compensable. Finally, an examination of the hours plaintiffs' attorneys expended in conjunction with briefing, preparing for oral arguments, and other related matters showed that the number of hours billed was not commensurate with the amount of work performed, especially in light of the years of experience the attorneys had.

5. The special master declined to adjust upward the base hourly rate he assigned to two of plaintiffs' attorneys, and the Court of Appeals likewise declined to do so. While the proceedings involved complex issues of first impression and required extensive

presentation and preparation and plaintiffs' attorneys obtained a favorable result on the recordkeeping claim, plaintiffs ultimately prevailed on only 1 of their 21 claims. Moreover, although plaintiffs' attorneys had represented school districts in Headlee enforcement actions for decades, none of the efficiencies expected from the length of this attorney-client relationship was present in this case. Likewise, the special master correctly declined to adjust the base hourly rate of plaintiffs' remaining attorneys upward. None of those attorneys testified before the special master, and no details were provided about the contributions these attorneys made to the successful prosecution of the case. Consideration of the factors enumerated in MRPC 1.5(a) and *Wood* and the limited record in this case failed to justify an upward adjustment of the respective hourly rates of the attorneys.

Plaintiffs ordered to submit amended statement of attorney fees.

Secrest Wardle (by *Dennis R. Pollard* and *Mark S. Roberts*) for plaintiffs.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Timothy J. Haynes*, Assistant Attorney General, for defendants.

ON FOURTH REMAND

Before: TALBOT, P.J., and SAAD and FORT HOOD, JJ.

TALBOT, P.J. This original action to enforce the Headlee Amendment[1] returns to us by virtue of our Supreme Court's May 24, 2013 order to articulate on the record our specific factual findings regarding the amount of attorney fees that are properly compensable for Phase II of these proceedings and to enter an award in favor of plaintiffs consistent with our findings. *Adair v Michigan*, 494 Mich 852 (2013). After our review of the record, the report of the special master, the objections of

[1] Const 1963, art 9, §§ 25 to 34.

the parties, and the applicable caselaw, we direct plaintiffs to submit an amended statement of attorney fees that conforms to our decision.

REASONABLE ATTORNEY FEES

As we observed in *Adair v Michigan (On Third Remand)*, 298 Mich App 383, 391; 827 NW2d 740 (2012), rev'd in part 494 Mich 852 (2013):

> The party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested. *Smith* [*v Khouri*] 481 Mich [519, 528; 751 NW2d 472 (2008)] (opinion by TAYLOR, C.J.). *Smith* establishes an analytical framework to guide the lower courts in determining what constitutes a "reasonable fee." In general terms, the *Smith* framework requires a trial judge to determine a baseline reasonable hourly or daily fee rate derived from "reliable surveys or other credible evidence" showing the fee customarily charged in the locality for similar legal services. *Id*. at 530-531, 537. Once the trial judge has determined this hourly rate, the judge must multiply this rate by the reasonable number of hours expended in the case. The product of this calculation serves as the "starting point for calculating a reasonable attorney fee." *Id*. at 531, 537. Finally, the trial judge may make up-or-down adjustments to the fee after considering certain factors enumerated in Rule 1.5(a) of the Michigan Rules of Professional Conduct and *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982), and any additional relevant factors. *Smith*, 481 Mich at 529-531, 537 (opinion by TAYLOR, C.J.).

Because the instant case is one to enforce the provisions of the Headlee Amendment, we also take into consideration the intent of Const 1963, art 9, § 32, which is to reimburse the taxpayer for the costs of maintaining the suit, *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 8-10; 564 NW2d 457 (1997), and the balancing of the need to reimburse

the taxpayer who brought suit against the potential harm to state taxpayers who must pay the costs awarded, *Durant v Michigan*, 456 Mich 175, 213; 566 NW2d 272 (1997).

Finally, we take guidance from the admonition in *Smith* that the analytical framework it established

> is not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls. Rather, it only permits an award of a *reasonable* fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the *actual* fee charged or the highest rate the attorney might otherwise command. [*Smith*, 481 Mich at 528 (opinion of TAYLOR, C.J.) (citations omitted).

"[R]easonable fees 'are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region.' " *Id*., quoting *Coulter v Tennessee*, 805 F2d 146, 149 (CA 6, 1986).

REASONABLE HOURLY RATE

The *Smith* Court offered the following guidance with regard to determining the hourly rate customarily charged:

> The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. "The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." *Eddleman v Switchcraft, Inc*, 965 F2d 422, 424 (CA 7, 1992) (citation and quotation [marks] omitted). We emphasize that "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v*

> *Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891 (1984). The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan. [*Smith*, 481 Mich at 531-532 (opinion by TAYLOR, C.J.) (citation omitted).]

Before the special master, A. David Baumhart, III, plaintiffs presented the testimony of Fred M. Mester, a retired Oakland Circuit judge, to establish a baseline reasonable hourly rate of compensation for each attorney seeking to recover a reasonable fee in this matter. According to Mester, consistently with *Smith*, he began by determining the customary fee charged in the locality for similar legal services. To make this determination, he examined the Economics of Law Practice in Michigan surveys published by the State Bar of Michigan for 2000, 2003, 2007, and 2010 to determine the market rate for the attorneys' work in this case. Mester disregarded the 2000 study as irrelevant because the survey was published before this case commenced and because the data contained in the survey "look[ed] backwards[.]" He did consider the 2003 and 2007 surveys, but found the 2010 survey most useful and, thus, gave more weight to the 2010 survey to guide his calculations because the 2010 survey results were based on a larger sampling of lawyers and law firms. Nevertheless, he used the results of the 2003 and 2007 surveys to lower his baseline hourly rate calculation. Next, Mester con-

cluded that the applicable area of practice for calculating a market rate was appellate practice

> because appellate law is basically what this case is all about. The case of original jurisdiction was in the appellate courts. The matter was before the Supreme Court on at least three different occasions. We know that all appellate matters have another basic foundation in law that has to start the case at the trial level, but this matter dealt basically with appeals and argument before the Court of Appeals and Supreme Court of the State of Michigan.

After deciding that the appellate practice was the applicable area of practice, he reviewed the 2010 survey and learned that the mean hourly rate for the appellate field of practice was $259; that the mean hourly rate for Oakland County, where the offices of plaintiffs' attorneys were located, was $254; that the mean hourly rate for law firms located in Oakland County south of M-59 was $260; and that the mean hourly rate for law firms of a comparable size was $292. He averaged these means and arrived at an average mean hourly rate of $266. After he made these calculations, Mester concluded that a $250-an-hour rate would be an appropriate hourly base rate for all eight attorneys who billed hours in this case.

Mester did not determine the reasonableness of the hours billed, however, which is the second step of the *Smith* framework, because he was not asked to do so by plaintiffs and because he "didn't see that as my responsibility." Rather, he proceeded to the third step of the *Smith* framework. Mester concluded that there were numerous considerations that warranted an upward adjustment of the hourly rate for Dennis Pollard, Richard Kroopnick, and William P. Hampton, attorneys for plaintiffs. These considerations included the outstanding quality of work exhibited by these attorneys in this

case and other cases over the course of their respective careers, the professional standing of these attorneys, the reputation of Pollard and Kroopnick as pertains to Headlee matters, the length and complexity of the case, the extensive discovery and briefing needed, their having obtained a declaratory judgment that resulted in a $25 million appropriation by the Legislature, the incurring of $200,000 in costs that the attorneys "carried,"[2] and the length of the attorneys' relationship with the school districts, which dated back to the 1970s. With these considerations in mind, Mester adjusted the $250 hourly rate upward to $450 an hour for Pollard, Kroopnick, and Hampton. He made no adjustment to the $250 hourly rate for the remaining five attorneys who assisted Pollard and Kroopnick: Kari Costanza, Mark Roberts, Daniel Villaire, Robert Schindler, and Matthew Drake.

We find the testimony of Mester to be unhelpful, as did the special master, and, therefore, we disregard his testimony. As observed in *Smith*, the market rate for an attorney's work is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question. *Smith*, 481 Mich at 531 (opinion of TAYLOR, C.J.). *Smith* directs that the market rate for an attorney's work be determined separately for each attorney who seeks to recover a reasonable fee. *Id*. at 534; see also *Augustine v Allstate Ins Co*, 292 Mich App 408, 439; 807 NW2d 77 (2011). In the present case, Mester concluded that a base rate of $250 was appropriate for all eight attorneys seeking to recover their respective reasonable fees. Mester treated Pollard, who has been in practice for 42 years, has more than three decades of

[2] Pollard testified before the special master that the costs were billed to and paid by plaintiff school districts.

experience in Headlee Amendment litigation, and has been lead counsel in this case, as having a similar ability and experience in the community as Schindler, who has been in practice since 2007 and has little experience in matters concerning the Headlee Amendment. This decision to treat each attorney as having equal ability and experience unequivocally establishes that Mester failed to correctly apply the *Smith* methodology. His conclusions about what constitutes a reasonable rate of hourly compensation for each attorney are inconsistent with the strictures of *Smith* and, therefore, are both unreliable and unhelpful. See *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 232-233; 823 NW2d 843 (2012) (stating that testimony that relies on subjective, self-serving, and anecdotal evidence is inconsistent with the strictures of *Smith* and unhelpful). Plaintiffs' assertion to the contrary notwithstanding, the mere fact that the state presented no witnesses to contradict the calculations of Mester does not require that we accept those calculations.

Likewise, we place no import on the testimony of Pollard that an hourly rate of $450 constituted reasonable compensation for himself and Kroopnick. His testimony reflects nothing more than a ratification of Mester's discredited opinion testimony. For this same reason, we disregard the testimony of Pollard that an hourly rate of $250 would be reasonable compensation for Roberts, Villaire, Schindler, and Drake.

Instead, we find relevant to our determination of a reasonable hourly rate the fact that plaintiffs and their attorneys entered into a fee agreement in 2000 pursuant to which the school districts agreed to compensate all attorneys providing services in this case at an hourly rate of $175. The hourly rate actually paid by plaintiffs, although "clearly not dispositive of what constitutes a

reasonable fee, is a factor to be considered in determining market place value as it is reflective of competition within the community for business and typical fees demanded for similar work." *Van Elslander*, 297 Mich App at 234. We also find relevant the following surveys published by the State Bar of Michigan: The 2000 Desktop Reference on the Economics of Law Practice in Michigan; Economics of Law Practice (2003); 2007 Economics of Law Practice Summary Report; and 2010 Economics of Law Practice Attorney Income and Billing Rate Summary Report.[3] These surveys provide some reliable empirical evidence of market rates. *Smith*, 481 Mich at 530-532 (opinion of TAYLOR, C.J.).

We begin our analysis of what constitutes a reasonable hourly rate of compensation for each of plaintiffs' attorneys by acknowledging that plaintiffs rely heavily on data generated by the State Bar pertaining to the appellate area of practice and that the special master relies, instead, on the data pertaining to the municipal law area of practice. We also acknowledge, however, that actions to enforce the Headlee Amendment, like this one, are sui generis. Such actions, if originally brought in this Court, are part appellate proceeding and, to the extent that the services of a special master are employed, they are also part trial proceeding in that they involve discovery, motion practice, and litigation. The practice areas listed and surveyed by the State Bar do not fully reflect the hybrid nature of these proceedings or the limited and specialized market for attorneys who are familiar with the operation of the Headlee Amendment. Thus, any attempt on our part to shoehorn this matter into one of the areas of practice identified in the various surveys of the State Bar serves no useful

---

[3] These reports are available at <http://www.michbar.org/opinions/content.cfm>.

purpose. "The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work." *Id*. at 531. The market for other areas of legal practice with broader client bases and greater demand provide no probative information regarding what constitutes the proper market for the provision of the specialized legal services associated with the enforcement of the Headlee Amendment.

Smith clearly contemplates that the trier of fact must independently review these State Bar surveys and determine what information contained in those surveys is most relevant and helpful to a determination of the market rate for each attorney for whom a reasonable attorney fee is sought. *Id*. at 530-532, 537. Because this Court sits as the trial court in this action, we exercise that power of independent review and reject any reliance on the data associated with the areas of practice surveys. Instead, we rely on the data collected statewide with regard to years in practice. We do so because plaintiffs' attorneys represent school districts and taxpayers located throughout the state and because plaintiffs chose this Court, which has statewide jurisdiction, as the court in which to commence their original action, rather than a circuit court with limited territorial jurisdiction, as allowed by MCL 600.308a(1). We also do so because the number of years in practice reflects how experience and demand may be compensated on an hourly basis. Finally, we observe that in 2003, the median hourly billing rates for attorneys with the same years in practice as the two lead counsels in this case, Pollard and Kroopnick ($175 an hour for Pollard and $180 an hour for Kroopnick), were consistent with the $175-an-hour rate plaintiffs' attorneys were charging plaintiffs at that time. As we previously observed, "the actual fee charged . . . is a factor to be considered in

determining market place value as it is reflective of competition within the community for business and typical fees demanded for similar work." *Van Elslander*, 297 Mich App at 234. For these reasons, we conclude that the data reported in the 2003, 2007, and 2010 surveys regarding the years in practice is the "most relevant available data." *Smith*, 481 Mich at 532 (opinion of TAYLOR, C.J.).

Based on our review of the 2003, 2007, and 2010 surveys and the years of practice for each of plaintiffs' six attorneys,[4] we find that a reasonable hourly rate for Pollard and Kroopnick is $210, that a reasonable hourly rate for Schindler, Villaire, and Drake is the contract hourly rate of $175, and that a reasonable hourly rate for Costanza is her actual billing rate of $140.

REASONABLE NUMBER OF HOURS EXPENDED

The special master found the number of hours expended by plaintiffs' attorneys during the phase II prosecution of the recordkeeping claim to have been reasonable and necessary with the following exceptions:

> During Phase II, Plaintiffs' attorneys expended some time on tasks that were not related to litigating the record keeping claim, including preparing a motion for reconsideration relating only to Plaintiffs' other 20 claims; preparing unsuccessful strategic motions to disqualify Michigan Supreme Court Justices; preparing a petition for costs that was not filed; preparing for the possibility of an argument

[4] We do not calculate a reasonable hourly rate for attorneys Hampton and Roberts because plaintiffs incurred their fees in phase III of these proceedings. Plaintiffs also sought a reasonable attorney fee for Sidney Klinger and an attorney identified only by the surname Zaremba. However, plaintiffs failed to present evidence from which a market rate for their respective services could be reasonably determined. Consequently, we disallow any recovery for the work performed by these attorneys.

before the Supreme Court that was never scheduled; and expending time on other Headlee matters. (Defendants' Exhibit B.) Therefore, Plaintiffs shall remove from their database of hours expended the following, per the revised Defendants' Exhibit B:

All hours related to possible motion for reconsideration of 2004 MSC decision (Defendants' Exhibit B, p. 1)

All hours related to motion to disqualify MSC Justices (*Id*, pp. 2-4)

All hours related to possible motion for reconsideration re: recusal motion (*Id*, p. 5)

Other duplicative or unrelated time as set forth below from Defendants' Exhibit B, p 8:

11/09/07 broadcast email entry — reduce hours expended by 1/2

11/12/07 broadcast email entry — reduce hours expended by 1/2

11/13/07 broadcast email entry — reduce hours expended by 1/2

02/29/08 fee petition — reduce hours expended to 0

03/07/08 fee petition — reduce hours expended to 0

08/20/08 fee petition — reduce hours expended to 0

08/22/08 fee petition — reduce hours expended to 0

09/22/08 — 10/15/09 all 7 entries in this time frame — reduce hours expended to 0.

Plaintiffs do not need to remove their attorney time for working with putative expert Sneed in that, while Sneed did not testify at trial, she did provide a significant benefit to Plaintiffs by way of a stipulation that negated Defendants' position that the record keeping was required by state law rather than by the federal [No Child Left Behind] legislation.[5]

---

[5] The special master's representation to the contrary notwithstanding, defendants asserted that the recordkeeping requirements were imposed on the state by the No Child Left Behind Act, PL 107-110, 115 State 1425.

> During Phase II, Plaintiffs' counsel also spent an unreasonable number of hours performing other tasks on the case. Especially given Mr. Pollard's and Mr. Kroopnick's vast experience in Headlee Amendment matters, a review of their hours expended spreadsheet demonstrates that the attorneys spent an unreasonable number of hours briefing, preparing for oral argument and performing other tasks. (Defendants' Exhibit C.) Plaintiffs have not sustained their burden of proving the Phase II hours expended by Messrs. Pollard and Kroopnick that have been challenged by Defendants in Defendants' Exhibit C are objectively reasonable. Those Phase II hours on Defendant's Exhibit C therefore shall be reduced by 20 percent, and Plaintiffs' database of hours expended reduced accordingly. This will result in a reduction in Mr. Pollard's 834.6 challenged hours of 166.92 hours and in Mr. Kroopnick's 731.6 challenged hours of 146.32 hours. [Transcript citation omitted]

We adopt these findings of the special master as our own. As we observed in our opinion on third remand, the motion for reconsideration of our Supreme Court's first decision, the motion to disqualify two justices of our Supreme Court, and the motion for reconsideration of the decision of the justices not to recuse themselves were not reasonable and necessary to the maintenance of the recordkeeping claim. *Adair*, 298 Mich App at 403. Consequently, the hours expended by plaintiffs' attorneys on those motions are not compensable. For this same reason, the hours expended in preparation for possible oral argument before the Supreme Court that was never scheduled are not compensable. Likewise, the hours spent by plaintiffs' attorneys in preparation of a petition for costs that was never filed are unreasonable and not compensable. The hours devoted by plaintiffs' attorneys to composing certain "broadcast emails" used by plaintiffs' attorneys to update plaintiffs are unreasonable. Pollard candidly admitted that the November 2007 broadcast e-mails included a "history of the Head-

lee Amendment cases" and a discussion of *Owczarek v Michigan*, 276 Mich App 602; 742 NW2d 380 (2007), a decision Pollard acknowledged had no relevance to a determination of the merits of the recordkeeping claim. Finally, our review of the hours expended by plaintiffs' attorneys in conjunction with briefing, preparing for oral arguments, and other related matters leads us to conclude that the number of hours billed is not commensurate with the amount of work performed, especially in light of the years of experience possessed by plaintiffs' attorneys and the inability of Pollard to justify the hours expended by identifying with any degree of specificity what activities had been performed.

FEE ENHANCEMENT

The special master declined to adjust upward the baseline hourly rate he assigned to Pollard and Kroopnick. We likewise decline to do so.

We acknowledge that these proceedings involved complex issues of first impression and required extensive presentation and preparation. We also acknowledge that plaintiffs' attorneys obtained a favorable result for plaintiffs on their recordkeeping claim that resulted in legislative appropriations of tens of millions of dollars. However, it must be observed that plaintiffs only prevailed on 1 of the 21 claims pleaded in their complaint. Moreover, although plaintiffs' attorneys have represented school districts for decades in Headlee enforcement actions, we find this long-term attorney-client relationship to be a double-edged sword. We find none of the expected efficiencies that should have been generated by the length of this attorney-client relationship present in this case. See *Augustine*, 292 Mich App at 437-438. Indeed, as observed by the special master, a review of plaintiffs' "hours expended spreadsheet dem-

onstrates that the attorneys spent an unreasonable number of hours briefing, preparing for oral argument and performing other tasks," which needlessly extended the time this matter spent before both of the special masters involved in the phase II litigation and this Court. Additionally, on both remands to the special masters, plaintiffs failed to act with all deliberate dispatch to ensure an expeditious resolution of those proceedings. Finally, plaintiff school districts have paid the costs of this proceeding and an attorney fee based on an hourly rate less than the baseline hourly rate we set in this opinion. Our balancing of these fee-consideration factors leads us to conclude that an award of enhanced fees in this case would be directly contrary to the admonition in *Smith* that the analytical framework it created "is not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls," *Smith*, 481 Mich at 528 (opinion of TAYLOR, C.J.), and the intent of those who ratified the Headlee Amendment that the costs awarded under Const 1963, art 9, § 32 are to be in an amount sufficient to provide the average taxpayer with the financial wherewithal to exercise the taxpayer's right to bring suit, *Durant v Dep't of Ed (On Second Remand)*, 186 Mich App 83, 118; 463 NW2d 461 (1990).

Likewise, on the record before us, we conclude that the special master correctly declined to make an upward adjustment to the baseline hourly rate of plaintiffs' remaining attorneys. None of those attorneys testified before the special master. Neither Pollard nor Kroopnick testified in any detail about the contributions made by these attorneys to the successful prosecution of the case. We have reviewed plaintiffs' exhibits detailing the qualifications and experience of each attorney and, after consideration of the factors enumerated in MRPC 1.5(a) and *Wood* and the limited record,

we conclude that plaintiffs have failed to present proofs sufficient to justify an upward adjustment of the respective hourly rates of Schindler, Villaire, Drake, and Costanza.

CONCLUSION

Plaintiffs shall submit an amended statement of attorney fees that conforms to our opinion. An order awarding attorneys in the revised amount will thereafter enter. We retain jurisdiction.

SAAD and FORT HOOD, JJ., concurred with TALBOT, P.J.

PEOPLE v JONES

Docket No. 312065. Submitted June 4, 2013, at Grand Rapids. Decided July 9, 2013, at 9:10 a.m. Leave to appeal sought.

Cynthia Cherrelle Jones was charged in the Berrien Trial Court, Criminal Division, with possession with intent to deliver less than 50 grams of marijuana, MCL 333.7401(2)(a)(*iv*), after marijuana was discovered in her car after a police stop. She moved for dismissal of the charge under MCL 333.26424, the section of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., that provides immunity from prosecution for a qualifying patient and registered primary caregivers who have been issued and possess a registry identification card. The prosecution moved in limine to preclude defendant from asserting the § 4 immunity, arguing that defendant was not entitled to the MMMA protections because she was not a resident at the time she applied for a registry identification card or when she was found in possession of the marijuana. The trial court, Angela M. Pasula, J., denied defendant's immunity-based motion to dismiss. The court also denied the prosecution's motion in limine, concluding that while a person must be a resident of Michigan to qualify as a cardholder under the MMMA, defendant had an unexpired Michigan marijuana registry card on the date she was stopped by police, which allowed her to assert the § 4 immunity. The court later denied the prosecution's renewed motion in limine, concluding that the evidence produced at the preliminary examination and an evidentiary hearing was insufficient to determine as a matter of law whether defendant qualified for the § 4 immunity and that the two disputed questions of fact—whether defendant was a Michigan resident at the time she applied for her patient and caregiver registry identification cards and whether the marijuana was in fact for medical use—were issues to be decided by a jury. The prosecution appealed and defendant cross-appealed.

The Court of Appeals *held*:

1. MCL 333.26424(a) and (b) grant registered qualifying patients and registered primary caregivers broad immunity from arrest, criminal prosecution, civil penalties, and disciplinary ac-

tions for the medical use of marijuana in accordance with the MMMA. As in cases in which the trial court must make findings of fact in pretrial proceedings to determine whether a defendant was entrapped, a trial court judge must act as the finder of facts when § 4 immunity is asserted because (1) the immunity provision does not negate any element of a marijuana-related crime, (2) a defendant is entitled to the dismissal of any marijuana-related charges if entitlement to the § 4 immunity is established, (3) a body of precedent to guide future police conduct is important to the application of the immunity and can be developed if the trial court judge acts as the finder of facts on the issue of § 4 immunity, and (4) testimony regarding admitted marijuana possession could infect a jury's ability to determine whether § 4 immunity is applicable under a certain set of facts. In addition, to have meaningful effect, the § 4 immunity language itself indicates that the immunity must be afforded at the earliest possible stages of any investigation or subsequent court proceedings and the trial court acting as fact-finder will result in a more expeditious resolution of immunity claims. In this case, the trial court erred by holding that whether defendant qualified for the § 4 immunity was a question of fact for the jury.

2. Although the version of the MMMA in effect at the time defendant was charged does not directly address residency, MCL 333.26424(j) allows a visiting qualifying patient to use medical marijuana in conformity with the MMMA while vising the state of Michigan. MCL 333.26422 also list several other states that do not penalize the medical use of marijuana and notes that marijuana for medical use was allowed for the health and welfare of Michigan's citizens. The trial court properly concluded that being a Michigan resident is a prerequisite to the issuance and valid possession of a registry identification card under the MMMA.

3. The trial court did not err by denying defendant's motion to suppress her statements to the police during the traffic stop because under the totality of the circumstances a reasonable person in defendant's position would have believed that she was free to leave and as such was not in custody for purposes of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

4. In this case, the trial court did not abuse its discretion by denying defendant's motion to dismiss. It was police department policy to automatically destroy all traffic-stop recordings six months after the traffic stop and defendant failed to present any

evidence of bad faith on the part of the police department for deleting the recording after that time period elapsed or that it would have been exculpatory.

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

CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — IMMUNITY — DETERMINATION OF IMMUNITY — FINDER OF FACTS.

Under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, a trial court judge is the finder of facts when § 4 immunity is asserted because (1) the immunity provision does not negate any element of a marijuana-related crime, (2) a defendant is entitled to the dismissal of any marijuana-related charges if entitlement to the § 4 immunity is established, (3) a body of precedent to guide future police conduct is important to the application of the immunity and can be developed if the trial court judge acts as the finder of facts on the issue of § 4 immunity, and (4) testimony regarding admitted marijuana possession could infect a jury's ability to determine whether § 4 immunity is applicable under a certain set of facts; the § 4 immunity language itself indicates that the immunity must be afforded at the earliest possible stages of any investigation or subsequent court proceedings and the trial court acting as fact-finder will result in a more expeditious resolution of immunity claims (MCL 333.26424).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

Targowski & Grow, PLLC (by *Daniel W. Grow*), for defendant.

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

HOEKSTRA, J. In this medical marijuana case, we granted the prosecution's application for leave to appeal to consider whether questions of fact regarding the applicability of immunity under § 4 of the Michigan Medical

Marijuana Act (MMMA), MCL 333.26421 *et seq*.,[1] must be resolved by the trial court or by a jury. Unpublished order of the Court of Appeals, entered January 8, 2013 (Docket No. 312065). In this context, the question of whether Michigan residency is a prerequisite to valid possession of a registry identification card under the MMMA also arises. Because we hold that residency is a prerequisite to valid possession of a registry identification card and that questions of fact regarding the applicability of § 4 immunity must be resolved by the trial court, we vacate the trial court's order and remand for further proceedings.

On January 28, 2011, Baroda Lake Township Police Officer John Hopkins stopped a vehicle being driven by defendant after observing the vehicle weave in and out of the fast lane and change lanes without signaling. During the stop, Officer Hopkins detected the odor of marijuana emanating from defendant's vehicle. He requested permission to search the vehicle, and defendant consented. When the trunk of the vehicle was opened, he instantly detected a strong odor of marijuana. In a black backpack located in the trunk, Officer Hopkins found eight individual baggies containing various amounts of marijuana totaling about five ounces and papers with names and numbers recorded on them, which Officer Hopkins believed to be drug records. Also in the backpack were patient and caregiver registry identification cards belonging to defendant, Salman Ali, and others. Defendant was questioned by Officer Hopkins about the marijuana at the scene of the traffic stop, and while being transported to and at the police station.

[1] Although the statutory provisions at issue refer to "marihuana," by convention this Court uses the more common spelling "marijuana" in its opinions. Section 4 of the MMMA was amended by 2012 PA 512, after defendant's arrest and bindover on the charged offense. Although the amendment language does not affect our holding, all references and quotations are to the 2008 version of § 4.

However, defendant was released without being charged after the questioning was completed.

On November 1, 2011, defendant was arrested and charged with possession of marijuana with intent to deliver less than 50 grams of marijuana, MCL 333.7401(2)(a)(*iv*). Before the preliminary examination, defendant moved for dismissal of the charges pursuant to the immunity provided by § 4 of the MMMA, MCL 333.26424, and the prosecution moved in limine to preclude defendant from asserting § 4 immunity. After conducting a contested preliminary examination, the district court issued a written opinion and order denying defendant's motion to dismiss and bound defendant over to the circuit court on the possession-with-intent-to-deliver charge. In a separate opinion and order, the district court denied the prosecution's motion in limine to preclude defendant from asserting § 4 immunity. In that opinion, the district court also addressed the prosecution's argument that defendant is not entitled to the MMMA protections because she was not a Michigan resident at the time she applied for a registry identification card or at the time that she was found to be in possession of marijuana. The district court held that residency in Michigan is required to qualify as a cardholder under the MMMA. However, it denied the prosecution's motion because it concluded that defendant had "an unexpired Michigan Medical Marihuana Registration Card when she was stopped by police on January 28, 2011," and defendant was entitled to claim § 4 immunity.

After the bindover to the circuit court, the prosecution filed a renewed motion in limine to preclude defendant from asserting § 4 immunity or an affirmative defense under § 8 at trial, and requested that the trial court conduct an evidentiary hearing on the lim-

ited question of whether defendant was a Michigan resident at the time she applied for her registry identification card under the MMMA.[2] Following an evidentiary hearing, the trial court took the matter under advisement, and in a written opinion and order denied the prosecution's renewed motion to preclude defendant from asserting § 4 immunity. The trial court found that the evidence produced at the preliminary examination and the July 2012 evidentiary hearing was insufficient to allow it to determine, as a matter of law, whether defendant was entitled to the immunity provided by § 4. Specifically, the trial court found that there were two disputed questions of fact, and that when questions of fact exist regarding whether a defendant is entitled to § 4 immunity, those questions must be submitted to a jury. The two questions of fact identified by the trial court were whether defendant was a Michigan resident at the time she applied for her patient and caregiver registry identification cards and whether the "true purpose" for which defendant possessed the marijuana was medical use in light of the fact that the marijuana was discovered with paperwork indicating drug trafficking.

On appeal, the prosecution argues that the trial court erred by ruling that questions of fact pertaining to the application of § 4 immunity must be submitted to a jury. Defendant agrees with the prosecution, but in addition maintains that the trial court erred by finding that residency is a prerequisite to the valid possession of registry identification cards.

---

[2] We note that the same judge presided over all proceedings in this case because the Michigan Supreme Court has consolidated and merged the Berrien County District Court, Probate Court and Circuit Court into a single trial court. We further note that defendant filed several motions that were also considered during the evidentiary hearing held on July 20, 2012 that are the subject of defendant's cross appeal.

We review de novo questions regarding the interpretation of the MMMA. *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012). The intent of the electors, rather than the Legislature, governs the interpretation of voter-initiated statutes like the MMMA. *Id*. at 397. A statute must be interpreted on the basis of its plain language, and the words of the MMMA must be given their ordinary and plain meaning as would have been understood by the electorate. *Id*.

Section 4 of the MMMA provides in relevant part:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, . . . for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.
>
> (b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, 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 assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and

(3) any incidental amount of seeds, stalks, and unusable roots. [MCL 333.26424.]

Sections 4(a) and 4(b) of the MMMA contain parallel immunity provisions that grant registered qualifying patients and registered primary caregivers broad immunity from arrest, criminal prosecution, civil penalties, and disciplinary actions. *People v Bylsma*, 493 Mich 17, 28; 825 NW2d 543 (2012); *Kolanek*, 491 Mich at 394-395. While the MMMA does not address whether factual questions arising in the application of § 4 immunity should be resolved by the trial court during pretrial proceedings or by a jury, our Supreme Court has instructed that the requirements of § 4 "are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges." *Kolanek*, 491 Mich at 403. Further, our Supreme Court directed courts to consider "well-established principles of criminal procedure" when deciding a motion to dismiss asserting the § 8 affirmative defense. *Id*. at 411.

Because we see no reason to distinguish § 8 and § 4 in terms of reliance on "well-established principles of criminal procedure" as instructed by *Kolanek*, we look to comparable Michigan law for guidance in resolving the § 4 issue presented in this case.

In making its decision, the trial court relied on the long-recognized principle in Michigan caselaw that questions of law in criminal cases are for the trial judge to decide, whereas questions of fact are for the jury. *Id*.; *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673

(1996); *People v Wright*, 161 Mich App 682, 685; 411 NW2d 826 (1987). While this is a well-established principle, it is not absolute. In certain instances, Michigan criminal law clearly places the fact-finding function with the trial court judge. See, e.g., *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000) (affirming this Court's decision, which recognized that the trial court must make factual findings when it determines whether a defendant's statement was voluntary); *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991) (holding that the trial court must make findings of fact in pretrial proceedings to determine whether a defendant was entrapped); *People v Chism*, 390 Mich 104, 123; 211 NW2d 193 (1973) (finding no clear error when the trial judge found that the consent to search was valid); *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009) (recognizing that the trial court must make factual findings when it rules on a motion to suppress physical evidence); *People v Frohriep*, 247 Mich App 692, 695-696; 637 NW2d 562 (2001) (recognizing that the trial court makes factual findings when it determines whether a consent to search was valid); *People v Parker*, 230 Mich App 337, 339-341; 584 NW2d 336 (1998) (recognizing that the judge makes the factual findings in conjunction with a decision on a motion to suppress evidence); *People v Dalton*, 155 Mich App 591, 598; 400 NW2d 689 (1986) (holding that the lawfulness of an arrest is a question of law to be decided by the trial court unless the lawfulness of the arrest is an element of a criminal offense in which case it becomes a question of fact for the jury). Thus, the "well-established principles of criminal procedure" suggest that under certain circumstances, it is necessary for the trial court to make factual determinations before trial. *Kolanek*, 491 Mich at 411. Accord-

ingly, the question becomes whether § 4 immunity fact-finding is most appropriately placed with the jury or the trial court.

In answering this question, we find the reasoning for assigning the fact-finding in entrapment cases to the trial court particularly informative. It is well established in Michigan that the trial court judge makes factual findings to determine whether a defendant has proved that he or she was entrapped. *Juillet*, 439 Mich at 61; *People v D'Angelo*, 401 Mich 167, 176-177; 257 NW2d 655 (1977). In *Juillet*, 439 Mich at 52, the Court explained that "[t]he overall purpose of the entrapment defense is to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed." Entrapment "is not a defense that negates an essential element of the charged crime. Instead, it presents facts that are collateral to the crime that justify barring the defendant's prosecution." *Id*. Thus, when a trial court determines that a defendant was entrapped, the charges against the defendant must be dismissed, regardless of whether the defendant actually committed a crime. Further, when entrapment is claimed, the trial court must conduct an evidentiary hearing, and the defendant bears the burden of proving by a preponderance of the evidence that he or she was entrapped. *Id*. at 61. "[T]he trial court must make specific findings of fact on the entrapment issue, and its decision will be reviewed under the clearly erroneous standard." *Id*.

The decision that the trial court, and not a jury, should make any factual determination regarding the existence of entrapment was based in part on our Supreme Court's observation that resolution of the

entrapment issue by the trial court "will provide, through an accumulation of cases, a body of precedent which will stand as a point of reference both for law enforcement officials and the courts." *D'Angelo*, 401 Mich at 175. Moreover, the Court noted that there is a concern that if such a question is left to a jury, the evidence indicating a defendant's guilt will "infect" the jury's ability to determine whether the defense of entrapment is applicable. *Id*.

Similar to entrapment, § 4 immunity does not negate any element of a marijuana-related crime; rather, it provides immunity from arrest, prosecution, or penalty to marijuana users who meet certain delineated requirements.[3] MCL 333.26424. Like a defendant who proves entrapment, a defendant is entitled to dismissal of any marijuana-related charges if he or she proves that he or she qualifies for § 4 immunity under the MMMA. See *id*.; *People v Tuttle*, 493 Mich 950; 828 NW2d 375 (2013); *People v Hartwick*, 493 Mich 950; 828 NW2d 48 (2013). Moreover, the reasoning behind entrapment principles is also applicable to § 4 immunity because a body of precedent to guide future police conduct is important to the application of § 4 immunity, which is meant to protect against arrest, as well as prosecution and penalty. Also, as is likely in entrapment cases, the knowledge of admitted marijuana possession may "infect" a jury's ability to determine whether § 4 immunity is applicable in a given situation. These similarities weigh in favor of holding that § 4 fact-finding should be done by the trial court judge.

[3] To qualify for § 4 immunity, one must prove that he or she "(1) is a qualifying patient, (2) who has been issued and possesses a registry identification card, and (3) possesses less than 2.5 ounces of usable marijuana," and that the marijuana was for medical use. *People v Nicholson*, 297 Mich App 191, 198; 822 NW2d 284 (2012).

Further, the language of § 4 itself provides an additional basis for holding that the question of immunity ought to be decided by the trial court judge. MCL 333.26424(a) and (b) provide that both qualifying patients and primary caregivers who have been issued and possess a registry identification card "shall not be subject to arrest, prosecution, or penalty in any manner." For this protection to have meaningful effect, the immunity must be afforded at the earliest possible stages of any investigation or subsequent court proceedings. The delay occasioned by having to wait for a jury to be impaneled to resolve factual questions would hinder the implementation of § 4 immunity. Assigning the trial court the duty of determining factual questions regarding the applicability of § 4 immunity will result in a more expeditious resolution of immunity claims.

In sum, relying on similar well-established principles of criminal law, and in particular, the comparison to entrapment, and on the language of the MMMA itself, we hold that § 4 immunity fact-finding is a question for the trial court judge to decide. Accordingly, the trial court's decision finding that § 4 immunity fact-finding is a question for the jury is reversed and the case is remanded for further proceedings where the judge shall determine whether defendant is entitled to § 4 immunity.[4]

Next, we address defendant's claim that the trial court erred by holding that Michigan residency is a prerequisite to valid possession of a registry identification card.

---

[4] We decline to consider the merits of defendant's claim to § 4 immunity in the first instance on appeal as urged by defendant because, as discussed, it is the duty of the trial court to first make the necessary factual findings regarding the applicability of § 4 immunity.

We review de novo questions of law such as those involving statutory interpretation. *Kolanek*, 491 Mich at 393. "We must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate." *Id*. at 397. Interpretation of the MMMA "is guided by the traditional principles of statutory construction." *Id*. Thus, words in a statute must be read harmoniously to give effect to the statute as a whole, and "every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (quotation marks and citation omitted).

The MMMA does not directly address residency. However, § 4(j) of the act does contain a provision allowing a "visiting qualifying patient" to use medical marijuana in conformance with the MMMA while visiting the state of Michigan.[5] A "visiting qualifying patient" is defined by the act to be "a patient who is not a resident of this state or who has been a resident of this state for less than 30 days." MCL 333.26423(*l*). Moreover, MCL 333.26422 lists several other states that do not penalize the medical use of marijuana, and notes that "Michigan joins in this effort for the health and welfare of *its citizens*." (Emphasis added.)

In light of the reference to Michigan citizens, and the provisions regarding a visiting qualifying patient in the MMMA, we agree with the trial court that Michigan

---

[5] MCL 333.26424(j) provides:

> A registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States that allows the medical use of marihuana by a visiting qualifying patient, or to allow a person to assist with a visiting qualifying patient's medical use of marihuana, shall have the same force and effect as a registry identification card issued by the department.

residency is a prerequisite to the issuance and valid possession of a registry identification card. If the MMMA were read not to require Michigan residency, there would be no reason to specifically refer to Michigan citizens or to include a provision regarding medical use of marijuana by visitors to Michigan. See *Peltola*, 489 Mich at 181 (stating that every word in a statute should be given meaning). Thus, we affirm the trial court's conclusion that Michigan residency is a prerequisite to valid possession of a registry identification card.[6]

Defendant also raises several issues on cross-appeal. First, defendant argues that the trial court erred by failing to exclude all her statements to the police because she maintains that she was questioned in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We disagree.

Defendant moved for suppression of her statements to police during the traffic stop, while being transported to the police station, and during her interview with police at the station. The trial court ruled that defendant was in custody once Officer Hopkins began transporting her to the police station and on that basis suppressed all statements made during that transport before she was read and waived her *Miranda* rights at the police station. The trial court found defendant was not in custody during the traffic stop or while she was in the officer's police cruiser at the scene of the traffic stop, and that her subsequent waiver of rights was valid.

---

[6] While it does not affect our analysis in this case, we note that MCL 333.26426(a), which sets forth the requirements for issuance of a registry identification card, was amended by 2012 PA 514, effective April 1, 2013, to specifically require proof of Michigan residency before the issuance of a registry identification card.

It is well settled that *Miranda* warnings need only be given when a person is subject to custodial interrogation. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). Whether a defendant is in custody for purposes of *Miranda* at the time of an interrogation is determined by looking at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he or she was free to leave. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995).

We agree with the trial court that in this case defendant was not in custody for purposes of *Miranda* during the traffic stop or while she was waiting in the police cruiser during the search of her vehicle. Officer Hopkins testified that he had asked defendant and her children to sit in his police cruiser for their own safety; a routine traffic stop does not generally involve taking a person into custody. *People v Burton*, 252 Mich App 130, 138-139; 651 NW2d 143 (2002). Moreover, Officer Hopkins testified that defendant was not handcuffed and was informed that she was not under arrest. Therefore, under the totality of the circumstances, a reasonable person in defendant's position would have believed she was free to leave. Accordingly, we affirm the trial court's decision not to suppress those statements.

Next, defendant argues that she is entitled to dismissal of the charges because the police destroyed the recording of her roadside stop, and that the destruction amounted to a violation of due process and prevented her from presenting a meaningful defense. We disagree.

Absent intentional suppression or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d

873 (1992). The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *Id*.

In this case, Officer Hopkins testified that it was department policy to automatically destroy all traffic-stop recordings six months after the date of the traffic stop. Defendant was stopped on January 28, 2011, and was not arrested until November 2011. Moreover, defendant failed to present any evidence of bad faith on the part of the police department and failed to provide any evidence that the recording would have been exculpatory. Accordingly, we conclude that the record does not support defendant's claims, and the trial court did not abuse its discretion by denying defendant's motion to dismiss.[7]

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

MURPHY, C.J., and FITZGERALD, J., concurred with HOEKSTRA, J.

---

[7] Defendant also challenges the trial court's conclusion that she failed to present evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense. This issue is premature in light of our holding that the trial court must resolve defendant's § 4 immunity claim. However, we question the trial court's conclusion that defendant was barred from asserting a § 8 defense during trial because she failed to present evidence to raise a question of fact in regard to § 8(a)(2) in light of the number of patient and registry identification cards in her possession and the fact that defendant possessed an amount of marijuana that would be permitted generally by the MMMA.

KANE v WILLIAMSTOWN TOWNSHIP

Docket No. 311182. Submitted May 15, 2013, at Lansing. Decided July 11, 2013, at 9:00 a.m.

John Kane filed an action in the Michigan Tax Tribunal (MTT), Small Claims Division, challenging a special assessment for police protection in Williamstown Township and claiming in part that any such special assessment had to be imposed on the basis of each property's taxable value, and not as a uniform fee. The Williamstown Township voters approved a proposal to allow for a special assessment district to raise money for police protection. To effectuate the proposal, the Williamstown Board of Trustees assessed $150 on residential properties, $250 on commercial properties, and $0 on vacant properties. The MTT hearing referee denied Kane's claim and issued a proposed opinion and judgment in Williamstown Township's favor. Kane filed exceptions to the proposed opinion and judgment. The MTT thereafter entered judgment in favor of Kane, concluding that MCL 41.801 required the special assessment to be calculated on the basis of the taxable value of Kane's properties, not as a flat fee. Williamstown Township appealed.

The Court of Appeals *held*:

To be validly imposed, a special assessment must benefit the assessed properties in proportion to the benefit received. MCL 41.801(2) allows a township board to defray the costs for the maintenance and operation of police and fire departments through a special assessment on the properties to be benefited. MCL 41.801(4) requires the township supervisor to spread the assessment levy on the taxable value of all the lands and premises in the special assessment district that are to be especially benefited by the police and fire protection, according to the benefits received; if a township determines that the properties in the district will benefit equally, then those properties must be assessed equal amounts as a matter of law. MCL 41.801 requires only that the assessment be spread on the taxable value of the lands, not that it be calculated on an ad valorem basis. The phrase "taxable value" was added to MCL 41.801, *et seq*., as amended by 1998 PA 545, to make it clear that a property's "true cash value" was not to be used

when calculating special assessments, not to indicate that all special assessments must be on an ad valorem basis. In this case, the MTT erred by concluding that the special assessment was invalid. MCL 41.801 allows a township board to calculate a special assessment for police and fire departments on either an ad valorem basis or on a uniform-fee basis according to the benefits received.

Reversed.

TOWNSHIPS — FIRE PROTECTION — SPECIAL ASSESSMENTS — CALCULATION OF SPECIAL ASSESSMENTS — UNIFORM FEES.

MCL 41.801(2) allows a township board to defray the costs for the maintenance and operation of police and fire departments through a special assessment on the properties to be benefited; to be validly imposed, a special assessment must benefit the assessed properties in proportion to the benefit received, the assessment must be spread on the taxable value of the lands; MCL 41.801 allows a township board to calculate a special assessment for police and fire departments on either an ad valorem basis or on a uniform-fee basis according to the benefits received; if the township determines that the properties in the district will benefit equally, then those properties must be assessed equal amounts as a matter of law.

Malcolm L. McKinnon for John Kane.

Fahey, Schultz, Burzych, Rhodes PLC (by *William K. Fahey*, *Stephen J. Rhodes*, and *Ross K. Bower II*), for Williamstown Township.

Amicus Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *Robert E. Thall*), for Michigan Townships Association.

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

WILDER, J. Respondent appeals as of right from the Michigan Tax Tribunal's (MTT) opinion and judgment, which invalidated the levy of a special assessment for police protection. We reverse.

I

The facts in this case are undisputed. On November 2, 2010, the voters in Williamstown Township approved a proposal to allow for the creation of a "special assessment district under 1951 PA 33, as amended, in order to raise money by special assessment for furnishing police protection."

On November 16, 2010, the Williamstown Township Board of Trustees held a special meeting regarding the establishment of a special assessment district and roll. After hearing comments from the public, the board adopted Resolution 2010-96, which provided that the special assessment on residential property would be $150, the special assessment on commercial property would be $250, and the special assessment on vacant property would be $0.

Thereafter, petitioner received a tax bill requiring payment of $150 on his residential property and $250 on his commercial property. Petitioner appealed to the Small Claims Division of the MTT, arguing in part that any such special assessment must be imposed on the basis of each property's taxable value and not a uniform fee. The hearing referee disagreed and issued a proposed opinion and judgment in respondent's favor.

Petitioner filed exceptions to the referee's proposed opinion and judgment, claiming that MCL 41.801(4) only allowed special assessments for police protection to be assessed on the basis of the property's taxable value. On April 5, 2012, the MTT concluded that the hearing referee erred because he had ignored the plain language of the statute. The MTT stated:

> The statute at issue clearly states that the special assessment shall be levied on the taxable value of the parcels being assessed. As such, it was error for the special

> assessment board to approve an assessment based on a flat-fee per parcel based on classification. The Tribunal finds that the special assessment in the present case should be calculated based on the taxable value of Petitioner's parcel, as required by the applicable statute.

II

This Court has limited review of the MTT's decisions. *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 650; 770 NW2d 915 (2009). If the facts are undisputed and there is no allegation of fraud, review is limited to whether the tribunal made an error of law or adopted a wrong principle. *Id*.

However, the resolution of the MTT's decision involves issues of statutory interpretation and application, which we review de novo. *Id*. "A court's primary purpose in interpreting a statute is to ascertain and effectuate legislative intent." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). "Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Id*. at 217-218 (quotation marks and citation omitted). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 313; 683 NW2d 148 (2004) (quotation marks, citation, and emphasis omitted). In other words, "this Court may engage in judicial construction only if it determines that statutory language is ambiguous." *Id*. (quotation marks and citation omitted).

III

At issue is whether MCL 41.801, which indisputably permits a township to assess an ad valorem (according to value) special assessment, also permits a township to assess and implement a uniform-fee special assessment. We conclude that it does.

Special assessments are presumed valid. *Kadzban v City of Grandville*, 442 Mich 495, 502; 502 NW2d 299 (1993). Although they may resemble a tax, they are not a tax. *Id*. at 500. Rather, a special assessment is a "specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area." *Id*. "[A] special assessment will be declared invalid only when the party challenging the assessment demonstrates that 'there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements.' " *Id*. at 502, quoting *Dixon Rd Group v City of Novi*, 426 Mich 390, 403; 395 NW2d 211 (1986). If there is not a proportionate relationship, then the special assessment would be "akin to the taking of property without due process of law." *Dixon Rd Group*, 426 Mich at 403. Therefore, to be validly imposed, the special assessment must benefit the assessed properties in proportion to the benefit received.

Turning to the statutory language at issue, MCL 41.801(2) and (3) provide, in pertinent part:

> (2) The township board . . . may provide annually by resolution for the appropriation of general or contingent funds for maintenance and operation of police and fire departments.
>
> (3) The township board . . . may provide that the sums prescribed in subsection (2) for purchasing and housing equipment, for the operation of the equipment, or both,

> may be defrayed by special assessment on the lands and premises in the township . . . to be benefited . . . .

Thus, it is clear that, to the extent the funds are used "for purchasing and housing equipment, for the operation of the equipment, or both," the township board can defray those costs by way of a special assessment on the properties "to be benefited."

MCL 41.801(4) in part states:

> If a special assessment district is proposed under subsection (3), the township board . . . shall estimate the cost and expenses of the police and fire motor vehicles, apparatus, equipment, and housing and police and fire protection, and fix a day for a hearing on the estimate and on the question of creating a special assessment district and defraying the expenses of the special assessment district by special assessment on the property to be especially benefited . . . .

For assessments taking place before January 1, 1999, MCL 41.801(4) further provides as follows:

> Before January 1, 1999, if the township board, or township boards acting jointly, determine to create a special assessment district, they shall determine the boundaries by resolution, determine the amount of the special assessment levy, and direct the supervisor or supervisors to spread the assessment levy on all of the lands and premises in the district that are to be especially benefited by the police and fire protection, according to benefits received . . . to defray the expenses of police and fire protection.

But for assessments occurring after December 31, 1998, MCL 41.801(4) also provides:

> After December 31, 1998, if the township board, or township boards acting jointly, determine to create a special assessment district, they shall determine the boundaries by resolution, determine the amount of the special assessment levy, and direct the supervisor or supervisors to

> spread the assessment levy on *the taxable value of* all of the lands and premises in the district that are to be especially benefited by the police and fire protection, according to benefits received . . . to defray the expenses of police and fire protection. [Emphasis added.]

The salient portion of this provision requires the township supervisor "to spread the assessment levy on the taxable value of all of the lands and premises in the district that are to be especially benefited by the police and fire protection, *according to benefits received* . . . ." (MCL 41.108[4], emphasis added.) As a result of the statute's plain language requiring that any assessments be made "according to the benefits received," if a township determines that the properties in the district will all benefit equally, then those properties will need to be assessed equal amounts as a matter of law.

Petitioner contends that because the assessments must be levied "on the taxable value of all the lands," any such assessments must be ad valorem and not uniform. However, as the amicus brief from the Michigan Townships Association notes, *spreading* the assessment levied on taxable value is not the same as *basing* the assessment on taxable value. The plain language of the statute only requires the assessment to be "spread" on the taxable value of the lands. It does not require that the *calculation* of the assessment be on basis of the taxable value of the lands. These are two distinct concepts. In short, any assessment that is determined for a particular parcel of land on the basis of the benefits received (whether it be ad valorem or uniform fee), must ultimately be conveyed as a corresponding millage rate to be applied to a the property's taxable value. For example, if the township assesses a uniform fee of $150, then each property will be assessed on a particular, individual millage rate on the basis of that property's taxable value that will result in the $150 being collected.

We further note that the legislative history surrounding this statute further supports our view. Before 1994, property was assessed at its true cash value. But in 1994, Proposal A, which introduced the term "taxable value," see Const 1963, art 9 § 3, was passed by the voters of Michigan. Proposal A limited the amount that a property's taxable value could increase each year, even if the property's true cash value rose at a greater rate. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528-529; 817 NW2d 548 (2012). In 1996, the attorney general issued an opinion on "whether a millage-based special assessment imposed under 1951 PA 33, MCL 41.801 *et seq*., . . . must be levied on the true cash value or upon the taxable value of the affected property." OAG, 1995-1996, No. 6896, p 153 (April 24, 1996). The attorney general opined that, because special assessments are not taxes, Proposal A did not apply and such special assessments should be levied on the property's true cash value instead of its taxable value. *Id*. at 154-156, citing *St Joseph Twp v Municipal Fin Comm*, 351 Mich 524, 533; 88 NW2d 543 (1958). In response, the Legislature in 1998 amended 1951 PA 33 by adding references to "taxable value," making it clear that "true cash value" was no longer to be used for special assessments. MCL 41.801 *et seq*., as amended by 1998 PA 545. Thus, when viewing the legislative history, it is clear that the references to "taxable value" in MCL 41.801(4) were not intended to indicate that all special assessments must be on an ad valorem basis.

Reversed. No costs are taxable pursuant to MCR 7.219, a public question being involved.

HOEKSTRA, P.J., and TALBOT, J., concurred with WILDER, J.

PEOPLE v CARRUTHERS

Docket No. 309987. Submitted June 4, 2013, at Detroit. Decided July 11, 2013, at 9:05 a.m. Leave to appeal sought.

Earl C. Carruthers was convicted of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*), following a jury trial in the Oakland Circuit Court. The possession charge was supported, in part, by one of the brownies in defendant's possession, which contained delta-9-tetrahydrocannabinol extracted from marijuana and infused into them. Defendant moved to dismiss the possession charge, arguing that at the time of the traffic stop he had a registry identification card under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., for himself and applications to be a primary caregiver under that act for four patients. He also argued that the gross weight of the brownies should not have been included when the prosecution determined the amount of marijuana possessed and that § 4 of the MMMA, MCL 333.26424, prohibited his prosecution because he possessed less than the 12.5 ounces of marijuana he was allowed to possess under § 4, rather than 13.54 ounces as the prosecution alleged after including the weight of the brownie. The court, Michael D. Warren, J., denied the motion, ruled that the entire weight of the brownie would be considered as a marijuana mixture, and ruled that defendant could not use the defense at trial. Defendant appealed.

The Court of Appeals *held*:

1. Sections 4(a) and (b)(1) of the MMMA, MCL 333.26424(a) and (b)(1), grant broad immunity from criminal prosecution and other penalties to qualified patients and caregivers who hold registry identification cards and possess an amount of marijuana that that does not exceed 2.5 ounces of usable marijuana or, for a primary caregiver, 2.5 ounces of usable marijuana for each qualifying patient to whom the caregiver is connected through the registration process. Section 8(a)(2) of the act, MCL 333.26428(a)(2), provides an affirmative defense to patients generally for possession of a quantity of marijuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious and debilitating medical condition or its symp-

toms. This affirmative defense is available regardless of the amount of marijuana possessed, and a defendant may assert a § 8 defense by moving to dismiss the criminal charges, in which case an evidentiary hearing under MCL 333.26428(b) must be held before trial.

2. It was unnecessary for the Court of Appeals to decide whether the aggregate weight of an edible product containing marijuana must be considered when determining whether the quantity limit of § 4 has been exceeded or whether only the net weight of the marijuana (or its active ingredient) contained in the edible product must be considered. Instead, edible products made with THC extracted from marijuana resin are not usable marijuana for purposes of the MMMA. While the MMMA definition of "marihuana" is incorporated from MCL 333.7106(3) of the Public Health Code and includes all parts of the plant *Cannabis sativa* L., as well as the resin extracted from any part of the plant, the definition of "usable marihuana" in MCL 333.26423(k) does not include the resin extracted from the plant. It includes only the dried leaves and flowers of the plant and any mixture or preparation thereof. Therefore, to constitute usable marijuana under the MMMA, any mixture or preparation must be of the dried leaves or flowers of the marijuana plant. Because the brownie was made with THC extracted from resin and the brownie was thus not usable marijuana under the MMMA, none of the brownie's weight should have been included when determining whether defendant possessed more than 12.5 ounces of usable marijuana.

3. The trial court reached the right result in denying defendant immunity from prosecution under § 4 of the MMMA. That immunity is conditioned on the qualifying patient or primary caregiver possessing an amount of marijuana that does not exceed 2.5 ounces of usable marijuana. Thus, consideration must be given not only to the amount of usable marijuana possessed, but also to the amount of marijuana possessed, that is, consideration must be given to the possession of marijuana that does not fit the statutory definition of "usable marijuana." Whether a defendant possessed an allowed quantity of usable marijuana is only the beginning of the relevant inquiry under § 4. It is also necessary to determine whether the defendant possessed any quantity of marijuana that did not constitute usable marijuana. If so, and without regard to the quantity of usable marijuana possessed, the defendant possessed an amount of marijuana in excess of the permitted amount of usable marijuana. Section 4 of the MMMA expressly conditions its immunity on the defendant possessing no amount of marijuana that does not qualify as usable marijuana. Defendant possessed 9.1

ounces of usable marijuana in raw plant form. He was arguably entitled to possess 12.5 ounces of usable marijuana. Because he possessed the brownie containing THC extracted from marijuana resin, which did not constitute usable marijuana but did constitute marijuana itself under the statutory definition, defendant possessed an amount of marijuana that exceeded the permitted amount of usable marijuana and failed to meet the requirements for § 4 immunity.

4. At the time of defendant's trial, a Court of Appeals case provided that a defendant had to fulfill the requirements of § 4 before he or she could raise a § 8 defense. The Supreme Court reversed that decision in *People v Kolanek*, 491 Mich 382 (2012), holding that the plain language of § 8 does not require compliance with the requirements of § 4 and that any defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense under § 8. A § 8 defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing. A defendant who moves for dismissal under § 4, however, can still raise a § 8 defense before trial by filing a motion and showing a prima facie case regarding the elements of that section. Because the Supreme Court determined that the state of the law at the time this case was pending rendered § 8 a nullity and the state of the law changed during the pendency of defendant's appeal, defendant was deprived of a substantial defense and demonstrated plain error. Given that MCL 333.26428(a) allows a defendant to assert the medical purpose for using marijuana as a defense to any prosecution involving that substance, defendant could attempt to assert the defense to his prosecution for possession with intent to deliver with respect to both the raw marijuana and the edible products containing THC. The appropriate remedy was not to simply grant defendant a new trial. Rather, he was entitled to an evidentiary hearing to establish whether he would be entitled to assert a § 8 defense. A remand was necessary for defendant to file a motion to dismiss. The Court of Appeals held that if defendant failed to meet the burden of establishing a prima facie existence of the elements of a § 8 defense at the hearing on remand, his conviction would stand. If defendant met the burden on remand without any question of fact, he would be entitled to dismissal of the possession charge. If defendant established evidence of each element listed in § 8 but there were still material questions of fact, he would be entitled to a new trial and the submission of this defense to the jury.

Vacated and remanded; jurisdiction retained.

CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — EDIBLE PRODUCTS.

Sections 4(a) and (b)(1) of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424(a) and (b)(1), grant broad immunity from criminal prosecution and other penalties to qualified patients and caregivers who hold registry identification cards and possess an amount of marijuana that that does not exceed 2.5 ounces of usable marijuana or, for a primary caregiver, 2.5 ounces of usable marijuana for each qualifying patient to whom the caregiver is connected through the registration process; MCL 333.26423(k) defines "usable marijuana" as the dried leaves and flowers of the marijuana plant, and any mixture or preparation thereof, but it does not include the seeds, stalks, and roots of the plant or the resin extracted from the plant; edible products made with delta-9-tetrahydrocannabinol extracted from marijuana resin are not usable marijuana for purposes of the MMMA.

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

Elton Mosley for defendant.

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

BOONSTRA, J. Defendant appeals by right his conviction of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*), following a jury trial. We remand this case to allow defendant to file a motion to dismiss the charges against him and for an evidentiary hearing to determine whether defendant can present an affirmative defense pursuant to § 8 of the Michigan Medical Marihuana[1] Act (MMMA), MCL 333.26421 *et seq.*

[1] Although the statutory provisions at issue refer to "marihuana" and "usable marihuana," "by convention this Court uses the more common spelling 'marijuana' in its opinions." *People v Jones*, 301 Mich App 566,

We also determine, as an issue of first impression, that under the existing statutory scheme, an edible product (in this case a brownie) containing delta-9-tetrahydrocannabinol (THC) extracted from marijuana resin is not usable marijuana under the MMMA. See MCL 333.26423(k).

I. BASIC FACTS AND PROCEDURAL HISTORY

Following a traffic stop on January 27, 2011, defendant was charged with possession with intent to deliver marijuana and driving with a suspended license. Defendant moved to dismiss the possession charge, arguing that the prosecution was improper because he had with him at the time of the traffic stop a medical marijuana card for himself, caregiver applications for four patients, and a caregiver certificate. He also argued that the gross weight of the brownies found in his vehicle should not be considered toward the amount limit set forth in § 4 of the MMMA, MCL 333.26424. Rather, only the net weight of the active ingredient of marijuana contained in the brownies should be considered, and § 4 would then prohibit his prosecution.[2] The trial court denied defendant's motion to dismiss, ruled that the entire weight of the brownies would be considered as a marijuana mixture, and ruled that defendant could not use the medical marijuana defense at trial. Although the trial court gave defendant permission to file an interlocutory appeal, no such appeal was ever filed.

___ n 1; ___ NW2d ___ (2013). This opinion will thus refer to "marijuana" apart from direct quotation of statutory language and references to the full title of the MMMA.

[2] Defendant indisputably possessed 9.1 ounces of usable marijuana in the form of raw plant matter. Thus, if the aggregate weight of the brownies (54.9 ounces) were added to that amount, defendant would have been in possession of 64 ounces, considerably more than the 12.5 ounces he arguably was allowed to possess under the MMMA. MCL 333.26424(a) and (b)(1).

Defendant was charged with possession of marijuana found in various locations within the vehicle, including mason jars, plastic bags, and a binder of plastic pouches, as well as containers of brownies that were individually labeled to indicate the weight of the brownie and its content of marijuana for medical use (e.g., brownie weighing 3.1 ounces and containing 2 grams of medical marijuana). The labels also said: "For medical use only. Keep out of children's reach, medical marijuana, two grams each." There were also some sugar oatmeal cookies, labeled as containing 3.75 grams of marijuana each.[3] Prices were written on the bags that contained marijuana. Various packaging materials—including Glad Zipper bags, labels, price labels, plastic portion cup lids, a vacuum sealer, and a grinder—were found. The police also found a tally sheet, listing people's names, the amount purchased, and the amount paid. For the most part, the prices and quantities matched the training and experience of the prosecution's expert witness regarding the street values of marijuana.

A brownie was tested by a forensic chemist and found to contain THC, a schedule 1 controlled substance. The chemist could not determine how much THC was in the brownie, nor could the chemist detect any plant material in the brownie by examining it microscopically. The chemist testified that the weight of "the total mixture that contains the THC," i.e., one brownie, was 69.08 grams;[4] the other brownies were of similar size. The chemist also testified that THC extraction techniques involve extracting THC from the resin of the marijuana

---

[3] The sugar cookies appear not to have been subjected to forensic testing and did not appear to have been part of the trial court's weight calculation.

[4] We note that 69.08 grams is 2.44 ounces, slightly less than the per-patient allowable quantity of usable marijuana under § 4 of the MMMA.

plant. Testimony from a prosecution expert indicated that 9.1 ounces of usable marijuana (separate from the baked goods) was found, as well as 54.9 ounces of brownies containing THC. At his preliminary examination, defendant acknowledged that THC was extracted from marijuana and infused into the brownies. Defendant's counsel at the preliminary exam also stated that the brownies were "not made of . . . ground up marijuana," but were made with a THC extract called "cannabutter."

The jury returned a guilty verdict to the charge of possession with intent to deliver the controlled substance marijuana. The trial court sentenced defendant to 3 years' probation with 33 days in jail. This appeal followed.

II. STANDARD OF REVIEW

This case presents issues of statutory interpretation. We review questions of statutory interpretation de novo. *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012).

Because the MMMA resulted from the passage of a citizens' initiative, our interpretation of language of the MMMA is guided by the established principles concerning the interpretation of voter initiatives:

> [B]ecause the MMMA was the result of a voter initiative, our goal is to ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself. We must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate. [*Id*. at 397 (citations omitted).]

See also *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010). Our analysis is also guided by our established canons of statutory interpretation. We pre-

sume that the meaning as plainly expressed in the statute is what was intended, and we avoid a construction that would render any part of the statute surplusage or nugatory. *Id*. Statutes that relate to the same subject, that is to say the same person or thing or class of persons or things, should be harmonized. *People v Shakur*, 280 Mich App 203, 209; 760 NW2d 272 (2008).

III. THE MMMA GENERALLY

Although marijuana remains illegal in Michigan, the MMMA allows the medical use of marijuana by a limited class of individuals. MCL 333.26421 *et seq*. The history and purpose of the MMMA has been described by our Supreme Court as follows:

> The MMMA was proposed in a citizen's initiative petition, was elector-approved in November 2008, and became effective December 4, 2008. The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an "effort for the health and welfare of [Michigan] citizens." To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA.
>
> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA'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 393-394 (citations omitted).]

This action presents issues arising under two sections of the MMMA. Section 4 of the MMMA,

MCL 333.26424, grants broad immunity from criminal prosecution and other penalties to qualified patients and caregivers who hold registry identification cards and possess "an amount of marihuana that that does not exceed 2.5 ounces of usable marihuana" or, with respect to a primary caregiver, "2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the [Department of Licensing and Regulatory Affairs'] registration process[.]" MCL 333.26424(a) and (b)(1).

Section 8 of the act, MCL 333.26428, provides an affirmative defense to patients generally for "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). The affirmative defense of § 8 is thus available regardless of the amount of marijuana possessed. A defendant may assert a § 8 defense by filing a motion to dismiss the criminal charges, in which case an evidentiary hearing must be held before trial. MCL 333.26428(b); *Kolanek*, 491 Mich at 396-397.

Under the MMMA, " '[m]arihuana' means that term as defined in section 7106 of the public health code, 1978 PA 368, MCL 333.7106." MCL 333.26423(e). MCL 333.7106(3) in turn defines "marihuana" as follows:

> "Marihuana" means all parts of the plant Canabis [sic] sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or

> preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

Additionally, the MMMA separately defines "usable marihuana" as follows:

> "Usable marihuana" means the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant. [MCL 333.26423(k).]

Thus, the definition of "usable marihuana" under the MMMA is narrower than the definition of "marihuana" that is incorporated into the MMMA through the Public Health Code, as is described with greater particularity below.

IV. THE MIXTURE ISSUE, AS PRESENTED

Defendant claims that the trial court erroneously denied him the protection of § 4 of the MMMA because the trial court's determination that he possessed more than the allowable quantity of marijuana under the act was based on the aggregate weight of the baked goods in his possession, rather than the net weight of the THC contained therein. We thus are presented with an issue of first impression: in determining whether the quantity limit of § 4 has been exceeded, is it the aggregate weight of an edible product that is to be considered or, alternatively, is it only the net weight of the marijuana (or its active ingredient) contained in the edible product that is to be considered?

Defendant maintains that the consideration of the aggregate weight of an edible product would "defeat the purpose of the MMMA," as it would effectively deny the medicinal use of marijuana by a delivery system other than smoking. Defendant argues that the proper course

of action would be to consider only the amount of marijuana as was reflected on the labels that defendant had affixed to the brownies.

The prosecution argues, to the contrary, that an edible product constitutes a "mixture" or "preparation" within the MMMA's definitions of "marihuana" and "usable marihuana" and, therefore, that the entire weight of the edible product should be considered. The prosecution contends that such a reading would be consistent with prior court decisions holding that the weight of a controlled substance for criminal prosecution purposes includes the aggregate weight of the entire mixture or preparation containing the controlled substance.

For the reasons that follow, we conclude that the issue as presented is not properly before us and that it is unnecessary for us to decide that issue in the circumstances presented. Rather, we hold, also as an issue of first impression, that an edible product made with THC extracted from marijuana resin is not usable marijuana under the MMMA. Our resolution of that definitional issue compels us to conclude that we should not reach the mixture issue as presented to us and instead should resolve the issues before us on alternative grounds.

V. THE BROWNIES WERE NOT USABLE MARIJUANA UNDER THE MMMA

As noted, the MMMA separately defines "marihuana" and "usable marihuana." Notably, the definition of "marihuana" includes "all parts" of the cannabis plant, as well as "the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." MCL 333.7106(3). The definition specifically excludes the "mature stalks" of the plant

"except the resin extracted therefrom." *Id*. By virtue of that exception, therefore, resin extracted from mature stalks is also expressly included within the definition of "marihuana." There is no dispute that both the raw marijuana and the brownies found in defendant's possession constitute marijuana under the MMMA.

By contrast, however, the definition of "usable marihuana" under the MMMA does not include "all parts" of the cannabis plant. More to the point, it specifically does not include "the resin extracted from" the cannabis plant. Nor does it include "the resin extracted" from mature stalks of the plant. Further, it does not include "every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." Rather, and in stark contrast to the MMMA's definition of "marihuana," it includes *only* "the dried leaves and flowers of the marihuana plant, and any mixture or preparation *thereof* . . . ." MCL 333.26423(k) (emphasis added). The word "thereof" as used in this definition refers back to the immediately preceding phrase "the dried leaves and flowers of the marihuana plant." Therefore, to constitute usable marijuana under the MMMA, any "mixture or preparation" must be of "the dried leaves or flowers" of the marijuana plant.

The prosecution argues that the resin from which THC is extracted would itself have been extracted from the leaves and flowers of the marijuana plant. Further, the brownies were a "mixture or preparation" of the THC. Therefore, according to the prosecution, the brownies constitute usable marijuana. The prosecution further argues that THC constitutes marijuana under the MMMA, and that THC is "clearly 'useable' [sic]," since it is ingested by virtue of ingesting the edible products in which it is contained.

The prosecution offered into evidence the testimony of the forensic chemist who analyzed the brownies[5] in this case. The chemist testified that there was no detectable plantlike material in the brownies, but they contained THC. She defined THC as one of the cannabinoids or active ingredients found in the marijuana plant. The chemist also testified that THC extraction techniques involve extracting THC from the resin of the marijuana plant. THC could be made synthetically as well. The chemist agreed at trial that both marijuana and THC were controlled substances. At defendant's preliminary examination, the chemist offered the opinion (which supports the prosecution's position on appeal) that brownies containing THC constitute usable marijuana under the MMMA because the tested brownie was "the extract from the marijuana plant as added to the—the mixture or the item that is to be consumed."

At his preliminary examination, defendant acknowledged that THC was extracted from marijuana and infused into the brownies. Defendant's counsel also stated that the brownies were "not made of . . . ground up marijuana" but were instead made with cannabutter containing THC extract. Defendant therefore argued at his preliminary examination, unsuccessfully, that the brownies were not usable marijuana under the MMMA.

On appeal, defendant does not press this argument; instead, he effectively concedes that point but argues that the proper course of action would have been for the trial court to use the amount of marijuana set forth on the label and count the brownies to see if the active ingredient totaled more than 3.4 ounces (the total

[5] The chemist tested only one brownie seized from defendant; however, defendant does not argue that the other brownies do not contain THC. Therefore, we will sometimes refer to "brownies" in the plural.

amount of usable marijuana that, when added to the 9.1 ounces of raw marijuana found in baggies, defendant arguably would be allowed to possess under § 4). In essence, defendant now seeks to avoid criminal prosecution under our controlled substance possession laws by (a) effectively conceding that the brownies are usable marijuana and thereby gaining protection under § 4 of the MMMA yet (b) seeking to count only the THC-portion of the brownies toward the statutory quantity allowance, even though our possession laws would count the entire weight of the brownies. See MCL 333.7401(2)(d)(*i*) through (*iii*); see also *People v Kidd*, 121 Mich App 92, 95; 328 NW2d 394 (1982); *People v Prediger*, 110 Mich App 757, 760; 313 NW2d 103 (1981); *People v Lemble*, 103 Mich App 220, 222; 303 NW2d 191 (1981). Further, because the evidence reflects that the amount of THC contained in a brownie cannot be measured, he suggests that the courts accept at face value the quantities listed on the labels he affixed to the brownies.

We disagree with both the prosecution and defendant, given the plain language of the MMMA itself.[6] Notably, the MMMA's definition of "usable marihuana" excludes much of the language found in the definition of "marihuana." It excludes the phrases "resin extracted from any part of the plant" and "compound, manufacture, salt, derivative . . . of the plant or its seeds or resin." See MCL 333.7106(3); MCL 333.26423(k). It additionally excludes "the resin extracted" from "the mature stalks of the plant." See MCL 333.7106(3); MCL 333.26423(k). To ignore these exclusions, and to

[6] We also note briefly that adoption of defendant's position that the trial court should have relied on the quantities set forth on the labels that defendant placed on the brownies would be absurd; we find no support in our precedent for the notion that the amount of a controlled substance possessed should be established by a defendant's self-report.

thereby construe the term "usable marihuana" as including a "mixture or preparation" of an extract (THC) of an extract (resin) from the marijuana plant, would alter the plain meaning of the words that the drafters of the MMMA chose to employ. By excluding resin from the definition of "usable marihuana," as contrasted with the definition of "marihuana," and defining "usable marihuana" to mean only "the dried leaves and flowers of the marihuana plant, and any mixture or preparation *thereof*," MCL 333.26423(k) (emphasis added), the drafters clearly expressed their intent *not* to include resin, or a mixture or preparation of resin, within the definition of "usable marihuana." They therefore expressed their intent not to include a mixture or preparation of an *extract* of resin. Consequently, an edible product made with THC extracted from resin is excluded from the definition of "usable marihuana." Rather, under the plain language of the MMMA, the only "mixture or preparation" that falls within the definition of "usable marihuana" is a mixture or preparation of "the dried leaves and flowers of the marihuana plant . . . ." *Id*.

Provisions not included in a statute should not be included by the courts. *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010). Further, the use of different terms in a statute suggests different meanings. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 14; 795 NW2d 101 (2009). Finally, although only an aid to interpretation, we note that the maxim *expressio unius est exclusio alterius* (the expression of one thing suggests the exclusion of all others) means that the express mention of one thing in a statutory provision implies the exclusion of similar things. *Johnson v Recca*, 492 Mich 169, 176 n 4; 821 NW2d 520 (2012).

Nor are we persuaded by the prosecution's argument that usable marijuana merely constitutes marijuana that is "usable" and that a brownie containing THC extracted from the resin of a marijuana plant is usable marijuana because it is marijuana that is "usable" simply by virtue of its ingestion. That argument requires a circularity of reasoning that would read into the drafters' definition of "usable marihuana" a component (resin) that the drafters expressly excluded. Moreover, it ignores the fact that the term "usable marihuana" is not simply a combination of the words "usable" and "marihuana"; rather, it is a term of art specifically defined by the MMMA. We are not at liberty to ignore that definition in favor of our own. See *People v Williams*, 288 Mich App 67, 74; 792 NW2d 384 (2010), aff'd 491 Mich 164 (2012). The drafters' definition of the term "usable marihuana" clearly was not intended to encompass all marijuana that theoretically is "usable," in the colloquial meaning of the term, by virtue of its ability to be ingested. Rather, as a term of art, it is designed to identify a subset of marijuana that may be possessed in allowed quantities for purposes of an immunity analysis under § 4 of the MMMA.[7]

We also are not persuaded by the prosecution's argument that our interpretation of the MMMA's definition of "usable marihuana" is contrary to the ordinary and customary meaning of the term. See *Kolanek*,

---

[7] The phrase "usable marihuana" in the MMMA thus refers to marijuana to which the law has granted a qualifying patient the power, right, or privilege to use, rather than merely referring to marijuana that is *able* to be ingested, smoked, or otherwise consumed in order to produce a narcotic effect. See, e.g., Blacks Law Dictionary (9th ed), p 1682 (indicating that "use" may mean "a benefit" conferred by the law); *Random House Webster's College Dictionary* (2000) (indicating that "use" may mean "the power, right, or privilege of using something" and "usable" may mean "available . . . for use").

491 Mich at 397 ("We must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate."). When a statute provides a definition of a term, we are not "left dependent upon dialect, colloquialism, the language of the arts and sciences, or even the common understanding of the man in the street. We have the act itself. We need not, indeed we must not, search afield for meanings where the act supplies its own." *W S Butterfield Theatres, Inc v Dep't of Revenue*, 353 Mich 345, 350; 91 NW2d 269 (1958); see also *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

In defining the parameters of legal medical-marijuana use, the drafters of the MMMA adopted a definition of "usable marihuana" that we believe comports with the voters' desire to allow limited "medical use" of marijuana and yet not to allow the unfettered use of marijuana generally. MCL 333.26423(f). Given the heightened potency of the THC extract, as compared with "the dried leaves and flowers," MCL 333.26423(k), this definition of "usable marihuana" (for purposes of establishing limited § 4 immunity) strikes us as a sound and reasoned mechanism to promote the "health and welfare of [Michigan] citizens," MCL 333.26422(c). It also provides an essential mechanism for implementing the voters' desire to continue prosecutions for possession and use of marijuana in excess of that which is permitted for medical use.

The evidence reflects that the amount of THC contained in an edible product cannot be measured, at least not with the testing methods commonly used in police laboratories.[8] Therefore, the inclusion of edible prod-

[8] The chemist testified at the preliminary exam that the chemical testing revealed "whether or not a cannabinoid was present in the

ucts within the definition of "usable marihuana," while mandating that only the amount of THC be counted toward the quantity limits of § 4 of the MMMA, as defendant would have us do, would effectively eviscerate the intent of the voters in limiting marijuana to its intended medical use. Given the unmeasurable nature of the highly potent THC contained in these edible products, the health and welfare of Michigan citizens would be threatened, and prosecutions for possession and use of edible products containing higher-than-allowed quantities of THC would be systematically thwarted.

Our interpretation also does not preclude the medical use of marijuana by ingestion of edible products;[9] to the contrary, that use is authorized by the MMMA, within the statutory limitations, provided that the edible product is a "mixture or preparation" of "the dried leaves and flowers of the marihuana plant," rather than of the more potent THC that is extracted from marijuana resin. MCL 333.26423(k). Again, we find that judgment of the drafters of the MMMA, in so defining "usable marihuana," to be an appropriate exercise of their duty to define the parameters of the legal use of marijuana for medical purposes.

---

sample" and further stated that the analysis was "qualitative, whether or not the substance is present, not how much." The chemist also agreed that the testing would not reveal the amount of THC present, but only indicates that there is "just enough that it's detectable."

[9] Defendant advances such an argument with respect to counting the entire weight of an edible product toward the quantity limit of § 4 of the MMMA. Although defendant formerly argued (at his preliminary examination) that edible products made with THC extract were not usable marijuana, we can now envision a possible argument to the effect that, because our endorsement of that position might result in the subjection of a possessor of those edible products to prosecution under our controlled substance possession statutes, that finding will similarly preclude all medical use of marijuana by ingestion of edible products. We disagree, for the reasons noted.

"Our courts repeatedly emphasize the importance of construing a statute according to its plain language and refraining from interfering with the Legislature's authority to make policy choices." *People v Adams*, 262 Mich App 89, 96; 683 NW2d 729 (2004). We once again emphasize this importance. Under the plain language of the MMMA, the brownies seized from defendant are not encompassed within its definition of "usable marihuana." Policy-based arguments to the contrary are better made to the Legislature, not the courts.

These principles, and our reading of the MMMA, thus convince us that edible products made with THC extracted from marijuana resin are not usable marijuana under the MMMA. Simply put, the evidence before this Court indicates that the brownies were not a "mixture or preparation" of "dried leaves and flowers of the marihuana plant." MCL 333.26423(k). Therefore, the brownies were not usable marijuana under the MMMA, and none of the weight of the brownies should have been counted towards the determination of whether defendant possessed more than 12.5 ounces of usable marijuana.

VI. APPLICATION

Having concluded that the brownies in defendant's possession were not usable marijuana under the MMMA, we must next apply that ruling to the facts of this case and, more specifically, to (a) defendant's claimed immunity under § 4 of the MMMA and (b) defendant's claimed right to present a defense under § 8 of the MMMA. We discuss each in turn.

A. DEFENDANT IS NOT ENTITLED TO IMMUNITY UNDER § 4 OF THE MMMA

The language of § 4 indicates that a "qualifying patient" who has been issued and possesses a registry

identification card is immune from arrest and prosecution "for the medical use of marihuana in accordance with this act," provided that he or she possesses "an amount of *marihuana* that does not exceed 2.5 ounces of *usable marihuana* . . . ." MCL 333.26424(a) (emphasis added). A "primary caregiver" who has been issued and possesses a registry identification card also is immune from arrest and prosecution for "assisting a qualifying patient" to whom he or she is connected through the applicable registration process with the "medical use of marihuana in accordance with this act," again provided that the primary caregiver possesses "an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana* for each qualifying patient" to whom he or she is connected through the registration process. MCL 333.26424(b)(1) (emphasis added).

Notably, neither of these provisions conditions its immunity on the qualifying patient's or primary caregiver's possessing an amount of *usable marijuana* that does not exceed 2.5 ounces. If they had wished to do so, the drafters of the MMMA could easily have employed such simple and readily understood language. Instead, each of these provisions conditions its immunity on the qualifying patient's or primary caregiver's possessing "an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana* . . . ." MCL 333.26424 (a) and (b)(1) (emphasis added).

This distinction is critical to our analysis because it demonstrates that the drafters of the MMMA chose to provide that, in evaluating a § 4 immunity claim, consideration must be given not only to the amount of usable marijuana that is possessed but, additionally, to the amount of marijuana that is possessed. In other words, consideration must also be given to the posses-

sion of marijuana that does not fit within the statutory definition of usable marijuana. This is consistent with the MMMA's use of the term of art "usable marihuana" to define that subset of marijuana that may be possessed in allowed quantities for purposes of an immunity analysis under § 4 of the MMMA.

In short, the question of whether a possessor of marijuana possesses an allowed quantity of usable marijuana is only the beginning of the relevant inquiry under § 4. A further pertinent and necessary inquiry, for purposes of a § 4 analysis, is whether that person possesses *any* quantity of marijuana that does *not* constitute usable marijuana under the term-of-art definition of the MMMA. If so, and without regard to the quantity of usable marijuana possessed, the person then does not possess "an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana* . . . ." MCL 333.26424 (a) and (b)(1) (emphasis added). Instead, he or she then possesses an amount of marijuana that is in excess of the permitted amount of usable marijuana. In other words, the language establishing limited immunity in § 4 of the MMMA expressly conditions that immunity on the person possessing *no* amount of marijuana that does not qualify as usable marijuana under the applicable definitions.

Defendant was in possession of 9.1 ounces of usable marijuana. Arguably, under the circumstances presented, defendant was entitled to possession of 12.5 ounces of usable marijuana. Therefore, he possessed an amount of usable marijuana that, assuming that all other requirements of § 4 were met, would have qualified him for § 4 immunity. However, defendant also was in possession of brownies containing THC extracted from marijuana resin. For the reasons stated, those brownies did not constitute "usable

marihuana" under the statutory definition. The parties agree, however, as do we, that the brownies did constitute "marihuana" under that term's statutory definition. Possession of THC extracted from marijuana is possession of marijuana. See *People v Campbell*, 72 Mich App 411, 412; 249 NW2d 870 (1976); see also MCL 333.7106(3). Therefore, defendant was in possession of an amount of marijuana that exceeded the amount of usable marijuana he was allowed to possess. By possessing edible products that were not usable marijuana under the MMMA, but indisputably were marijuana, he failed to meet the requirements for § 4 immunity.

We therefore determine that the trial court reached the right result in denying defendant immunity from prosecution pursuant to § 4 of the MMMA. We do not disturb that result. *People v Mayhew*, 236 Mich App 112, 118 n 2; 600 NW2d 370 (1999) ("[W]e will not reverse the trial court's decision where it reached the right result for a wrong reason.").

B. DEFENDANT IS ENTITLED TO ASSERT A § 8 AFFIRMATIVE DEFENSE

Defendant argues that he was precluded from offering an affirmative defense pursuant to § 8 of the MMMA, MCL 333.26428, by this Court's decision in *People v Anderson*, 293 Mich App 33; 809 NW2d 176 (2011), vacated 492 Mich 851 (2012). Because *Anderson* is no longer good law, defendant argues, his case should be remanded to allow him to pursue an affirmative defense according to the procedure outlined in *Kolanek*, 491 Mich at 410-413, and *People v Bylsma*, 493 Mich 17, 35-37; 825 NW2d 543 (2012). As this issue was not raised before the trial court (since *Kolanek* and *Bylsma* had not yet been decided by our Supreme Court), we

review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Section 8 of the MMMA, MCL 333.26428, provides an affirmative defense to patients and primary caregivers when it is demonstrated, *inter alia*, that the quantity of marijuana collectively possessed 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 [thereof]." MCL 333.26428(2). The procedure for asserting the defense is that the defendant files a motion to dismiss the criminal charges and an evidentiary hearing is held before trial. MCL 333.26428(3)(b). A § 8 defense therefore "cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing." *Kolanek*, 491 Mich at 411.

The affirmative defense of § 8 is available regardless of the amount of marijuana possessed.[10] That is, § 8

[10] Our Supreme Court has noted that "§ 4 [of the MMMA] does not permit defendants to operate a business that facilitates patient-to-patient sales of marijuana . . . ." *Michigan v McQueen*, 493 Mich 135, 158; 828 NW2d 644 (2013). However, in *McQueen*, our Supreme Court did not specifically state that the § 8 affirmative defense was unavailable for a defendant engaged in patient-to-patient sales of marijuana because the proceeding in that case was a public nuisance action, not a criminal proceeding. *Id*. at 158-159. The rationale of *McQueen* may indeed compel a determination that a defendant cannot establish the "medical purpose for using marihuana" required by MCL 333.26428(a) if that defendant possesses marijuana for the purpose of patient-to-patient sales, especially in light of *People v Green*, 494 Mich 865 (2013), rev'g 299 Mich App 313 (2013), in which our Supreme Court quoted *McQueen* with approval in reversing this Court's affirmance of the trial court's dismissal of charges (presumably under § 4 of the MMMA) against the defendant for delivery of marijuana. However, whether the § 8 defense is similarly unavailable for a defendant engaged in patient-to-patient sales is not currently before this Court.

(unlike § 4) specifies no particular quantity limit, but instead requires that the amount possessed be "not more than was reasonably necessary" for the statutorily recognized purposes. MCL 333.26428(2). Additionally, § 8 does not refer to "usable marihuana," but instead states that a patient or primary caregiver, or both, "may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ." MCL 333.26428(a).

Our Supreme Court has stressed that "[s]ections 4 and 8 provide separate and distinct protections and require different showings" and that "the requirements of § 4 cannot logically be imported into the requirements of § 8 . . . ." *Kolanek*, 491 Mich at 401-402. Rather, "we must examine these provisions independently." *Bylsma*, 493 Mich at 28. Therefore, our decision with regard to defendant's claim of denial of a § 8 defense does not depend on our analysis under § 4, our conclusion that the brownies possessed by defendant were not usable marijuana under the MMMA, or our conclusion that defendant was not entitled to § 4 immunity.

Defendant unsuccessfully argued, both during his preliminary exam and in a pretrial motion to dismiss, that he was entitled to dismissal of charges under § 4 of the MMMA, as discussed in parts IV, V, and VI(A) of this opinion. Defendant did not raise a § 8 argument at any time before trial. When the prosecution specifically requested clarification of whether defendant was requesting a § 8 affirmative defense, defense counsel stated, "Your Honor, actually, the prosecution may be correct in regards to allowing the particular defense; however, I think there's still a question of fact for the trier of fact of whether he was in compliance with the rules." Defendant never raised or reserved a § 8 affir-

mative defense, and the prosecution argues that defendant specifically disclaimed any desire to assert one and, therefore, waived any right to assert a defense under § 8.

However, defendant argues that he that he did not raise this defense before trial because the law at that time provided that a defendant must fulfill the requirements of § 4 before the defendant could raise a § 8 defense. In *People v King*, 291 Mich App 503, 505, 510; 804 NW2d 911 (2011), rev'd sub nom *Kolanek*, 491 Mich 382 (2012), this Court interpreted the MMMA as requiring a defendant to comply with the requirements of § 4 before asserting an affirmative defense under § 8. Our Supreme Court reversed that decision in *Kolanek*, holding that "the plain language of § 8 does not require compliance with the requirements of § 4." *Kolanek*, 491 Mich at 401. The Court further held that

> [a]ny defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense under § 8. As long as the defendant can establish the elements of the § 8 defense and none of the circumstances in [MCL 333.26247(b)] exists, that defendant is entitled to the dismissal of criminal charges. [*Id*. at 403.]

In *Kolanek*, the Court stated that a defendant must raise a § 8 defense in a pretrial motion to dismiss. *Id*. at 410-411. However, the Court clarified in *Bylsma*, 493 Mich at 35-37, that a defendant who moves for dismissal under § 4 could still raise a § 8 defense before trial by filing a motion and showing a prima facie case regarding the elements of § 8. Thus, a defendant who moves to dismiss under § 4 is not precluded from raising a § 8 defense in a separate pretrial motion to dismiss. *Id*.

Defendant did not reserve the right to raise a § 8 defense or otherwise preserve this issue for appeal. No evidentiary hearing was held, and no evidence concerning the requirements of § 8 was presented. Defendant had a trial, was not permitted to present any medical-marijuana defense, and was convicted. The question for this Court is whether this result is plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Defendant argues that he did not raise a § 8 defense because the law at that time required that the requirements of § 4 first be fulfilled. At the time of defendant's trial in February 2012, the Michigan Supreme Court had already granted leave to appeal in *King*, specifically to consider whether the requirements of § 4 must be met to raise a § 8 defense. *People v King*, 489 Mich 957 (2011).

"[A] Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2). However, changes to a criminal law are generally given retrospective application to cases pending on appeal as of the date of the filing of the opinion containing the new rule. See *People v Hampton*, 384 Mich 669, 673-678; 187 NW2d 404 (1971). Defendant filed his claim of appeal on May 2, 2012. *Kolanek* was decided on May 31, 2012. We therefore conclude that defendant is entitled to the retrospective application of *Kolanek*.

The *Kolanek* Court noted that this Court's interpretation of the MMMA in *King* rendered § 8 a nullity. *Kolanek*, 491 Mich at 402. Thus, because the state of the law at the time this case was pending rendered § 8 a nullity, and the state of the law changed during the pendency of defendant's appeal, we conclude that defendant was deprived of a substantial defense and has demonstrated plain error. As stated, the language of the

MMMA allows defendant to assert "the medical purpose for using marihuana as a defense to any prosecution involving marihuana," MCL 333.26428(a); thus defendant may attempt to assert this defense to his prosecution for possession with intent to deliver with respect to both the raw marijuana and the edible products containing THC that were found in his possession.[11]

In that regard, we note that, unlike with respect to § 4 immunity, the MMMA does not condition the availability of a § 8 affirmative defense on the possession of *only* a limited quantity of *usable marijuana*. Rather, a § 8 defense may be available without regard to whether the marijuana possessed was usable marijuana and without regard to the quantity possessed. Further, the considerations that caused the drafters of the MMMA to so condition the broader immunities afforded under § 4 may not exist in particular individual circumstances giving rise to the assertion of a § 8 affirmative defense. For example, if a particular qualifying patient suffers from a serious or debilitating medical condition (or symptoms thereof) and treatment or alleviation requires the medical use of marijuana, even in a form that consists of a mixture or preparation of THC extracted

[11] The prosecution argues that defendant explicitly waived his right to a § 8 defense. Defendant's counsel did make statements at the preliminary examination to the effect that he was not seeking a § 8 defense. However, waiver is "the intentional relinquishment or abandonment of a *known* right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted) (emphasis added). Given the law at the time, we will not fault defendant for pursuing a § 4 defense before any § 8 defense; as noted, a defendant is not precluded from raising a § 8 defense in a separate pretrial motion. *Bylsma*, 493 Mich at 35-37. Once his § 4 motion was denied, as the law existed at the time, defendant would have had no reason to pursue a § 8 defense. Thus, we conclude that his failure to do so was not a waiver of that defense, nor were his counsel's statements at the beginning of the proceedings against defendant.

from the resin of a marijuana plant (and thus would not qualify a patient or primary caregiver for § 4 immunity), then the patient or his or her primary caregiver may be entitled to assert a § 8 affirmative defense provided that it is demonstrated that the amount of marijuana possessed was not more than was reasonably necessary for the statutorily recognized purposes (and provided that the other conditions of § 8 were met). This is not to say that establishing a § 8 defense under such circumstances would be an easy task; to the contrary, we suspect that the bar to establishing a defense under those circumstances would indeed be a high one, and one that would become increasingly higher as the amount or potency of the marijuana possessed increases. That said, however, § 8 affords a qualifying patient or primary caregiver an opportunity to demonstrate the satisfaction of the statutory conditions for asserting the defense, even under those circumstances.

However, we conclude that the appropriate remedy is not to simply grant defendant a new trial. Rather, defendant is entitled to an evidentiary hearing to establish whether he is entitled to assert a § 8 defense. If, following an evidentiary hearing, no reasonable juror could conclude that a defendant has satisfied the elements of a § 8 defense, then the defendant is precluded from asserting the defense at trial. *Kolanek*, 491 Mich at 412. Before vacating defendant's conviction and ordering a new trial, it would thus behoove this Court to know whether defendant would in fact be able to assert the defense at trial (or indeed is entitled to dismissal of the charges against him). We therefore remand this matter so that defendant may file a motion to dismiss the charges against him and for an evidentiary hearing to be held on the prima facie existence of the elements of a § 8 defense. If defendant cannot meet this burden,

his conviction will stand. *Id*. If defendant meets this burden without any question of fact, he will be entitled to dismissal of the marijuana possession charge. *Id*. If defendant establishes evidence of each element listed in § 8 but there are still material questions of fact, then he will be entitled to a new trial and the submission of this defense to the jury. See *id*.

VII. CONCLUSION

In light of the plain language of the MMMA, we conclude that the brownies possessed by defendant were not usable marijuana under the MMMA. Therefore, we further conclude (although under a different rationale than that of the trial court or that advanced on appeal) that the trial court did not err by denying defendant immunity from prosecution under § 4 of the MMMA. However, because the state of the law changed during the pendency of defendant's appeal, he is entitled to move the trial court for dismissal and an evidentiary hearing on his ability to assert an affirmative defense under § 8 of the MMMA.

Vacated and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

M. J. KELLY, P.J., and MURRAY, J. concurred with BOONSTRA, J.

WILCOXON v CITY OF DETROIT ELECTION COMMISSION

Docket No. 317012. Submitted July 9, 2013, at Detroit. Decided July 11, 2013, at 9:10 a.m.

D. Etta Wilcoxon filed a complaint in the Wayne Circuit Court against the Detroit Election Commission and the Detroit City Clerk, Janice Winfrey, seeking an order of mandamus, superintending control, preliminary injunction, and other relief to compel the board of elections to certify her nominating petitions and the city clerk to place her name on the ballot for the August, 2013 Detroit City Clerk primary election. The department of elections originally informed plaintiff that her petition contained sufficient signatures in accordance with the Detroit City Charter for placement on the primary ballot, but later notified plaintiff after the nominating petition deadline, that (1) the circulator's oath was challenged on two pages of the petition, resulting in the board of elections invalidating those elector signatures, (2) 58 other signatures had previously been invalidated without notification, and (3) plaintiff's name would not be placed on the primary ballot because she did not have the amount of signatures required for placement on the primary ballot. Plaintiff sought a review of this decision by the Secretary of State, who affirmed the board of election's decision, concluding that the circulator's failure to record the actual date of his signature on the nominating petition was a fatal defect, rendering all the signatures on those petition sheets invalid. Plaintiff challenged that determination and the department of elections informed her that her appeal of that decision was untimely. The court, Patricia Fresard, J., determined that the elector signatures on specified petition pages were invalid because they did not strictly comply with MCL 168.544c, that the undated elector signatures on certain petition pages were not invalid under that provision because the statute did not require an elector's signature to be dated, that certain elector signatures could be validated by comparison with the signature card in the voter record, and without indicating the basis on which the order was issued, directed that plaintiff's name be placed on the primary ballot. Defendants appealed.

The Court of Appeals *held*:

1. MCL 168.552(7) requires that the city clerk shall make a formal declaration as to the sufficiency or insufficiency of nominating petitions after completing an examination of or investigation of the signatures on the petition. A person aggrieved by such a determination may seek review as provided in MCL 168.552(6) by (1) appealing the decision to the Secretary of State within three days of the official declaration, or (2) filing a mandamus, certiorari, or other appropriate remedy in the circuit court. A person who filed a nominating petition and feels aggrieved by the determination of the Secretary of State may seek review of that decision by mandamus, certiorari, or other appropriate remedy in the circuit court. Because it deprives a party of review by the Secretary of State, when the city clerk fails to make an official declaration in a timely manner as to the sufficiency or insufficiency of a nominating petition, review of that nominating petition's signatures properly lies in the circuit court through an action for mandamus, certiorari, or other appropriate remedies. In this case, plaintiff's action was properly before the circuit court and the court properly ordered plaintiff's name to be placed on the primary ballot. The MCL 168.552(6) three-day time requirement did not apply to bar review as untimely because the department of elections failed to make a timely and official declaration of its original invalidation of 58 signatures as required by MCL 168.552(7), which deprived plaintiff of her clear legal right to meaningful review by the Secretary of State as allowed by MCL 168.552(6); a subsequent letter responding to another challenge by plaintiff, which indirectly notified plaintiff of those previously invalidated signatures, was inadequate to constitute an official declaration of the sufficiency or insufficiency of the petition's signatures.

2. An elector's failure to date his or her signature on a nominating petition does not render that signature invalid for purposes of MCL 168.544c. In this case, the trial court did not err by concluding that the specified, undated electors' signatures were properly counted on the nominating petitions.

3. Under MCL 168.552(7), a city clerk reviews the validity and genuineness of signatures appearing on a nominating petition subject to MCL 168.552(13), which provides in part that if the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a rebuttable presumption that the signature is invalid. A person challenging the clerk's invalidation of signatures may establish that the signature on the nominating petition is the signature of a person who is registered to vote by presenting evidence

to rebut the clerk's conclusion. In this case, because the city clerk refused plaintiff's demand for a procedure to review the invalidation of signatures that could not be confirmed by name and address within a time frame that would have allowed her to seek review of that decision with the Secretary of State, the circuit court properly reviewed the signatures under MCL 168.552(6) through an action for mandamus, superintending control, or declaratory action (MCL 168.552[6] and [7]).

4. Absent evidence that a city clerk used a handwriting expert to verify an elector's signature on a nominating petition, the circuit court properly reviewed electors' signatures by visually comparing the elector's signature on the nominating petition to that contained on the voter registration card.

Affirmed.

1. ELECTIONS — SUFFICIENCY OF NOMINATING PETITIONS — REVIEW OF NOMINATING PETITIONS — OFFICIAL DECLARATION OF SUFFICIENCY OF NOMINATING PETITIONS.

A city clerk shall make an official declaration as to the sufficiency or insufficiency of nominating petitions after completing an examination or investigation of the signatures on the petition; a person aggrieved by such a determination may seek review as provided in MCL 168.552(6) by (1) appealing the decision to the Secretary of State within three days of the official declaration, or (2) filing a mandamus, certiorari, or other appropriate remedy in the circuit court; if a person who filed a nominating petition feels aggrieved by the determination of the Secretary of State, review in the circuit court through an action for mandamus, certiorari, or other appropriate remedy is appropriate; because it deprives a party of review by the Secretary of State, when the city clerk fails to make an official declaration in a timely manner as to the sufficiency or insufficiency of a nominating petition, review of that nominating petition's signatures properly lies in the circuit court through an action for mandamus, certiorari, or other appropriate remedies.

2. ELECTIONS — NOMINATING PETITIONS — ELECTOR SIGNATURES — DATES OF SIGNATURE.

An elector's failure to date his or her signature on a nominating petition does not render that signature invalid for purposes of MCL 168.544c.

3. ELECTIONS — VALIDITY OF SIGNATURES — REBUTTABLE PRESUMPTION.

Under MCL 168.552(7), a city clerk reviews the validity and genuineness of signatures appearing on a nominating petition subject

to MCL 168.552(13), which provides in part that if the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a rebuttable presumption that the signature is invalid; a person challenging the clerk's invalidation of signatures may establish that the signature on the nominating petition is the signature of a person who is registered to vote by presenting evidence to rebut the clerk's conclusion.

4. ELECTIONS — NOMINATING PETITIONS — REVIEW OF NOMINATING PETITIONS — REVIEW OF ELECTOR SIGNATURES.

Absent evidence that a city clerk used a handwriting expert to verify an elector's signature on a nominating petition, a circuit court may review an elector's signature by visually comparing the elector's signature on the nominating petition to that contained on the voter registration card.

Andrew A. Paterson for D. Etta Wilcoxon.

Portia L. Roberson and *Sheri L. Whyte* for Detroit Election Commission and Detroit City Clerk Janice Winfrey.

Before: FORT HOOD, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM. Defendants, Detroit City Clerk Janice Winfrey and the Detroit Election Commission, appeal as of right the order directing plaintiff to be placed on the August 6, 2013 primary election ballot as a candidate for the office of Detroit City Clerk. We affirm.

I. FACTUAL BACKGROUND AND PROCEEDINGS

On May 1, 2013, plaintiff filed nominating petitions for the office of Detroit City Clerk. Section 3-109 of the Detroit City Charter provides in part that the petition for a candidate who is seeking nomination to the office of city clerk "shall be signed by not less than five hundred (500) signatures of qualified voters of the City

of Detroit and not more than . . . one thousand (1,000) signatures of qualified voters of the City of Detroit."[1] According to defendants, plaintiff's nominating petitions contained 561 signatures. After investigating the petitions, the city's department of elections determined that 58 signatures were invalid, which left 503 valid signatures.

On May 7, 2013, Daniel Baxter, the Detroit Director of Elections, sent plaintiff a letter stating that it had been determined that she had submitted "sufficient signatures" to qualify to have her name appear on the ballot for the primary election of August 6, 2013. This letter did not state, nor explain, that the city clerk and the department of elections had made a finding that 58 petition signatures were invalid.

Following the May 14, 2013, filing deadline for nominating petitions, a challenge to plaintiff's petition was filed with the department of elections. On May 22, 2013, Baxter sent a letter to plaintiff advising her of the challenge, in particular to the circulator's oath on pages six and seven of the petitions. The circulator, Thomas Barrow, signed and dated these pages with the date of November 7, 2013. Baxter cited MCL 168.544c, which governs nominating petitions and provides in relevant part:

> (4) The circulator of a petition shall sign and date the certificate of circulator before the petition is filed. A circulator shall not obtain electors' signatures after the circulator has signed and dated the certificate of circulator. A filing official shall not count electors' signatures that were obtained after the date the circulator signed the certificate or that are contained in a petition that the circulator did not sign and date.

[1] A copy of the current city charter was not contained in the lower court record, but defendants filed a copy of the relevant provision on July 10, 2013.

Baxter's letter further explained that the erroneous date on the two challenged pages invalidated the signatures on those pages for the reason that, the date of "November 7, 2013 has not occurred, it is considered an invalid entry and renders the certificate incomplete." Baxter's letter thus informed plaintiff that her candidacy would not be certified, that her name would be excluded from the August 6, 2013 primary ballot, and, significantly, constituted the first notice to plaintiff that, in addition to the invalidation of the two at-issue signature pages, the clerk had also invalidated 58 *other* signatures, reducing plaintiff's total number of valid signatures from 503 to 475, 25 fewer signatures than required by the city charter.

According to defendants, the following day, on May 23, 2013, the Detroit Election Commission held a meeting for the purpose of certifying the names of all candidates for the August 6, 2013, primary election ballot. The commission did not certify plaintiff as a candidate for Detroit City Clerk.

Plaintiff filed two requests with the Michigan Bureau of Elections, dated May 25, 2013 and May 27, 2013, seeking a review by the Secretary of State of defendant's determination to exclude her from the ballot on the basis that she had insufficient signatures to qualify for certification to the August 6, 2013 primary ballot. These letters specifically referred to defendant's determination that the erroneous circulator's oath on two signature pages invalidated the petition signatures on those pages. On May 30, 2013, the Michigan Director of Elections, Christopher Thomas, sent plaintiff a letter advising that her appeal was denied because the Secretary of State agreed with the clerk that the circulator's failure to record the actual date of his signature was a

fatal defect, which rendered all the signatures appearing on those petition sheets invalid.

Contemporaneous with plaintiff's appeal to the Secretary of State, plaintiff also sent a letter dated May 28, 2013, to the Detroit City Clerk stating that she and her "Team" had spent three business days in the clerk's office and had documented the names of more than 55 voters that were "invalidated" for a variety of reasons. In this letter, plaintiff listed voter names from the nominating petitions, the clerk's disqualification assessment of each name, and the challenger's assessment of why the signature was valid. Plaintiff demanded that the clerk "provide the procedure of a full and fair review of this contested assessment." Plaintiff also stated that she was copying Secretary of State Ruth Johnson and was requesting that Johnson "provide the timeframe for her review and assessment."

It is not entirely clear from the record if the clerk responded to this letter. The record shows that Baxter sent a letter to plaintiff dated May 24, 2013, stating that the city department of elections was in receipt of her "grievance" and "was unable to comply with [her] request." Baxter also stated that MCL 168.552(6) offered her "the most direct route to seek remedy for your concern." Given that plaintiff's letter was dated May 28, 2013, we cannot determine whether Baxter's letter was in response to an oral request made by plaintiff before she wrote the May 28, 2013 letter, or if Baxter misdated the letter and was responding to plaintiff's May 28, 2013 letter requesting review of the signature invalidation.

On June 3, 2013, the Michigan Bureau of Elections sent plaintiff a letter responding to her letter dated May 28, 2013 and advising that her request to reinstate the signatures was denied as untimely:

> In view of the fact that you received notice of your disqualification from the Detroit City Clerk's office on May 23, 2013, the deadline to file an appeal with the Secretary of State elapsed on May 28, 2013 at 4:00 p.m. Your fax sent to this office on May 30, 2013 is untimely and the Secretary of State is not authorized to act on a belatedly filed appeal. Therefore, your request that the Secretary of State reinstate the signatures of 55 voters determined invalid by the Detroit City Clerk is denied.

The letter further cited MCL 168.552(6) and (7), claiming that the statute required that an appeal concerning a candidate's disqualification must be filed with the Secretary of State within three (3) days after the official declaration by the city clerk, unless the third days falls on a Saturday, Sunday, or legal holiday, in which case the request may be filed not later than 4:00 p.m. on the next day that is not a Saturday, Sunday, or legal holiday.

Two days later, on June 5, 2013, plaintiff filed a complaint for mandamus, superintending control, preliminary injunction and other relief in the circuit court. In relevant part, plaintiff alleged that she had filed her nominating petitions for the position of city clerk with the required number of signatures, that on being advised that she would not be placed on the ballot for the primary election she had made an inquiry in an effort to challenge the election commission's decision to exclude her from the ballot, that her challenge to the election commission's decision was rejected, and that her sole remedy was to seek superintending control of the election commission and a writ of mandamus against the city clerk. Plaintiff further claimed that the circulator's error on the certificate was "a simple technical deficiency" and was not "error enough" to justify invalidating the petitions.

On June 6, 2013, the circuit court entered a temporary restraining order and order to show cause. In

relevant part, the order directed the election commission to restore plaintiff to the primary ballot as a candidate for city clerk and further ordered the commission to show cause on June 20, 2013, why a preliminary injunction should not be ordered.

On June 12, 2013, plaintiff filed an amended complaint, adding additional allegations. Defendants filed responses to the complaints, claiming that a writ of mandamus could not issue because plaintiff failed to plead that they did not perform a clear legal duty, and that an injunction could not issue because plaintiff failed to meet her burden for such extraordinary relief.

On June 20, 2013, the parties appeared in the circuit court for the first of four hearings conducted by the assigned judge.[2] After hearing some argument from the parties, the circuit court agreed that the petitions circulated by Thomas Barrow and dated November 7, 2013, were invalid and could not be counted toward the required minimum of 500 signatures because these pages did not strictly comply with MCL 168.544c. Plaintiff argued that she should have been permitted to amend her pleadings to allege that the city clerk had improperly denied her a determination regarding 27 signatures that had been invalidated for reasons other than the invalidated circulator certificate, and that the clerk had improperly required her to appeal first to the Secretary of State without having received that determination. Defendants' attorney objected on the basis that the ballot needed to be sent to the printer and the clerk was required to mail absentee ballots in two days,

[2] The temporary restraining order and the order to show cause were signed by Judge Wendy Baxter. However, the case was assigned to Judge Patricia Fresard. Judge Fresard expressed understandable concern at the initial hearing regarding the parties' failure to file judge's copies of the pleadings with her office as well as the parties' failure to apprise the court of the urgency of the matter.

on June 22, 2013. The circuit court granted plaintiff's request to amend her pleading on her counsel's promise to file the amended pleading the next morning. On June 21, 2013, plaintiff filed a third amended complaint, adding a count for a declaratory judgment with respect to the validity of the 27 signatures.

After the initial hearing and at the circuit court's direction, the parties engaged in a collaborative review of the signatures. The circuit court conducted its additional hearings over the course of three days, during which the parties reported their progress. Although defendants asserted that plaintiff was not entitled to relief as a matter of law, they did not object to the circuit court's decision to proceed in this manner. Nor did defendants request an order from the circuit court regarding this procedure to allow them to file an application for leave to appeal in this Court. Rather, defendants worked together with plaintiff, as the court encouraged, to reach an agreement that plaintiff had filed 494 valid petition signatures, making it necessary for the circuit court to resolve the validity of at least six signatures for plaintiff to be certified for placement on the ballot.

As to three signatures, defendant argued that the signatures were invalid because no date of signing appeared next to those signatures. The circuit court ruled that MCL 168.544c does not mandate that a person date his or her signature, and the date used by the circulator may be used as the applicable date to determine whether the person was a registered voter. This ruling raised the total number of valid signatures to 497 on the nominating petitions.[3] The circuit court also compared certain additional signatures from the

---

[3] Because these three signatures were initially invalidated on the ground that they were not dated, no one had verified whether any of the

petitions with signatures on the voter cards, and overturned the invalidation of four more signatures. The circuit court then declared "the candidate is on the ballot," but failed to articulate the particular basis from plaintiff's complaint (i.e., mandamus, superintending control, declaratory judgment) on which it relied to make this declaration. The basis is also not identified in the order entered by the court.

II. PRELIMINARY MATTER

At the outset, we are compelled to point out that at the time defendants filed their claim of appeal with this Court on July 2, 2013, defendants stated in their motion for immediate consideration of the motion for peremptory reversal that they "will begin the process of printing the ballots soon to ensure that the absentee ballots and election ballots are mailed out in a timely manner . . . ." Nothing has occurred during the course of the proceedings before this Court that has precluded defendants from fulfilling either this promise or the clerk's duties in this regard. The circuit court entered an order directing defendants to restore plaintiff's name to the ballot as a candidate for city clerk, and also entered an order denying defendants' ex parte motion for stay of this directive. The parties failed to swiftly and urgently seek a decision from the circuit court following plaintiff's filing of her action on June 5, 2013, instead, choosing not to request a hearing date earlier than the June 20, 2013 date initially set by the court. Moreover, the parties did not diligently proceed to appeal.[4] In any

---

persons were registered voters. Defendants' attorney later announced that their voter registrations were verified.

[4] On June 27, 2013, the circuit court ruled at the conclusion of the fourth hearing that plaintiff had met the signature requirements to appear on the ballot. On June 28, 2013, the circuit court denied

event, we conclude that the timing of this appeal did not prevent the city clerk from complying with the election laws regarding the mailing of the absentee ballots.

III. ANALYSIS

A. STANDARD OF REVIEW AND MANDAMUS

In their brief on appeal, defendants argue that a writ of mandamus cannot issue because plaintiff failed to plead that they did not perform a clear legal duty, and that an injunction cannot issue because plaintiff failed to meet her burden for such extraordinary relief. Although this Court reviews a trial court's decision to issue or deny a writ of mandamus for an abuse of discretion, *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 598; 822 NW2d 159 (2012), "this Court reviews de novo as questions of law whether a defendant has a clear legal duty to perform and whether a plaintiff has a clear legal right to performance." *Barrow v Detroit Election Comm*, 301 Mich App 404, 411; ___ NW2d ___ (2013). This case also requires this Court to

---

defendants' ex parte motion for stay of this ruling. Defendants did not file a claim of appeal until July 2, 2013, which was accompanied by a motion for stay, which this Court denied, *Wilcoxon v Detroit Election Comm*, unpublished order of the Court of Appeals, entered July 8, 2013 (Docket No. 317012), and a motion to expedite the appeal. However, defendants did not file the brief on appeal and a motion for peremptory reversal until July 3, 2013. The hearing transcripts were not received by this Court until July 5, 2013, and July 8, 2013, and there is some question as to how or whether the urgency of this appeal was communicated to the court reporters. Although plaintiff advised that she might pursue a bypass to our Supreme Court or file a motion to affirm, she did neither. Our Supreme Court has advised the bar association that election-related legal issues may be facilitated by filing directly in the Supreme Court prior to any resolution by the Court of Appeals. See *Scott v Dir of Elections*, 490 Mich 888, 889; 804 NW2d 199 (2011); MCR 7.302(C)(1). The parties' conduct in this case is not consistent with their claims of urgency and the need for speedy resolution.

construe the statute that governs the process by which nominating petitions are accepted and reviewed, MCL 168.552, and the statute that governs the form, size and content for nominating petitions, MCL 168.544c. Statutory interpretation is also reviewed by this Court de novo. *Stand Up*, 492 Mich at 598.

The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature. *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 660 (1989); *Amburgey v Sauder*, 238 Mich App 228, 231-232; 605 NW2d 84 (1999). Once the intention of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *Certified Question*, 433 Mich at 722. The language of the statute expresses the legislative intent. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. *Id*. If the language of the statute is plain and unambiguous, effect must be given to the words used, and judicial construction is neither necessary nor permitted. *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Dep't of Transp*, 481 Mich at 191. The Legislature's use of the term "shall" denotes mandatory action or direction, *Mich Educ Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011), and the term "may" denotes permissive action, *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). "A circuit court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo." *In re Receiv-*

ership of 11910 South Francis Rd, 492 Mich 208, 218; 821 NW2d 503 (2012). Application of the law to the facts presents a question of law subject to review de novo. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996).

In *Barrow*, this Court reviewed a mandamus action filed by a challenger to the nominating petitions of Mike Duggan for the office of the Mayor of Detroit, whereby the circuit court granted the relief and directed removal of Duggan's name as eligible for placement on the primary ballot. This Court set forth the following standards for mandamus, which are applicable in this matter as well:

> Duggan challenges the grant of mandamus to plaintiff. A plaintiff has the burden of establishing entitlement to the extraordinary remedy of a writ of mandamus. *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 519-520; 810 NW2d 95 (2011). The plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgment, and (4) the plaintiff has no other adequate legal or equitable remedy. *Vorva v Plymouth-Canton Community Sch Dist*, 230 Mich App 651, 655-656; 584 NW2d 743 (1998).
>
> It is undisputed that defendants have the statutory duty to submit the names of the eligible candidates for the primary election, see MCL 168.323 and MCL 168.719. The inclusion or exclusion of a name on a ballot is ministerial in nature. Here, plaintiff himself is a candidate for mayor, as well as a citizen of Detroit. Aside from the instant action, plaintiff has no other adequate legal remedy, particularly given that the election is mere weeks away and the ballot printing deadline is imminent. Plaintiff thus has established that mandamus is the proper method of raising his legal challenge to Duggan's candidacy. See, generally, *Sul-*

> *livan v Secretary of State*, 373 Mich 627; 130 NW2d 392 (1964); *Wojcinski v State Bd of Canvassers*, 347 Mich 573; 81 NW2d 390 (1957).
>
> The circuit court accepted plaintiff's challenges to Duggan's candidacy, thus, plaintiff established his entitlement to a writ of mandamus. Upon review, if we in turn likewise determine that Duggan did not meet the qualifications to be a candidate for elected office under the charter, plaintiff would have a clear legal right to have Duggan's name removed from the list of candidates, the Election Commission would have a clear legal duty to remove Duggan's name, the act would be ministerial because it would not require the exercise of judgment or discretion, and plaintiff would have no other legal or equitable remedy. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 291-292; 761 NW2d 210 (2008), aff'd in result only 482 Mich 960 (2008). Accordingly, we must consider whether Duggan complied with the charter provisions to establish his qualifications to be among the candidates for mayor. [*Barrow*, 301 Mich App at 411-413.]

Likewise, we must consider whether plaintiff's nominating petitions complied with the charter provision and MCL 168.544c, which we emphasize was the only statutory provision on which defendants focused below and raised in their brief on appeal.

B. REVIEW PROCESS FOR NOMINATING PETITIONS

We begin with a general overview of the statute governing the process by which nominating petitions are accepted and reviewed by the city clerk. In relevant part, MCL 168.552(7) provides that the city clerk with whom nominating petitions are filed "may examine the petitions and investigate the validity and genuineness of signatures appearing on the petitions" and that, subject to subsection (13), the city clerk "may check the signatures against registration records." MCL 168.552(7) further states:

> The city clerk shall make a determination as to the sufficiency or insufficiency of the petitions upon the completion of the examination or investigation, and shall make an official declaration of the findings. A person feeling aggrieved by the determination has the same rights of review as in case of a determination by the county clerk.

The rights of review for a person who is aggrieved by a determination of the county clerk are set forth in MCL 168.552(6), which provides in relevant part:

> A person feeling aggrieved by a determination made by the county clerk may have the determination reviewed by the secretary of state by filing a written request with the secretary of state within 3 days after the official declaration of the county clerk, unless the third day falls on a Saturday, Sunday, or legal holiday, in which case the request may be filed not later than 4 p.m. on the next day that is not a Saturday, Sunday, or legal holiday. Alternatively, the aggrieved person may have the determination of the county clerk reviewed by filing a mandamus, certiorari, or other appropriate remedy in the circuit court. A person who filed a nominating petition and feels aggrieved by the determination of the secretary of state may then have that determination reviewed by mandamus, certiorari, or other appropriate remedy in the circuit court.

Defendants argued below that plaintiff did not file the proper appeal regarding the certification of petition signatures with either the Secretary of State or with the circuit court. On appeal, defendants summarily assert that this Court should reverse because plaintiff failed to file a timely appeal with the Secretary of State. We disagree, and conclude that plaintiff's complaint was properly before the circuit court because defendants failed to comply with their statutory duties.

The record is clear that while the department of elections' initial canvass of plaintiff's nominating petitions—the canvass of plaintiff's petitions conducted

before May 7, 2013—resulted in the invalidation of 58 signatures for a variety of reasons, defendants made no "official declaration of the[se] findings." Thus, plaintiff was given no official or timely notice that defendants had invalidated these petition signatures. Baxter's May 22, 2013 letter, informing plaintiff that a challenge had been lodged to the circulator's certificate on two nominating petitions dated November 7, 2013, and that the department of elections agreed with that challenge, gave plaintiff her first notice, and then only indirectly, that some signatures had been invalidated earlier for reasons unrelated to the circulator's date challenge when it advised her that only 475 of her petition signatures were considered valid. However, pursuant to the plain language of MCL 168.552(6), *Johnson*, 491 Mich at 436, defendants were required to issue an official declaration of the findings with respect to the invalidation of signatures. We therefore conclude that the indirect notice contained in Baxter's May 22, 2013 letter to plaintiff was inadequate to constitute the official declaration of the sufficiency or insufficiency of petition signatures that defendants were required to make, and plaintiff was entitled to receive, under MCL 168.552(6) and (7). As such, plaintiff was also wrongfully deprived of any meaningful review by the Secretary of State of the city clerk's determination that certain signatures were invalid.

We find it particularly disturbing that after plaintiff subsequently reviewed the reasons for invalidation at the location where the petitions were stored, made her own assessment regarding the validity of the signatures, and demanded a review with the city clerk and the Secretary of State, the department of elections either failed to respond or responded by stating it was unable to comply with her request. While the Michigan Bureau of Elections concluded that plaintiff's May 30,

2013 "appeal" was untimely on the apparent basis that the May 22, 2013 letter from Baxter to plaintiff was the clerk's determination regarding the invalid signatures, we find that, given the city clerk's deficient declaration of findings, plaintiff was deprived of a meaningful review of the clerk's determination by the Secretary of State. Accordingly, the circuit court's consideration of plaintiff's third amended complaint for mandamus, superintending control, preliminary injunction and declaratory judgment was warranted under MCL 168.552(6).[5]

C. NOMINATING PETITIONS

We next address defendants' argument that the trial court erred by concluding that defendants improperly invalidated several signatures contained in the nominating petitions and address whether the relief ordered by the circuit court was appropriate.

First, defendants contend that the trial court erred by finding that three of plaintiff's signatures were improperly invalidated by defendants because they did comply with the requirements of MCL 168.544c. MCL 168.544c(1) provides that a nominating petition "shall be in the following form" as set forth in the statute. The

---

[5] We note that the circuit court seemingly ruled that because MCL 168.552(6) "alternatively" permitted mandamus, certiorari or other appropriate relief in the circuit court, an aggrieved person could seek review of the city clerk's decision by the Secretary of State, the circuit court, "or both as she chooses." We question this interpretation of MCL 168.552(6), which arguably requires instead that an aggrieved person choose a particular appellate remedy in the statute to the exclusion of the other. However, defendant has not raised this issue on appeal and it has not been briefed at all by the parties. Thus, we decline to more fully address this issue because we find it is unnecessary to the resolution of this appeal. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.").

statutory form contains a section for signatures and signature lines with the following headings above the lines: "Printed Name and Signature," "Street Address or Rural Route," "Zip Code," and "Date of Signing," with "Mo." "Day" and "Year" underneath the last heading. MCL 168.544c(2) provides:

> The petition shall be in a form providing a space for the circulator and each elector who signs the petition to print his or her name. The secretary of state shall prescribe the location of the space for the printed name. The failure of the circulator or an elector who signs the petition to print his or her name, to print his or her name in the location prescribed by the secretary of state, or to enter a zip code or his or her correct zip code does not affect the validity of the signature of the circulator or the elector who signs the petition. A printed name located in the space prescribed for printed names does not constitute the signature of the circulator or elector.

MCL 168.544c(4) provides, in relevant part, that "[t]he circulator of a petition shall sign and date the certificate of circulator before the petition is filed. A circulator shall not obtain electors' signatures after the circulator has signed and dated the certificate of circulator."

Defendants proclaim that the Legislature "did not provide for a valid petition signature that was without the actual signature of the individual, was without address, or was without date." As we understand this argument, relevant to the circuit court's actual ruling, the statute above affirmatively states that a signature remains valid even if the elector fails to print his or her name, to enter a zip code or his or her correct zip code, and thereby the failure to excuse other omissions (such as the date of signing) should invalidate the person's signature. Citing *Stand Up for Democracy*, 492 Mich at 588 for the proposition that "substantial compliance" is not sufficient, defendants assert that the individual

petition entries that were without a printed name, an address or a date, are not in compliance with the statute and therefore the signature must be found invalid. We disagree.

While the plain language of MCL 168.544c(2) does require that the circulator "shall" properly date the petition, evidencing the necessity of mandatory action on the part of the circulator, *Mich Educ Ass'n*, 489 Mich at 218, in contrast, the plain language of MCL 168.544c(2) does not contain any language requiring that the *elector* shall "date" the petition. *Johnson*, 491 Mich at 436.[6] In contrast, for example, under MCL 168.954, the Legislature specifically requires a signer of a recall petition to "affix his or her signature, address, and the date of signing." There is no similar mandatory provision contained in MCL 168.544c, and defendants fail to refer to any other statute requiring the elector to include the date of signing on a nominating petition.[7] Accordingly, we cannot conclude that a person's failure to date his or her signature renders the signature invalid. The trial court did not err by concluding that the electors' undated signatures were appropriately counted on the nominating petitions.

Finally, defendants argue that any individual signature lines that were invalidated because the voter registration could not be confirmed by name and address "are not proper subjects of writ of mandamus." Defendants assert that the investigation of petitions for names that do not have a current registration is not

---

[6] MCL 168.544c(6) further states that an individual "shall" not sign more nominating petitions for the same office than there are persons to be elected to the office, and MCL 168.544c(7) lists other actions that an individual "shall" not do.

[7] Notably, in their brief defendants have not cited or discussed any provision in the city charter that may be applicable.

ministerial in nature. We do not find this argument persuasive. As mentioned earlier in this opinion, under MCL 168.552(7), the city clerk's review of the validity and genuineness of signatures appearing on the nominating petitions is subject to MCL 168.552(13), which provides:

> The qualified voter file may be used to determine the validity of petition signatures by verifying the registration of signers. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, *there is a rebuttable presumption that the signature is invalid*. The qualified voter file shall be used to determine the genuineness of a signature on a petition. Signature comparisons shall be made with the digitized signatures in the qualified voter file. The county clerk or the board of state canvassers shall conduct the signature comparison using digitized signatures contained in the qualified voter file for their respective investigations. If the qualified voter file does not contain a digitized signature of an elector, the city or the township clerk shall compare the petition signature to the signature contained on the master card. [Emphasis added.]

We find the "rebuttable presumption" language above indicates that a person challenging the clerk's invalidation of the signatures may present evidence to rebut the clerk's conclusion and therefore establish that the signature on the nominating petition is the signature of a person who is registered to vote. In this case, the city clerk refused plaintiff's demand to provide the procedure for a "full and fair review of the contested assessment" regarding the signatures in a timeframe that permitted plaintiff to seek a meaningful review of the invalidated signatures by the Secretary of State. Therefore, plaintiff had available to her the legal remedy of a mandamus/superintending control/declaratory action in the circuit court to force a review of the signatures.

It is clear from the record of the hearings below that, had this signature review taken place before defendants determined that several signatures were invalid, this whole proceeding may have been avoided. According to an affidavit submitted by Gina Avery, the department of elections disqualified the signatures of three petitioners under the category "Can't determine," which defendants' attorney explained at the hearing was the result of the address listed on the petition not matching the voter card with the same name. The city proclaimed that if there were several people with the same name, it was "impossible" to verify the signature. Yet, plaintiff demonstrated that this impossibility simply did not exist. Her attorney presented the signature from the qualified voter file whose signature "best" matched the disputed signature on the petition. Once the circuit court found the signatures matched, the circuit court validated the signatures.[8]

---

[8] In their reply brief, defendants contend that the circuit court erred by conducting its own comparison of the signatures on the petition and the voter-registration information. At the June 27, 2013 hearing, defense counsel objected to plaintiff's failure to present a handwriting expert. Plaintiff's counsel noted that the actions taken by plaintiff and her team were consistent with how the director of elections verified signatures. There was never any evidence that the director of elections employed handwriting experts to verify signatures. Defense counsel later acknowledged that she "told counsel before if he wishes to have the Judge take judicial notice that the signatures match, then that is the process that he should take." The circuit court noted that if a signature was verifiable to the "nonexpert eye," it would be verified, but if the court was uncomfortable in verifying the signature, it would not do so. The circuit court expressly stated on the record that *the parties did not ask for an adjournment to obtain handwriting experts*. At that time, defense counsel did not request the opportunity to submit the signatures to a handwriting expert, despite the trial court's statement. A party may not harbor error as an appellate parachute by assenting to action in the lower proceeding and raising the issue as an error on appeal. *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010). Because there is no indication in the record that the director of elections employed

Even though it is not entirely clear whether the circuit court's ruling resulted in an order of mandamus, superintending control, or declaratory relief, we conclude that the circuit court's review of the signatures was proper. Because plaintiff demonstrated that she had the minimum number of valid signatures, she had a clear legal right to the relief granted by the circuit court.

IV. CONCLUSION

We hold that the circuit court properly ordered plaintiff's name to be placed on the August 6, 2013, primary election ballot as a candidate for the office of Detroit City Clerk. Defendants failed to comply with their statutory duties with respect to review of nominating petitions and plaintiff had a clear legal right to performance. In light of defendants' failure to afford plaintiff a meaningful review by the Secretary of State, the circuit court's consideration of plaintiff's third amended complaint for mandamus, superintending control, preliminary injunction and declaratory judgment was warranted under MCL 168.552(6).

Affirmed. No costs to be taxed, a public question being involved. MCR 7.219(A). This opinion is given immediate effect pursuant to MCR 7.215(F)(2).

FORT HOOD, P.J., and WILDER and STEPHENS, JJ., concurred.

---

an expert in the ordinary course of business to verify signatures and the circuit court compared specific identifying features of different letters, we cannot conclude that the circuit court's verification of the signatures was clearly erroneous. *City of Flint v Chrisdom Props, Ltd*, 283 Mich App 494, 498; 770 NW2d 888 (2009).

SYSTEM SOFT TECHNOLOGIES, LLC v ARTEMIS TECHNOLOGIES, INC

Docket No. 310091. Submitted July 10, 2013, at Lansing. Decided July 16, 2013, at 9:00 a.m.

System Soft Technologies, L.L.C., filed a notice of entry of a foreign judgment in the Ingham Circuit Court, seeking to enforce a default judgment it had obtained in Florida against Artemis Technologies, Inc. System Soft subsequently issued writs of garnishment against several of Artemis's customers. Summit Community Bank moved to intervene and for a temporary restraining order quashing execution on the writs, arguing that it had priority over unsecured creditors, including System Soft, as a perfected, secured creditor of Artemis. Summit explained that it had already declared Artemis in default, provided notice of the default, and preserved its rights to accelerate the maturity of its loans to Artemis and to give notice to Artemis's account debtors to direct future payments to Summit. The court, Clinton Canady, III, J., granted Summit's motion to intervene, quashed System Soft's writs of garnishment, and enjoined System Soft from taking further collection action against defendant. System Soft appealed by leave granted.

The Court of Appeals *held*:

1. Summit was not required to foreclose on its security interest in order to prevent System Soft from collecting on its debt. Under MCL 440.9601(1)(a), after default a secured creditor may reduce a claim to judgment, foreclose, or otherwise enforce the claim by any available judicial procedure. A secured party may also notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party under MCL 440.9607(1)(a). The secured party, however, is not required to take those actions. Under MCL 440.9601(1), after default the secured party also has those rights provided by agreement of the parties. In this case, Summit's agreement with Artemis entitled it to exercise the rights and remedies of a secured creditor under the Uniform Commercial Code and all other rights and remedies available at law, in equity, or otherwise. Pursuant to Summit's forbearance agreement with Arte-

mis, Summit had allowed Artemis to continue to operate its business after default in order for Artemis to generate income to repay its loan balances. This forbearance agreement was permissible under Artemis's security agreement with Summit and under MCL 440.9601(1). The agreement was also appropriate given that the evidence indicated that liquidating Artemis's assets would have resulted in Summit only being repaid a small fraction of what it was owed. Because Summit was not required to foreclose, liquidate, or seize Artemis's assets and the security agreement and MCL 440.9601(1) authorized the method Summit used to collect on the debt, the trial court did not abuse its discretion by quashing System Soft's writs of garnishment or by enjoining System Soft from taking other collection action against Artemis.

2. The equitable remedy of the marshaling of assets exists for the benefit of persons who hold a subordinate secured claim in property. When a senior creditor has a lien against two funds or parcels and the junior lienor has a lien against only one of those properties, a court of equity may compel the former to satisfy its claim out of the property that is encumbered by its only lien. However, application of the doctrine is limited in that it will not be allowed if it cannot be invoked without prejudicing or injuring the rights of the senior creditor or when it would harm the interests of a third party. In this case, even if System Soft held a subordinate secured claim in the accounts receivable and could invoke the doctrine of marshaling, the issue was not ripe for appellate review given that the trial court had offered to conduct an evidentiary hearing to determine whether the doctrine of marshaling would benefit System Soft, and System Soft had declined to pursue the evidentiary hearing.

Affirmed.

DEBTOR AND CREDITOR — PRIORITY — PROTECTION OF INTERESTS — SECURED CREDITORS.

A perfected, secured creditor is not required to foreclose on its security interest in order to prevent an unsecured creditor from collecting on the unsecured creditor's debt; under MCL 440.9601(1)(a), after default a secured creditor may reduce a claim to judgment, foreclose, or otherwise enforce the claim by any available judicial procedure; a secured party may also notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party under MCL 440.9607(1)(a), but the secured party is not required to take those actions.

Maddin, Hauser, Wartell, Roth & Heller, P.C. (by *Martin S. Frenkel* and *Brandon K. Buck*), for System Soft Technologies, L.L.C.

Grua, Tupper & Young, PLC (by *Remo Mark Grua* and *Thomas M. Tupper*), for Summit Community Bank.

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

PER CURIAM. Plaintiff, System Soft Technologies, L.L.C., appeals by leave granted the trial court's order granting intervenor, Summit Community Bank's (Summit's), motion to intervene, quashing plaintiff's writs of garnishment, and enjoining plaintiff from taking any other collection action against defendant, Artemis Technologies, Inc. Because Summit was a perfected, secured creditor of defendant with higher priority than plaintiff and had declared its loans to defendant in default, accelerated the balances owed, and entered into a forbearance agreement with defendant, and because plaintiff's argument pertaining to the doctrine of marshaling is not ripe for this Court's review, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The basic facts of this case are not in dispute. Plaintiff is a limited liability company with its principal place of business in Florida, and defendant is a Michigan corporation. On December 1, 2008, plaintiff and defendant entered into a contract pursuant to which plaintiff provided employees to defendant to perform information technology services. When defendant failed to make the required payments under the contract, plaintiff obtained a default judgment against defendant in Florida in the amount of $147,398.63.

On July 26, 2011, plaintiff filed a notice of entry of foreign judgment in the Ingham Circuit Court. Defendant filed an objection to the notice, arguing that the Florida court lacked personal jurisdiction over it, rendering the default judgment unenforceable. Plaintiff disputed defendant's claim that the Florida court lacked personal jurisdiction over defendant. The trial court temporarily stayed enforcement of the Florida judgment and ordered defendant to petition the Florida court to determine whether that court had personal jurisdiction over defendant to issue the default judgment. The trial court also ordered defendant to post a surety bond in the amount of $147,398.63. The court further ordered that if defendant failed to timely post the bond, "the Florida Judgment will be entered as a Judgment of this Court without further notice or hearing, and Plaintiff may execute the Florida Judgment in accordance with Michigan law." It is undisputed that defendant failed to timely post the bond.

On February 7, 2012, the trial court signed subpoenas requiring John W. Gilkey, II, and Olubbunmi Akinyemiju, corporate representatives of defendant, to appear for creditor's examinations. The subpoenas contained a restraining order prohibiting defendant from transferring its assets. On February 16, 2012, defendant filed an emergency motion to quash the subpoena issued to Akinyemiju and to allow defendant to pay its regular employee-related expenses and expenses incurred in the ordinary course of business that were necessary to continue operations. On February 24, 2012, the trial court entered an order quashing the subpoena issued to Akinyemiju and modifying the subpoena issued to Gilkey to allow defendant to make payments and transfer assets "in the ordinary course of business[.]"

On April 4, 2012, plaintiff issued writs of garnishment against several of defendant's customers, i.e., defendant's accounts receivable, following which Summit filed a motion to intervene and a motion for a temporary restraining order quashing execution on the writs. Summit argued that it is a perfected, secured creditor of defendant pursuant to loan agreements, promissory notes, and security agreements for both a term loan and a line of credit. Summit asserted that defendant owed it approximately $422,000 and that it had declared defendant in default, provided a notice of default, and preserved its rights to accelerate the maturity of the loans and to give notice to account debtors to direct future payments to Summit. Summit argued that the trial court should quash plaintiff's writs of garnishment because Summit had a perfected security interest in all of defendant's assets, including its accounts receivable, and, accordingly, Summit had priority over unsecured creditors such as plaintiff. Summit rejected the notion that it had to enforce its security interest in order to have priority over plaintiff. The trial court entered a temporary restraining order enjoining plaintiff from serving the writs of garnishment or attempting to execute on the writs for a period of 14 days.

In response to Summit's motion, plaintiff argued that it had discovered during Gilkey's creditor's examination that defendant is making its full monthly loan payments to Summit and that defendant has approximately $700,000 in total assets. Plaintiff asserted that Summit had repeatedly threatened to execute its security interest if plaintiff did not accept defendant's settlement offer. Plaintiff contended that on numerous occasions it requested Summit to state in specific detail the actions that it had taken to enforce its security interest against defendant, but that Summit had failed

to respond. Plaintiff argued that defendant and Summit colluded to prevent plaintiff from collecting on its default judgment. Plaintiff requested that the trial court order Summit to marshal defendant's other assets before seeking to execute its security interest on the accounts receivable that are the subject of plaintiff's writs of garnishment.

Defendant filed a brief in support of Summit's motion to intervene. Defendant maintained that Gilkey's testimony during the creditor's examination made clear that liquidation of defendant's assets would likely result in only $60,000 to $80,000. Defendant asserted that it owed Summit approximately $422,000 and that it owed state and federal taxes totaling approximately $295,000. Defendant contended that Summit held a perfected first-priority lien on defendant's assets and that the state and federal taxing authorities held a perfected second-priority lien on those assets. Defendant argued that absent an order enjoining plaintiff from executing on the writs of garnishment directed to defendant's customers, plaintiff's collection activities would result in defendant's loss of future revenue. Defendant maintained that the only way that its unsecured creditors, such as plaintiff, would get paid is if it is able to stay in business, continue to work with its customers, and generate new revenue. Finally, defendant contended that if it was forced to close and liquidate its assets, Summit would likely recover only 20 percent of what it was owed, and plaintiff and the state and federal taxing authorities would recover nothing.

Following a hearing on Summit's motion, the trial court entered an order granting Summit's motion to intervene, quashing plaintiff's writs of garnishment,

and enjoining plaintiff from taking further collection action against defendant. The trial court stated, in relevant part:

> We now turn to the question of what are we going to do with the existing writs? The Court would conclude that it doesn't believe that marshaling applies here because prior to the issuance of the writs, [plaintiff] was not a lienholder. They [sic] were a general unsecured creditor.
>
> [Counsel for plaintiff] would argue that upon filing the writs, he would become a lienholder to those limited funds that are subject to the writ, but at the time the writ was issued, they [sic] were not [a] lienholder. And I don't really know if in this instance whether marshaling applies. It would seem to me there would be several accounts out there and a lienholder in one account had priority and also might have been on three or four other accounts, and then there is a junior lienholder that only has one, and there is sufficient monies in the other accounts to put something toward the junior had they decided to put that money in that account. We don't have that situation here. It appears that we have a workout agreement after default on the loan that has allowed [defendant] to stay in business.
>
> As the bank is monitoring the deposits, [defendant] apparently is still paying its expenses, has 15 employees, . . . and has been making payments. They've reduced the amount. . . .
>
> The Court isn't in a position to determine today the value of the assets of [defendant]. We—there seems to be little dispute over the fact that ahead of [plaintiff] at a minimum is Summit who's perfected [and] the federal/state taxing authorities. So it looks like those numbers, even taking the numbers presented here today, um, are close, so I don't know if there would be any money that would go through to [plaintiff].
>
> And I say that because I think in today's economy, with the nature of the economy as it is, [plaintiff] is saying, well, they could foreclose, and the result would be putting these 15 people out of work when, in fact, there is little likelihood

in the Court's opinion based on the information I have today that [plaintiff] will be getting anything anyways.

. . . It would be different if, you know, we had some substantial assets, but I don't see that here.

And there was an argument about the liquidation, and I've already talked about that. That doesn't appear as if there is sufficient funds, but I think [plaintiff] would be entitled to have an evidentiary hearing on this, if they [sic] so desire to, I guess, go back over the results of the debtor's exam. I don't think the debtor's exam would take the place of an evidentiary hearing, frankly, so if you wanted—[plaintiff] wanted to come in and challenge the asset listing.

I think the compelling—two compelling things for me are, A, the perfected security agreement that's in place for these same funds. And, B, that the bank had already declared a default on the loan and was trying to work it out to keep [defendant] in business because as [Summit] at least indicated . . . today, that it's not in their best interest for [defendant] to go out of business. I don't think it's [plaintiff's] best interest for them to go out of business when, in fact, it doesn't appear as if there would be any funds even if there was a total foreclosure.

I think it's likely that Summit would prevail on their request as a priority lienholder. So let me make that on the record too; they're a priority lienholder, and I think it's likely they would prevail on this. So I think the likelihood on them prevailing in this matter is great. I think there is irreparable harm to potential employees of [defendant] if they're displaced in their job while this matter is pending.

So for those reasons, I'm going to grant Summit Bank's motion to intervene. I'm going to quash the writs of garnishment that have been issued, and I'm going to continue the injunction in this matter until we have an evidentiary hearing.

. . . So I would think that would leave it up to [plaintiff] if they [sic] wish to have an evidentiary hearing; that we'd give them [sic] one as soon as practicable.

Plaintiff now appeals the trial court's ruling.

II. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision whether to quash a writ of garnishment. *Cortez v Int'l Union, United Auto, Aircraft & Agricultural Workers of America (UAW-CIO)*, 339 Mich 446, 453; 64 NW2d 636 (1954). We also review for an abuse of discretion a trial court's decision to grant injunctive relief. *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571 (2007). "An abuse of discretion occurs when a trial court's decision is not within the range of reasonable and principled outcomes." *Id*. In addition, we review equitable issues de novo. *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010).

III. LEGAL ANALYSIS

Plaintiff argues that the trial court erred by quashing its writs of garnishment and enjoining it from taking further collection activities against defendant. Plaintiff does not contest that Summit, a perfected, secured creditor, has higher priority than plaintiff, a mere judgment creditor, but asserts that Summit was required to foreclose on its security interest in order to prevent plaintiff from collecting on its debt.

In support of its argument, plaintiff relies on MCR 3.101(E)(3)(e), MCR 3.101(G)(1)(d), and MCR 3.101(J)(2). MCR 3.101(G)(1)(d) concerns the liability of garnishees:

> (1) Subject to the provisions of the garnishment statute and any setoff permitted by law or these rules, the garnishee is liable for
>
> * * *

(d) all debts, whether or not due, owing by the garnishee to the defendant when the writ is served on the garnishee, except for debts evidenced by negotiable instruments or representing the earnings of the defendant[.]

MCR 3.101(J)(2) concerns payment of periodic garnishments: "For periodic garnishments, all future payments shall be paid as they become due as directed by the court pursuant to subrule (E)(3)(e) until expiration of the garnishment." MCR 3.101(E)(3)(e) concerns the manner of payment:

(3) The writ shall direct the garnishee to:

* * *

(e) in the discretion of the court and in accordance with subrule (J), order the garnishee either to

(i) make all payments directly to the plaintiff or

(ii) send the funds to the court in the manner specified in the writ.

Summit correctly argues that these provisions merely set forth the process for postjudgment garnishment and do not address the specific question at issue in this appeal, i.e., whether the trial court properly quashed plaintiff's writs of garnishment when Summit elected not to foreclose on its security interest. Thus, plaintiff's reliance on these court rules is misplaced.

Plaintiff's reliance on *Cortez*, 339 Mich 446, and *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14; 69 NW2d 176 (1955), is likewise misplaced because those cases involved prejudgment garnishment, as opposed to postjudgment garnishment, and have no bearing on the legal issue presented in this appeal. This Court was unable to locate any Michigan precedent addressing a junior creditor's rights when a senior creditor refuses to execute on its security interest. In fact, several law

review articles indicate that article 9 of the Uniform Commercial Code (UCC), which concerns secured transactions, fails to specify a result when a senior creditor fails to enforce its interest while a junior creditor seeks to enforce a lien. See, e.g., Note, *Secured creditors holding lien creditors hostage: Have a little faith in revised article 9*, 81 Ind L J 733 (2006). Article 9 of the Michigan UCC, MCL 440.9101 *et seq.*,[1] provides that, after default, a secured party "[*m*]*ay* reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure." MCL 440.9601(1)(a). A secured party "[m]ay" also "[n]otify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party." MCL 440.9607(1)(a). Notably, the UCC does not *require* a secured party to foreclose, to order an account debtor to pay the secured party, or to enforce the claim by judicial procedure.

Particularly relevant to this case is MCL 440.9601(1), which states that "[a]fter default, a secured party has the rights provided in this part and, except as otherwise provided in section 9602,[2] those provided by agreement of the parties." The security agreement in this case set forth certain rights and remedies in the event of default. The agreement provided, in relevant part:

> **Other Rights and Remedies**. Lender [i.e., Summit] shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, as may be amended from time to time. *In addition, Lender*

[1] Effective July 1, 2013, article 9 of the Michigan UCC was amended by 2012 PA 87. Our references to UCC provisions are to those in effect at the time that the trial court decided this dispute.

[2] MCL 440.9602 pertains to rights that a debtor or obligor may not waive.

> *shall have and may exercise any or all other rights and remedies it may have available at law, in equity, or otherwise*. [Emphasis added.]

Summit opted to declare the loans in default, accelerate the balances, and enter into a forbearance agreement with defendant. A forbearance agreement is an agreement between a defaulting party and a lender regarding the manner in which the parties intend to handle the default. See *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 622; 752 NW2d 37 (2008); *Fed Nat'l Mtg Ass'n v Wingate*, 404 Mich 661, 669; 273 NW2d 456 (1979). Pursuant to the forbearance agreement, Summit allowed defendant to continue to operate its business and generate income in order for defendant to repay its loan balances. It appears that Summit's approach was appropriate given that liquidating defendant's assets would have purportedly resulted in Summit only being repaid only approximately 20 percent of what it was owed. Pursuant to the security agreement and MCL 440.9601(1), Summit was entitled to enter into the forbearance agreement with defendant as a remedy for defendant's default.

Plaintiff argues that this case is on all fours with *Frierson v United Farm Agency, Inc*, 868 F2d 302 (CA 8, 1989), and that a similar result is compelled. In that case, a judgment creditor served summonses of garnishment on three banks, including Merchants Bank (Merchants), in which the debtor had deposit accounts. *Id*. at 303. Merchants maintained that it had a perfected security interest in all of the debtor's funds on deposit and denied that the funds belonged to the debtor. *Id*. The trial court determined that Merchants had a prior perfected security interest in all three bank accounts but that, "because Merchants did not declare [its loan to the debtor] in default or follow procedures required

by the loan agreement to enforce its U.C.C. and contract rights, Merchants had neither a present right to the funds nor a right to have the garnishment quashed." *Id*. The appellate court agreed, stating that "Merchants cannot refuse to exercise its rights under the security agreement, thereby maintaining [the debtor] as a going concern, while it impairs the status of other creditors by preventing them from exercising valid liens." *Id*. at 305. The court concluded by stating that the judgment creditor could garnish the funds, but that "Merchants' security interest in the funds will continue, and Merchants can trace and recapture when it chooses to declare the loan in default and accelerate the debt."

In this case, unlike in *Frierson*, Summit did declare its loans to defendant in default and accelerate the balances due. Summit and defendant also entered into a forbearance agreement pursuant to which defendant made payments to Summit. The security agreement specifically authorized Summit to exercise any and all rights and remedies against defendant, and it appears that Summit opted for the remedy that gave it the best chance of collecting the total balance due. Thus, this case is distinguishable from *Frierson*, in which Merchants did not declare the debtor in default and did not accelerate the debt. In short, because the UCC did not require Summit to foreclose, liquidate, or seize defendant's assets and because MCL 440.9601(1) and the security agreement authorized Summit's method of collecting on the debt, the trial court did not abuse its discretion by quashing plaintiff's writs of garnishment and enjoining plaintiff from taking other collection activities against defendant.

Plaintiff also argues that the trial court erred by failing to order Summit to marshal defendant's assets not subject to plaintiff's writs of garnishment and to

enforce Gilkey's personal guaranty granted as security to Summit in exchange for Summit's loans to defendant. Plaintiff contends that, at a minimum, the trial court erred by failing to conduct an evidentiary hearing to determine whether defendant's assets should be marshaled.

"[T]he equitable remedy of marshaling of assets exists for the benefit of persons who hold a subordinate secured claim in property[.]" *SCD Chem Distrib, Inc v Maintenance Research Laboratory, Inc*, 191 Mich App 43, 46; 477 NW2d 434 (1991). Pursuant to the doctrine:

> [W]here a senior creditor has a lien against two funds or parcels and the junior lienor has a lien against only one of those properties, a court of equity may compel the former to satisfy its claim out of the property that is encumbered by only its lien. However, application of the doctrine is limited in that it will not be allowed if it cannot be invoked without prejudicing or injuring the rights of the senior creditor or where it would harm the interests of a third party. [*Id*.]

Even assuming that plaintiff held a subordinate secured claim in the accounts receivable and could therefore properly invoke the doctrine of marshaling,[3] plaintiff's argument is not ripe for this Court's review. The trial court opined that it did not appear that marshaling defendant's assets would benefit plaintiff because it did not appear that defendant had sufficient assets to pay Summit, the state and federal taxing authorities, and plaintiff, in that order. Nonetheless, the court stated several times that it would

[3] Because the trial court entered a temporary restraining order enjoining plaintiff from serving the writs of garnishment, plaintiff never became a lien creditor whose rights attached. "[A] garnishment lien attaches upon service of the writ." *Mich Tractor & Machinery Co v Elsey*, 216 Mich App 94, 97; 549 NW2d 27 (1996) (quotation marks and citation omitted).

hold an evidentiary hearing to determine the amount of defendant's assets if plaintiff wanted to pursue the matter. In fact, the trial court continued the injunction on plaintiff's collection activities "until we have an evidentiary hearing." Plaintiff, however, never requested an evidentiary hearing and instead sought leave to appeal in this Court arguing that, at a minimum, the trial court erred because it did not conduct an evidentiary hearing. Because the trial court offered to conduct an evidentiary hearing to determine whether the doctrine of marshaling would benefit plaintiff, and plaintiff declined to pursue the matter, this issue is not ripe for our review. Generally, "appellate review is limited to issues decided by the trial court." *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).

Finally, plaintiff's argument that the trial court erred by failing to require Summit to enforce the personal guaranty that Gilkey had granted to Summit is part and parcel of plaintiff's argument pertaining to marshaling of defendant's assets and is likewise not ripe for this Court's review. Courts have recognized that the property of a guarantor shareholder may be considered the property of the corporate debtor in certain circumstances. See, e.g., *In re Dealer Support Servs Int'l, Inc*, 73 BR 763, 765 (ED Mich, 1987). Those circumstances include when the shareholder treated the corporation as an alter ego, when the shareholder holds property against the corporation that equitably should be deemed a contribution to the corporation's capital, and when the shareholder has engaged in inequitable conduct. *Id*. The record is devoid of any indication that these circumstances applied to Gilkey. Indeed, this matter is an appropriate issue for examination at an evidentiary hearing.

Affirmed. Summit, being the prevailing party, may tax costs pursuant to MCR 7.219.

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

PERKINS v AUTO-OWNERS INSURANCE COMPANY

Docket Nos. 310473 and 312674. Submitted July 10, 2013, at Lansing. Decided July 18, 2013, at 9:00 a.m. Leave to appeal sought.

James Perkins brought an action in the Grand Traverse Circuit Court against Auto-Owners Insurance Company, State Farm Fire & Casualty Company, State Farm Mutual Automobile Insurance Company, and Progressive Northern Insurance Company, seeking first-party no-fault personal protection insurance (PIP) benefits. Plaintiff had been injured in a collision involving his motorcycle and a motor vehicle in Michigan. At the time of the accident, plaintiff was a resident of Kentucky. The motorcycle was registered in Kentucky and insured by Progressive. Plaintiff also had motor vehicles in Kentucky insured by either or both of the State Farm defendants. Auto-Owners insured the motor vehicle involved in the collision. The court, Philip E. Rodgers, Jr., J., granted summary disposition in favor of the State Farm defendants and Progressive. Plaintiff and Auto-Owners then filed cross-motions for summary disposition, and the court granted plaintiff's motion and denied Auto-Owners' motion, ruling that Auto-Owners was obligated to pay Michigan no-fault benefits to plaintiff. The court also granted plaintiff attorney fees, interest, and costs. Auto-Owners appealed the award of PIP benefits in Docket No. 310473 and the award of attorney fees in Docket No. 312674. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Plaintiff was eligible to receive PIP benefits. MCL 500.3113(c) provides that a person is not entitled to PIP benefits for accidental bodily injury if at the time of the accident (1) he or she was not a resident of Michigan, (2) occupied a motor vehicle or motorcycle not registered in Michigan, and (3) was not insured by an insurer that had filed a certification in compliance with MCL 500.3163, the section of the no-fault act that makes an insurer that files the necessary certification subject to the Michigan PIP system with respect to an out-of-state resident insured under its policy. Plaintiff's motorcycle insurer had not filed this certification, but the insurers of his automobiles had. Auto-Owners argued that because the insurer of his motorcycle had not filed the certifica-

tion, plaintiff was not entitled to PIP benefits. For plaintiff to have been excluded from PIP benefits under MCL 500.3113(c), however, all three conditions of that statute must have been met. The third condition was not. The statute precludes recovery if the out-of-state party was not insured by an insurer that filed a certification in compliance with MCL 500.3163. In fact, plaintiff was so insured because his motor vehicle insurers had filed the required certification. Nothing in the statute requires that the insurer filing the certification be the one that provided insurance for the vehicle involved in the accident. Under the no-fault act, persons rather than vehicles are insured against loss.

2. MCL 500.3148(1) provides that an attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits that are overdue if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. The mere fact that it is ultimately determined that the insurer must pay benefits does not compel the conclusion that its initial decision to deny benefits was unreasonable, but Auto-Owners did not raise a legitimate question of statutory construction in this case. The actual language of MCL 500.3113(c) does not establish the requirement that the out-of-state vehicle occupied by the claimant must be the one for which the insurer has filed a certification, the cases Auto-Owners relied on for its argument were not on point, and Auto-Owners made a nonsensical argument that its interpretation of the statute was necessary to keep out-of-state residents living near Michigan's borders from scamming the no-fault system. Auto-Owners failed to present any legitimate basis to even consider accepting its interpretation of the statute. To conclude that Auto-Owners presented a legitimate question of statutory interpretation in this case would effectively require adoption of the principle that any time an insurer raises a question of first impression under the no-fault act, that question, as a matter of law, presents a legitimate question of statutory interpretation.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — MOTORCYCLE ACCIDENTS — CERTIFICATION OF NO-FAULT COVERAGE BY INSURERS.

MCL 500.3113(c) provides that a person is not entitled to personal protection insurance (PIP) benefits under the no-fault act for accidental bodily injury if at the time of the accident (1) he or she was not a resident of Michigan, (2) occupied a motor vehicle or motorcycle not registered in Michigan, and (3) was not insured by

an insurer that had filed a certification in compliance with MCL 500.3163, the section of the no-fault act that makes an insurer that files the necessary certification subject to the PIP system with respect to an out-of-state resident insured under its policy; nothing in the statute requires that the insurer that filed the certification be the one that provided insurance for the vehicle involved in the accident, and a person who occupied a motor vehicle or motorcycle insured by an insurer that did not file the certification may nonetheless be entitled to PIP benefits if he or she has vehicles insured by another insurer who did.

Jay Zelenock Law Firm PLC (by *Jay Zelenock* and *Laura A. Van Hyfte*) for James Perkins.

Strain, Murphy & VanderWal, P.C. (by *Joseph P. VanderVeen*), for Auto-Owners Insurance Company.

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

SAWYER, P.J. This case presents what appears to be a question of first impression, namely whether a nonresident motorcyclist who is involved in an accident with a motor vehicle in this state is entitled to personal protection insurance (PIP) benefits when the insurer of the motorcycle involved in the accident has not filed a certification under MCL 500.3163, but the motorcyclist is also covered under an automobile policy issued by a different insurer, who has filed such a certification, for an automobile not involved in the accident. We hold that under these circumstances, the motorcyclist is entitled to PIP benefits.

The facts relevant to these appeals are not in dispute. Plaintiff was injured while riding his motorcycle on M-22 near Glen Arbor, Michigan, and was involved in a collision with a motor vehicle operated by Sara Kaplan. At the time of the accident, plaintiff was a resident of the commonwealth of Kentucky. The motorcycle was registered in Kentucky and insured by defendant Pro-

gressive Northern Insurance Company. At the time of the accident, plaintiff also had motor vehicles in Kentucky insured by defendants State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company (collectively "State Farm"). The Kaplan vehicle was insured by defendant Auto-Owners Insurance Company.

Plaintiff filed the instant action, seeking first-party no-fault benefits from all three insurance companies. The trial court granted State Farm's and Progressive Northern's motions for summary disposition. Plaintiff and Auto-Owners then filed cross-motions for summary disposition, with the trial court granting plaintiff's motion and denying Auto-Owners' motion, ruling that Auto-Owners was obligated to pay Michigan no-fault benefits to plaintiff. Thereafter, the trial court also granted plaintiff's motion for attorney fees, interest, and costs. Auto-Owners now appeals.

We review de novo the trial court's decision on summary disposition.[1] Similarly, questions of statutory interpretation are reviewed de novo.[2] We give the words used by the Legislature their plain and ordinary meaning.[3]

With respect to the PIP benefit claim in its first appeal, Auto-Owners' sole argument is that plaintiff is not entitled to PIP benefits because the insurer of the motorcycle had not filed a certification in compliance with MCL 500.3163. MCL 500.3113(c) provides in relevant part as follows:

---

[1] *Borman v State Farm Fire & Cas Co,* 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482 (1994).

[2] *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 598; 822 NW2d 159 (2012) (opinion by MARY BETH KELLY, J.)

[3] *Id.*

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (c) The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and was not insured by an insurer which has filed a certification in compliance with section 3163.

Section 3163, MCL 500.3163, provides as follows:

> (1) An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.
>
> (2) A nonadmitted insurer may voluntarily file the certification described in subsection (1).
>
> (3) Except as otherwise provided in subsection (4), if a certification filed under subsection (1) or (2) applies to accidental bodily injury or property damage, the insurer and its insureds with respect to that injury or damage have the rights and immunities under this act for personal and property protection insureds, and claimants have the rights and benefits of personal and property protection insurance claimants, including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage.
>
> (4) If an insurer of an out-of-state resident is required to provide benefits under subsections (1) to (3) to that out-of-state resident for accidental bodily injury for an accident in

> which the out-of-state resident was not an occupant of a motor vehicle registered in this state, the insurer is only liable for the amount of ultimate loss sustained up to $500,000.00. Benefits under this subsection are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.

It is undisputed that plaintiff's motorcycle insurer has not filed this certification, while his automobile insurer has filed a certification. The question to be resolved is whether it was necessary for the motorcycle insurer to have filed the certification in order for plaintiff to be eligible to receive PIP benefits because it was the motorcycle, and not plaintiff's automobile, that was involved in the accident. We agree with the trial court that it was not and that plaintiff is eligible to receive PIP benefits.

We turn first to the actual language of the statute. We find the terms of § 3113(c) plain and unambiguous: for plaintiff to be excluded from PIP benefits, all three conditions must be met. And the third condition has not been met. MCL 500.3113(c) precludes recovery if the out-of-state party "was not insured by an insurer which has filed a certification in compliance with section 3163." The simple fact remains that plaintiff was insured by an insurer that had filed the required certification. Nothing in the statute requires that the insurer be the one that provided insurance for the vehicle involved in the accident. Indeed, as this Court observed in *Farmers Ins Exch v Farm Bureau Gen Ins Co of Michigan*,[4] under the no-fault act "persons rather than vehicles are insured against loss." And because plaintiff

[4] 272 Mich App 106, 109; 724 NW2d 485 (2006).

is a person insured by a carrier that had filed a certification under § 3163, § 3113(c) does not exclude him from PIP benefits.

Auto-Owners cites two cases in support of its position, neither of which is particularly helpful in resolving this question. Auto-Owners cites *Gersten v Blackwell*[5] for the proposition that the general purpose behind MCL 500.3113(c) is to "prevent benefits provided by Michigan's scheme from going to someone who has not paid a premium for the same." But *Gersten* did not deal with the situation in which the out-of-state party was occupying a vehicle insured by an "uncertified" insurer but also owned a vehicle insured by a "certified" insurer. Rather, it merely dealt with the question whether treating in-state and out-of-state residents differently posed a constitutional violation, which it concluded did not.[6]

Similarly, the other case relied on by Auto-Owners, *Drake v Gordon*,[7] did not deal with the multivehicle question presented in the case at bar; once again, the applicability (and constitutionality) of applying the no-fault act to out-of-state residents, specifically the restrictions on tort recoveries, was the issue resolved in the case. Auto-Owners relies on *Drake* for the proposition that out-of-state motorists cannot "successfully contend that they are entitled to the benefits of [the no-fault act] without having borne its burdens" and that plaintiff could have protected himself by "paying into the state's plan."[8]

But Auto-Owner's argument contains a logical flaw: plaintiff has paid into the no-fault system through the

---

[5] 111 Mich App 418, 424; 314 NW2d 645 (1981).

[6] *Id*. at 424-425.

[7] 848 F2d 701 (CA 6, 1988).

[8] *Id*. at 707-708.

motor vehicle insured by State Farm. More precisely, MCL 500.3113(c) would not operate to preclude plaintiff's recovery of PIP benefits had he been driving his State Farm insured motor vehicle at the time of the accident instead of the motorcycle. But in terms of plaintiff having paid into Michigan's no-fault system, nothing would have been different: he would have paid the same premiums to the same insurers who had the same certification or lack of certification under § 3163.

Furthermore, Auto Owners' suggestion that the Legislature intended to exclude nonresident motorcyclists "from receipt of no-fault benefits where the motorcyclist has not paid a premium for no-fault PIP coverage on his motorcycle" overlooks a very basic fact: only the owner or registrant of a motor vehicle is required to have personal protection insurance and, by definition, motorcycles are not motor vehicles.[9] Therefore, motorcycles are not required to have personal protection insurance coverage. Nevertheless, motorcyclists are entitled to PIP benefits when injured in an accident involving a motor vehicle.[10] Indeed, Auto-Owners' argument is inconsistent with the fact that a person is entitled to PIP benefits if injured in a motor vehicle accident even if not an occupant of a motor vehicle.[11] To accept Auto-Owners' argument, we would have to ignore these statutes because it would be necessary to conclude that to be eligible to receive PIP benefits, one must be occupying a vehicle insured under the no-fault act at the time of injury. Clearly that is not the case.

In fact, not only are motorcyclists entitled to PIP benefits despite the fact that there is no requirement that they carry insurance with PIP benefits, the motor-

---

[9] MCL 500.3101(1) and (2)(e).

[10] MCL 500.3114(5).

[11] MCL 500.3115.

cycle insurer is never required to pay PIP benefits through the motorcycle policy. Under MCL 500.3114(5), the motorcycle insurance policy is never the source of the payment of PIP benefits. This further demonstrates that the Legislature, while desiring to generally extend PIP benefits to motorcyclists, was unconcerned with the motorcycle insurer's certification status under § 3163.

Moreover, it is not always the case that the insurer related to the motor vehicle involved in the accident will be the one responsible for the payment of PIP benefits. For example, in *Goldstein v Progressive Cas Ins Co*,[12] an out-of-state resident was a passenger in a car that was registered out of state itself. The plaintiff was covered by a policy issued to his father, also an out-of-state resident. Both insurers had filed certifications pursuant to MCL 500.3163. This Court determined that the insurer that had issued the policy to the plaintiff's father (whose vehicle was not involved in the accident) covered the plaintiff and was responsible for the payment of no-fault benefits.[13]

This Court addressed a similar issue in *Transport Ins Co v Home Ins Co*,[14] in which we held that

> [o]ur reading of § 3163 according to the plain and ordinary meaning of its words does not persuade us that the motor vehicle owned, operated, maintained, or used by the nonresident must also be one that is covered under the terms of the foreign policy. In our view, the only conditions of carrier liability imposed under § 3163 are: (1) certification of the carrier in Michigan, (2) existence of an automobile liability policy between the nonresident and the certified carrier, and (3) a sufficient causal relationship between the

[12] 218 Mich App 105; 553 NW2d 353 (1996).

[13] *Id*. at 107-108.

[14] 134 Mich App 645, 651; 352 NW2d 701 (1984).

> nonresident's injuries and his or her ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. Inasmuch as the undisputed facts of this case reveal that these three conditions of liability have been met, we find no error in the trial court's reliance on § 3163.

Auto-Owners also poses a nonsensical argument suggesting that plaintiff's interpretation of the statute would allow a nonresident to create a scheme by which the nonresident could avail himself or herself of PIP benefits. Under Auto-Owners' scenario, a nonresident who lives near the Michigan border could insure a junker car for a minimal amount from a noncertified insurer, keep it parked at home, drive an uninsured vehicle to and from work in Michigan, and be entitled to PIP benefits. This argument fails for at least two reasons. First, while Auto-Owners is correct that it would avoid the provisions of MCL 500.3113(b),[15] it would still not avoid MCL 500.3113(c) because there would be no coverage by an insurer that had filed a certification. Second, it overlooks the requirement under MCL 500.3102 of no-fault insurance for any motor vehicle operated in this state for 30 or more days per calendar year.

In sum, Auto-Owners' arguments fail to counter the clear and unambiguous language of § 3113(c). Plaintiff is a person insured by an insurer that has filed a certification under § 3163. Therefore, plaintiff is not excluded from receiving PIP benefits after being injured in a motor vehicle accident occurring in Michigan.

In its second appeal, Auto-Owners challenges the trial court's award of attorney fees under MCL 500.3148(1), which provides as follows:

---

[15] The provisions of MCL 500.3113(b) are avoided because an out-of-state vehicle is not required to carry no-fault insurance under § 3101.

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

This presents a mixed question of fact and law. The question of what constitutes reasonableness is one of law that we review de novo.[16] But whether the denial of no-fault benefits was reasonable under the facts of the case is a question of fact that we review for clear error.[17] The Court in *Ross v Auto Club Group*[18] further explained the purpose of MCL 500.3148(1) and the burden it places on the insurer:

> The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. Accordingly, an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay. The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty. [Citations omitted.]

Auto-Owners argues that it did not unreasonably refuse to pay benefits because there was a legitimate question of statutory construction regarding the interpretation of MCL 500.3113(c). We disagree. Auto-Owners correctly states that the mere fact that it is ultimately determined that the insurer must pay benefits does not compel the conclusion that its initial decision to deny benefits was unreasonable.[19] Neverthe-

---

[16] *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

[17] *Id*.

[18] *Id*. at 11.

[19] *Brown v Home-Owners Ins Co*, 298 Mich App 678, 691; 828 NW2d 400 (2012).

less, we are not persuaded that Auto-Owners raised a legitimate question of statutory construction in this case. As discussed above, the actual language of MCL 500.3113(c) does not establish the requirement that the out-of-state vehicle occupied by the claimant must be the one for which the insurer has filed a certification. The cases relied on by Auto-Owners are not on point and do not logically support its position. And Auto-Owners concludes with a nonsensical argument that its interpretation of the statute was necessary to keep out-of-state residents living near the Michigan border from scamming the no-fault system. In short, not only does Auto-Owners' argument fail, it fails to present any legitimate basis to even consider accepting its interpretation of the statute. To conclude that Auto-Owners in this case has presented a legitimate question of statutory interpretation would effectively require us to adopt a principle that any time an insurer raises a question of first impression under the no-fault act, that question, as a matter of law, presents a legitimate question of statutory interpretation. We are unwilling to do that.

For these reasons, we affirm the trial court's determination that plaintiff was entitled to PIP benefits and that Auto-Owners was obligated to pay plaintiff's attorney fees under MCL 500.3148.

Affirmed. Plaintiff may tax costs.

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

BEV SMITH, INC v ATWELL

Docket No. 308761. Submitted June 11, 2013, at Detroit. Decided July 18, 2013, at 9:05 a.m.

Bev Smith, Inc., brought an action in the Oakland Circuit Court against Steven A. Atwell, alleging breach of contract, fraud in the inducement, fraudulent misrepresentation, and silent fraud related to the sale of a rare 1965 Dodge altered-wheelbase racecar. Plaintiff purchased the vehicle believing the restored Dodge was the vehicle driven by legendary drag racer Dave Strickler during the 1965 drag racing season. Plaintiff alleged that after purchasing the vehicle in 2007, it discovered in the summer or fall of 2008 that the Dodge had been reconstructed chiefly with replacement parts and, thus, that it was not the real and authentic Strickler car as defendant had represented in the bill of sale. Defendant moved for summary disposition under MCR 2.116(C)(10). The court, Wendy L. Potts, J., granted summary disposition in favor of defendant and dismissed plaintiff's claims with prejudice. Plaintiff appealed.

The Court of Appeals *held*:

1. An automobile is a good covered by the Uniform Commercial Code (UCC), MCL 440.2101 *et seq*., and the sale of the Dodge was a transaction in goods within the meaning of MCL 440.2102. The UCC applies to transactions in goods, including rare or antique goods. Under article 2 of the UCC, a buyer may (1) accept goods, MCL 440.2606; MCL 440.2607, (2) reject goods, MCL 440.2602, or (3) revoke acceptance within a reasonable time if a nonconformity substantially impairs the value of the goods, MCL 440.2608. In this case, plaintiff accepted the Dodge. Pursuant to MCL 440.2607(3)(a), when a tender has been accepted, the buyer must within a reasonable time after he or she has discovered or should have discovered any breach, notify the seller of the breach or be barred from any remedy. What is a reasonable time for taking any action depends on the nature, purpose, and circumstances of the action. The documentary evidence in this case established that the replacement body and parts on the Dodge would have been discoverable upon inspection of the vehicle. Even if the Dodge was not the real and authentic Strickler Dodge, it was just as inau-

thentic at the time of purchase as when plaintiff asserts the defects were discovered. The fact that plaintiff had a full and fair opportunity to inspect the Dodge before purchasing it, and an even greater opportunity to inspect the Dodge after purchasing it, necessarily shortened the allowable period for discovering any nonconformities or inauthenticities. Under the circumstances, plaintiff's notice of breach, provided to defendant more than three years after execution of the bill of sale, was not given within a reasonable time. Consequently, the circuit court correctly ruled that plaintiff was barred from any remedy for breach of contract under MCL 440.2607(3)(a).

2. Plaintiff's claims of fraudulent misrepresentation and silent fraud essentially reiterated the allegations set forth in its breach-of-contract claim. Accordingly, plaintiff was limited to its contractual remedies under the UCC, and the trial court properly granted summary disposition in favor of defendant with respect to those claims.

3. There can be no fraud when the means of knowledge regarding the truthfulness of a representation were available to the plaintiff and the defendant did not prohibit the plaintiff from using those means. In this case, plaintiff received a binder containing numerous photographs, notes, and other documents concerning defendant's restoration of the Dodge. These documents detailed the restoration process, disclosed the presence of the replacement body, and listed many of the other replacement parts used on the vehicle. Additionally, plaintiff had a full and fair opportunity to inspect the vehicle, but did not do so. In sum, plaintiff fully possessed the means of discovering the truth or falsity of defendant's representations, and plaintiff's ability to use those means was never prohibited or impeded by defendant in any way. Rather, plaintiff was presented with the information and chose to ignore it and, therefore, could not have been fraudulently induced to enter into the transaction as a matter of law. The circuit court properly granted summary disposition in favor of defendant with respect to plaintiff's claim of fraud in the inducement.

Affirmed.

SALES — UNIFORM COMMERCIAL CODE — AUTOMOBILES — RARE GOODS — ACCEPTANCE — NOTICE OF BREACH WITHIN A REASONABLE TIME.

An automobile is a good covered by the Uniform Commercial Code (UCC), MCL 440.2101 *et seq*.; the UCC applies to transactions in goods, including rare or antique goods; under article 2 of the UCC, a buyer may (1) accept goods, MCL 440.2606; MCL 440.2607, (2)

reject goods, MCL 440.2602, or (3) revoke acceptance within a reasonable time if a nonconformity substantially impairs the value of the goods, MCL 440.2608; pursuant to MCL 440.2607(3)(a), when a tender has been accepted, the buyer must within a reasonable time after he or she has discovered or should have discovered any breach, notify the seller of the breach or be barred from any remedy; what is a reasonable time for taking any action depends on the nature, purpose, and circumstances of the action.

Caplan & Associates, P.C. (by *David M. Caplan*), for plaintiff.

Butzel Long, P.C. (by *Phillip C. Korovesis* and *Bernard J. Fuhs*), for defendant.

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

JANSEN, P.J. Plaintiff appeals by right the circuit court's opinion and order of February 9, 2012, granting summary disposition in favor of defendant and dismissing plaintiff's claims with prejudice. We affirm.

I

This case arises from the sale of a rare 1965 Dodge altered-wheelbase racecar ("the Dodge" or "the vehicle"), specially manufactured by Chrysler Corporation for drag racing and use as a promotional vehicle.[1] Legendary drag racer Dave Strickler raced the Dodge during the 1965 season. The Dodge was then sold to another racecar driver, Chuck McJury, who made substantial alterations to the vehicle. Among other things, McJury replaced the vehicle's original 1965 Dodge

[1] It appears from the record that Chrysler built only 12 altered-wheelbase racecars in 1965. Under contract with Chrysler, the vehicles were actually converted and prepared by Detroit-area subcontractor Automotive Conversion Corporation.

Coronet body with a 1966/1967 Dodge Charger body.[2] After racing the Dodge for a short time, McJury sold it to Melvin Smith of East Galesburg, Illinois. Melvin Smith then sold the Dodge to David Fengel in 1979 or 1980. Fengel testified that the vehicle was in poor condition when he purchased it. Fengel described it as a "body shell on wheels" with "[n]o engine" and "no transmission."

Defendant purchased the Dodge from Fengel in the early 1990s for $35,000. Fengel provided defendant with documentation concerning the vehicle's history, alterations, and chain of title. In particular, Fengel provided defendant with the vehicle's original 1965 certificate of title, bearing Dave Strickler's name and address.

Defendant gathered parts and spent more than 10 years restoring the vehicle. Ted Smith, who assisted defendant in the restoration of the Dodge, testified that he and defendant relied on historical photographs, manuals, and other bulletins to guide them in the restoration process. He testified that the Dodge was meticulously restored, using as many original 1965 parts as possible. According to Ted Smith, the only reproduction parts used in the restoration were the left and right front floor panels. Ted Smith agreed that the vehicle had been restored to "Concours level" condition and that it was better than the original car. Despite the presence of the 1966/1967 Dodge Charger body that had been installed by McJury, Ted Smith believed that the restored Dodge represented "the real and authentic Strickler vehicle."

Defendant testified that when he initially acquired the Dodge, it was "very rusty" and was "missing 90

[2] McJury never reinstalled the vehicle's original 1965 Dodge Coronet body. The original 1965 Dodge Coronet body was apparently discarded and has never been recovered.

percent of its parts." Defendant therefore acquired a "donor car" or "parts car" from which he took various parts that were necessary to restore the vehicle. However, defendant testified that he attempted to use as many original parts as possible. To this end, defendant purchased numerous 1965 replacement parts over the years. Defendant opined that, after his restoration of the Dodge, the car was "the real and authentic Strickler vehicle."

Defendant worked with Edward Strzelecki to sell the Dodge after he had finished restoring it. In February 2007, Strzelecki sent letters to potential buyers offering the vehicle for sale and providing certain information concerning the vehicle's history, restoration, and chain of title. In one of those letters, dated February 4, 2007, Strzelecki wrote to Nicholas Smith[3] describing the vehicle as "Dave Strickler's 65 Dodge 'FACTORY' Altered Wheel-Base." Strzelecki explained that the Dodge was on loan to the Chrysler Museum in Auburn Hills, Michigan, where it was on "semi-permanent display." Strzelecki claimed in his letter that the Chrysler Museum had appraised the vehicle and had insured it for more than $2 million.[4]

Nicholas Smith considered Strzelecki to be a friend. Strzelecki gave him a binder containing extensive information and documentation pertaining to the Dodge. Among other things, the binder contained several historical photographs of the vehicle with its 1965 Dodge Coronet body, photographs of the vehicle with its subsequent 1966/1967 Dodge Charger body, documentation

[3] It appears that Nicholas Smith is an officer of plaintiff Bev Smith, Inc. Nicholas Smith is a self-described collector of classic cars.

[4] At oral argument before this Court, plaintiff's attorney asserted that, contrary to Strzelecki's representation, the Chrysler Museum does not appraise or insure the vehicles that it displays.

of the vehicle's chain of title, a handwritten note from McJury confirming that he had purchased the vehicle from Strickler, typewritten notes concerning other 1965 altered-wheelbase racecars in existence, and magazine articles concerning the Strickler car. Nicholas Smith confirmed that he had reviewed the contents of the binder before agreeing to purchase the Dodge from defendant.

"[W]hen it looked like the transaction might happen," Nicholas Smith traveled to Michigan and went to the Chrysler Museum with Strzelecki to personally inspect the vehicle. He walked around the vehicle at the Chrysler Museum but remained "outside of the rails that protected the car from visitors." According to Nicholas Smith, defendant represented "on more than one occasion" that "all of the original parts were used in the [restoration] project."

As soon as plaintiff decided to purchase the Dodge, the parties entered into negotiations concerning the consideration to be paid. Plaintiff ultimately agreed to give defendant $600,000 in cash, plus two other classic automobiles in exchange: (1) a 1964 Dodge Coronet Hemi Super Stock valued at $278,000, and (2) a 1964 Ford Thunderbolt valued at $250,000. On March 29, 2007, the parties executed the following bill of sale[5]:

> BILL OF SALE
>
> Steve Atwell hereby agrees to sell and Bev Smith Ford agrees to purchase the Dave Strickler 1965 Dodge AWB[6] drag car, VIN W151191681. Seller represents this vehicle to be the real and authentic Strickler car, that he (Atwell) is the true owner of the car, and further that no liens or encumbrances exist against the vehicle.

---

[5] Nicholas Smith signed the bill of sale on behalf of plaintiff.

[6] "AWB" means "altered wheelbase."

> It is agreed that Smith will pay Atwell the sum of $600,000.00 (six hundred thousand dollars) plus two vehicles as described herein. Smith represents these two vehicles to be authentic and free of any liens or encumbrances.
>
> 1. 1964 Dodge Coronet Hemi Super Stock (color red), VIN 6142229092
> 2. 1964 Ford Thunderbolt (color white), VIN 4F41K230520.
>
> Smith agrees to provide Atwell first opportunity to purchase the Strickler vehicle in the event Smith elects to re-sell it. Atwell likewise agrees to provide Smith first opportunity to repurchase the Thunderbolt and/or 64 Dodge. As part of this buy-sell agreement, the parties agree that the previous sale of the 1964 Dodge Hemi Super Stock (color black), V[IN] 6142227884 becomes final.
>
> Atwell will be responsible for removing the Strickler car from the Chrysler Museum at a future date to be mutually agreed upon. Coincidently, the car will be delivered by Atwell to an agreed upon site and, at Atwell's expense, brought to good mechanical and running condition.
>
> It is hereby stated and understood that this transaction will not be valid until funds and titles have changed hands.

After plaintiff accepted delivery of the vehicle, Nicholas Smith altered the Dodge in certain respects according to his own preferences and took the vehicle to various car shows. At a classic car event in Ohio in July 2008, a car historian informed Nicholas Smith that the Dodge had a "donor body" and was not the "real" Strickler car. Nicholas Smith subsequently spoke with McJury, who informed him that Strickler's original 1965 Dodge Coronet body had been discarded. Another expert, Mike Guffey, informed Nicholas Smith sometime in the fall of 2008 that the Dodge had relatively few original parts. Defendant testified that he could not recall whether or not he had told plaintiff that the vehicle had its original 1965 body.

On April 20, 2010, plaintiff's attorneys in Florida sent a letter to defendant that stated in pertinent part:

> [Plaintiff] has learned that the Strickler Car it purchased from you is in fact not the "real and authentic" vehicle driven by Dave Strickler in the 1960s, as you expressly represented and warranted during the sale and in the Contract. [Plaintiff] now knows that the vehicle was re-bodied and otherwise restored using predominantly non-original and reproduction parts. [Plaintiff] would never have purchased the Strickler Car if it knew the vehicle was not the "real and authentic" vehicle as promised.
>
> As a result of your material misrepresentations regarding the authenticity and restoration of the Strickler Car, [plaintiff] has suffered and continues to suffer substantial damages. . . . Stated simply, you exploited the authenticity and restoration of the Strickler Car to fraudulently gain a profit from [plaintiff].
>
> Your false misrepresentations and warranties regarding the restoration and authenticity of the Strickler Car are all actionable under the law . . . .
>
> * * *
>
> Attached please find the lawsuit which [plaintiff] intends to file against you. . . .
>
> If you would like to discuss resolving this matter to avoid litigation prior to [plaintiff] filing this lawsuit, please contact us within ten (10) days after your receipt of this letter. If we do not hear from you within 10 days of your receipt of this letter, this lawsuit will immediately be filed against you.

On September 28, 2010, plaintiff commenced this action in the Oakland Circuit Court. Plaintiff alleged that it had discovered that the Dodge was reconstructed chiefly with replacement parts and, accordingly, that it was not "the real and authentic Strickler car" as

defendant had represented in the bill of sale. Plaintiff set forth claims of breach of contract (count I), fraud in the inducement (count II), fraudulent misrepresentation (count III), and silent fraud (count IV).[7]

During discovery, defendant and Strzelecki admitted that they had used more than 200 replacement parts in the restoration of the Dodge. Strzelecki confirmed that the Dodge, as restored by defendant, did not have the original chemically milled body[8] from 1965. In addition, Ted Smith testified that very little of the original 1965 Dodge Coronet had been used and that numerous replacement parts were taken from a donor car. Ted Smith testified that many of the original parts were discarded because they were too rusty or in poor condition.

Galen Govier, an expert on altered-wheelbase racecars, inspected the Dodge. Govier opined that less than 15 percent of the original 1965 Dodge Coronet had been retained and that the body, engine, transmission, and rear axle were not "correct for a 1965 Dodge." James Schild, an expert on classic automobile restoration, testified that the restored Dodge was a "[r]econstruction" and that it had been "re-bodied." Because the vehicle had an entirely different body, Schild testified that "it cannot possibly be the real and authentic [Strickler] car . . . ."

William Stiles testified that he "built Dave Strickler's altered wheelbase car" in 1965. Stiles asserted that he had refused to authenticate the restored Dodge because

[7] Plaintiff also claimed that defendant had breached the contractual right of first refusal by reselling the 1964 Ford Thunderbolt to a third party without first offering it to plaintiff or giving plaintiff notice of his intent to sell (count V). This claim is not at issue in the present appeal.

[8] The original 1965 Dodge Coronet body was treated with acid to reduce the thickness and weight of the metal.

it was "not the car I built." According to Stiles, defendant "built a car to look like the original car. . . . But it's not the original car." Stiles opined that defendant should have used whatever remained of the original Dodge, even if it was in poor condition and required significant patching, and should not have used so many replacement parts. Stiles did not believe that the restored Dodge was collectible because it was no longer the original Strickler racecar.

On January 11, 2012, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that there was no genuine issue of material fact for trial, that plaintiff had waived any claim concerning the vehicle's authenticity by waiting too long to sue, and that plaintiff could not have reasonably relied on any misrepresentations by defendant as a matter of law. According to defendant, it was readily apparent at the time of purchase that the vehicle had been restored using certain replacement parts and did not have the original 1965 Dodge Coronet body. Defendant contended that Nicholas Smith, a sophisticated car collector, should have immediately noticed these alterations. Defendant also contended that plaintiff had a full and fair opportunity to inspect the vehicle or retain an expert to inspect the vehicle, but had failed to do so before purchasing it. Defendant argued that because plaintiff had waited until April 20, 2010, to notify him of any alleged breach relating to the authenticity of the vehicle, plaintiff was barred from any remedy pursuant to MCL 440.2607(3)(a).

With respect to plaintiff's fraud claims, defendant argued that it was unreasonable as a matter of law for plaintiff to rely on any warranties or representations outside the four corners of the bill of sale. In addition, defendant argued that there could be no fraud in this

case because the means to discover the true nature of the vehicle were at all times available to plaintiff. Defendant further contended that plaintiff's fraud claims were barred by the economic loss doctrine.

Following oral argument, the circuit court issued an opinion and order granting summary disposition in favor of defendant and dismissing plaintiff's claims with prejudice. The court ruled that it was beyond genuine factual dispute that plaintiff had waited too long to notify defendant of any alleged breach relating to the vehicle's authenticity. Thus, the court concluded that any remedy for breach of contract was barred by MCL 440.2607(3)(a). With respect to plaintiff's fraud claims, the court ruled that plaintiff could not have justifiably relied on any alleged misrepresentations by defendant because it had for itself the means to discover the truth. Specifically, the court noted that defendant had provided plaintiff with a full and fair opportunity to inspect the Dodge prior to its sale, but that plaintiff had chosen not to inspect the vehicle. Further, the circuit court remarked that plaintiff's fraud claims were based entirely on economic injury, and related exclusively to the quality or character of the good sold. Thus, the court ruled, they were barred by the economic loss doctrine.

II

We review de novo the circuit court's grant or denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law."

Kennedy v Great Atlantic & Pacific Tea Co, 274 Mich App 710, 712; 737 NW2d 179 (2007). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Whether the Uniform Commercial Code (UCC) 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). "When interpreting a uniform act, such as the Uniform Commercial Code, it is appropriate for this Court to look for guidance in the caselaw of other jurisdictions in which the act has been adopted." *Id*.

In general, "[t]he question whether a [party] may be a merchant as that term is used in the U.C.C. is a question of law for the courts to decide by applying the U.C.C. definition of merchant to the facts in the case." *Milwaukee Co v Northrop Data Systems, Inc*, 602 F2d 767, 771 (CA 7, 1979); see also *Vince v Broome*, 443 So 2d 23, 28 (Miss, 1983) (noting that "[t]he ultimate question of whether a person comes within the definition of merchant is a mixed question of law and fact"). But when there are no disputed material facts, the question whether a party is a merchant under the UCC should be decided on summary disposition as a matter of law. See *Hammer v Thompson*, 35 Kan App 2d 165, 184; 129 P3d 609 (2006); see also *Moll v Abbott Laboratories*, 444 Mich 1, 28 n 36; 506 NW2d 816 (1993) (stating that "[t]he law does not oblige a trial judge to sit idle and present the issue to a jury when the undisputed facts support but one conclusion").

Whether a reasonable time has elapsed is generally a question for the trier of fact. *Moore v First Security Cas*

Co, 224 Mich App 370, 379; 568 NW2d 841 (1997). If reasonable minds could not differ, however, the question of what constitutes a reasonable time should be decided on summary disposition as a matter of law. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 322; 696 NW2d 49 (2005); see also *Moore*, 224 Mich App at 379.

III

As a preliminary matter, we hold that defendant's sale of the Dodge must be evaluated under article 2 of the Uniform Commercial Code (UCC), MCL 440.2101 *et seq*. An automobile is a "good" covered by the UCC, MCL 440.2105(1); see also *Whitcraft v Wolfe*, 148 Mich App 40, 50; 384 NW2d 400 (1985), and defendant's sale of the Dodge to plaintiff unquestionably constituted a "transaction[] in goods" within the meaning of MCL 440.2102.

Plaintiff contends that the UCC should not be applied in this case because the transaction was merely a sale to a private collector and was not "commercial" in nature. We disagree with this contention. It does not matter to our analysis that the Dodge was sold to a private collector or that the sale was not quintessentially commercial in nature. The UCC indisputably applies to transactions in goods, including rare or antique goods, between private collectors. See, e.g., *Bander v Grossman*, 161 Misc 2d 119, 120-122; 611 NYS2d 985 (1994) (applying the UCC to the sale of a collectible Astin-Martin automobile); *Sundlun v Shoemaker*, 421 Pa Super 353, 356, 359-361; 617 A2d 1330 (1992) (applying the UCC to the sale of a rare, antique clock); *Wilson v Hammer Holdings, Inc*, 850 F2d 3, 4-6 (CA 1, 1988) (applying the UCC to the sale of artwork to private collectors); *N Bloom & Son (Antiques) Ltd v*

Skelly, 673 F Supp 1260, 1262, 1265-1266 (SD NY, 1987) (applying the UCC to the sale of an antique emerald and diamond necklace to a private buyer).

IV

We also hold that plaintiff was not a "merchant" within the meaning of the UCC for purposes of the transaction at issue. A "merchant" is "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." MCL 440.2104(1).[9] It is true that Nicholas Smith described himself as a serious collector of classic cars. However, plaintiff did not purchase the Dodge in furtherance of its trade and did not specifically hold itself out as possessing specialized knowledge or skill concerning classic automobiles.[10] Nor does the success of plaintiff's business depend on collecting classic racecars. Plaintiff is akin to a hobbyist and purchased the Dodge merely for pleasure. Cf. *Nelson v Union Equity Co-op Exchange*, 548 SW2d 352, 357 (Tex, 1977).

V

Plaintiff argues that the circuit court erred by concluding that it was beyond genuine factual dispute that

[9] Michigan's UCC was recently amended. This opinion cites the statutes in effect when the circuit court decided this case, including MCL 440.2104(1), amended effective July 1, 2013, by 2012 PA 87.

[10] Because plaintiff was not a merchant, the transaction at issue in this case was not "between merchants" as defined by MCL 440.2104(3).

it failed to provide notice of the alleged breach of contract to defendant within a reasonable time. We disagree.

In general, under article 2 of the UCC, a buyer may (1) accept goods, MCL 440.2606; MCL 440.2607, (2) reject goods, MCL 440.2602, or (3) revoke acceptance within a reasonable time if a nonconformity substantially impairs the value of the goods, MCL 440.2608.[11] It is undisputed that plaintiff accepted the Dodge in this case. This occurred, at the very latest, shortly after the bill of sale was executed and plaintiff had taken possession of the vehicle, when Nicholas Smith altered the Dodge in certain respects according to his own preferences. See MCL 440.2606(1)(c).

MCL 440.2607(3)(a) provides that when a tender has been accepted "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy[.]"[12] Accordingly, the salient question is whether plaintiff notified defendant of the alleged breach of contract within a reasonable time. "What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." MCL 440.1204(2);[13] see also *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105, 113; 394 NW2d 17

---

[11] "Although their legal effects are the same, rejection and revocation of acceptance differ in the circumstances under which each may be employed. Rejection occurs before the goods are accepted and is permitted where the tender fails 'in any respect to conform to the contract.' Revocation of acceptance, on the other hand, can take place only after the goods have been accepted and only where their 'nonconformity substantially impairs [their] value to him (the buyer).' " 2 Hawkland, Uniform Commercial Code Series, Sales, § 2-608:2, p 124 (citations omitted).

[12] "The burden is on the buyer to establish any breach with respect to the goods accepted." MCL 440.2607(4).

[13] MCL 440.1204(2) was amended effective July 1, 2013, by 2012 PA 86. The relevant statutory language is now located at MCL 440.1205(1).

(1986) (observing that "[w]hat is a reasonable time for taking any action depends on the nature and circumstances of the case").

The particular breach of contract alleged by plaintiff in this case pertains to the authenticity of the Dodge. Specifically, plaintiff asserts that it discovered sometime in the summer or fall of 2008 that the Dodge was not "the real and authentic Strickler car" as represented by defendant in the bill of sale. Plaintiff repeatedly asserts that the vehicle's replacement body and numerous replacement parts were difficult to detect and that this lengthened the time necessary to discover the alleged breach. But the documentary evidence presented in this case overwhelmingly establishes that the replacement body and parts would have been easily discoverable upon inspection of the vehicle. Indeed, plaintiff admits that it was given documents at the time of sale describing how McJury had replaced the vehicle's body and enumerating the numerous replacements parts used during the vehicle's restoration. Plaintiff also admits that defendant afforded it a full and fair opportunity to inspect the vehicle before the bill of sale was executed. There is simply no evidence to indicate that the vehicle's alleged inauthenticity was latent or otherwise hidden from plaintiff's view.

We need not definitively resolve whether the vehicle was "the real and authentic Strickler car" as represented in the bill of sale because plaintiff had ample time and opportunity to discover the claimed inauthenticities. Even if the Dodge is not "the real and authentic Strickler car," it was just as inauthentic at the time of purchase as it was when Nicholas Smith claims to have discovered the defects in the summer or fall of 2008. "Because of the static nature of authenticity," plaintiff was no less capable of discovering the inauthenticities

at the time of purchase than it was at a later time. *Wilson*, 850 F2d at 6. Moreover, plaintiff easily could have discovered any problems related to the vehicle's genuineness at the outset, by means of an inspection or an expert appraisal. See *id*. at 7; see also *Krahmer v Christie's Inc*, 903 A2d 773, 781-782 (Del Ch, 2006). It is beyond dispute that any lack of authenticity would have been "readily apparent to the trained eye of an [automotive] expert." See *Rosen v Spanierman*, 894 F2d 28, 32 (CA 2, 1990).

The fact that plaintiff had a full and fair opportunity to inspect the Dodge prior to purchasing it, and an even greater opportunity to inspect the Dodge after purchasing it, necessarily shortened the allowable period for discovering any nonconformities or inauthenticities. See 2 Hawkland, Uniform Commercial Code Series, Sales, § 2-608:5, p 167. For purposes of UCC § 2-607(3)(a),[14] "[q]ualities that are apparent . . . reasonably should be inspected and complained of soon after the goods . . . have been delivered . . . ." *P & F Constr Corp v Friend Lumber Corp of Medford*, 31 Mass App 57, 60; 575 NE2d 61 (1991). Yet plaintiff did not notify defendant of the purported breach until April 20, 2010, when its attorneys in Florida sent a letter complaining that the Dodge was "not the 'real and authentic' vehicle driven by Dave Strickler in the 1960s . . . ." In other words, plaintiff did not notify defendant of the purported breach of contract until more than three years after purchasing the vehicle and approximately three years after receiving the vehicle from defendant. We hold that plaintiff's notice of breach, provided to defendant more than three years after the execution of the bill of sale, was not given within a reasonable time. See *Mich Sugar Co v Jebavy-Sorenson Orchard Co*, 66 Mich App 642, 647; 239 NW2d 693 (1976).

[14] MCL 440.2607(3)(a).

Plaintiff should have discovered any alleged breach of contract relating to the authenticity of the Dodge shortly after purchasing it. Even viewing the admissible evidence in the light most favorable to plaintiff, reasonable minds could not conclude that plaintiff notified defendant of the alleged breach "within a reasonable time after [it] discover[ed] or should have discovered any breach" as required by MCL 440.2607(3)(a).[15] Consequently, the circuit court correctly ruled that plaintiff was "barred from any remedy" for breach of contract, MCL 440.2607(3)(a); see also *Jones v Linebaugh*, 34 Mich App 305, 310-311; 191 NW2d 142 (1971), and properly granted summary disposition in favor of defendant with respect to plaintiff's breach-of-contract claim.[16]

VI

We further conclude that the circuit court properly dismissed plaintiff's claims alleging fraud in the inducement, fraudulent misrepresentation, and silent fraud.

---

[15] We note that the timeliness of a buyer's notice of breach under MCL 440.2607(3)(a) does not depend on a showing of prejudice to the seller. *Eaton Corp v Magnavox Co*, 581 F Supp 1514, 1532 (ED Mich, 1984).

[16] The "reasonable time" allowed for revocation of acceptance under MCL 440.2608(2) is generally longer than the "reasonable time" allowed for notice of breach under MCL 440.2607(3)(a). See Official Comment 4 to UCC § 2-608 (noting that "the reasonable time period [for revocation of acceptance] should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender"). Plaintiff does not specifically argue that it revoked its acceptance of the vehicle under MCL 440.2608. Lest there be any confusion, however, we conclude that because plaintiff could have discovered the Dodge's replacement body and numerous replacement parts upon reasonable inspection, plaintiff would not have been entitled to revoke its acceptance of the vehicle after three years. See MCL 440.2608(2); see also MCL 440.2608(1)(b); *Colonial Dodge, Inc v Miller*, 420 Mich 452, 459; 362 NW2d 704 (1984) (observing that, in order to justify a buyer's revocation of acceptance, a nonconformity must "be difficult to discover").

Plaintiff's claims of fraudulent misrepresentation and silent fraud essentially reiterated the allegations set forth in plaintiff's breach-of-contract claim. The gravamen of these two claims was that defendant misled plaintiff by affirmatively representing that the restored Dodge was "the real and authentic Strickler car" and by failing to disclose the extensive use of replacement parts. But these claims alleged nothing extraneous to the contractual dispute. The fraudulent representations alleged by plaintiff pertained exclusively to the quality and authenticity of the Dodge. These representations were indistinguishable from defendant's representation in the contract that the vehicle was "the real and authentic Strickler car . . . ." Defendant's alleged nondisclosures likewise pertained solely to the authenticity and genuineness of the Dodge. Accordingly, plaintiff was limited to its contractual remedies under the UCC, and the circuit court properly granted summary disposition in favor of defendant with respect to plaintiff's claims of fraudulent misrepresentation and silent fraud. *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 374-375; 532 NW2d 541 (1995).

We acknowledge that the economic loss doctrine does not bar claims of fraud in the inducement when one party's ability to negotiate fair terms and make an informed decision has been undermined by the other party's fraudulent behavior. See *id*. at 372-373. However, "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Webb v First of Mich Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). As explained previously, plaintiff received a binder containing numerous photographs, notes, and other documents concerning defen-

dant's restoration of the Dodge. These documents detailed the restoration process, disclosed the presence of the replacement 1966/1967 Dodge Charger body, and listed many of the other replacement parts used on the vehicle. Additionally, plaintiff had a full and fair opportunity to inspect the vehicle, but did not do so. In sum, plaintiff fully possessed the means of discovering the truth or falsity of defendant's representations, and plaintiff's ability to utilize these means was never prohibited or impeded by defendant in any way. See *id*. Quite simply, plaintiff was "presented with the information and chose to ignore it," *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 501; 686 NW2d 770 (2004), overruled on other grounds by *Titan Ins Co v Hyten*, 491 Mich 547 (2012), and therefore could not have been fraudulently induced to enter into the transaction as a matter of law. The circuit court properly granted summary disposition in favor of defendant with respect to plaintiff's claim of fraud in the inducement.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

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

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 July 11, 2013:

PEOPLE V CARRUTHERS, Docket No. 309987. Reported at 301 Mich App 590.

Pursuant to the opinion issued concurrently with this order, this case is remanded for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until after they are concluded. As stated in the accompanying opinion, we remand this case to the trial court to allow defendant to file a motion to dismiss the charges against him pursuant to MCL 333.26428, and for an evidentiary hearing to be held on that issue. Should defendant make out a prima facie case of all of the elements of an affirmative defense under § 8 of the Michigan Medical Marihuana Act, his conviction shall be vacated and the charges against him dismissed. Should defendant not meet this burden, his conviction stands. If the defendant establishes evidence of each element listed in § 8 but there are still material questions of fact, then he is entitled to a new trial and the submission of this defense to the jury.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings. Upon remand, this Court will enter an order either affirming defendant's conviction, vacating defendant's conviction, or granting defendant a new trial.

Order Entered July 26, 2013:

AUTO-OWNERS INSURANCE COMPANY V ALL STAR LAWN SPECIALISTS PLUS, INC, Docket No. 307711. The Court orders that a special panel shall be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Amerisure Ins Co v Time Auto Transp, Inc*, 196 Mich App 569; 493 NW2d 482 (1992).

The Court further orders that the following portions of the opinion in this case released on July 9, 2013, are vacated: (1) Section I in its entirety, (2) Section II, paragraph 2, and (3) Section III, paragraph 2.*

* New opinion reported at 301 Mich App 515—REPORTER.

Appellant may file a supplemental brief within 21 days of the Clerk's certification of this order. Appellee may file a supplemental brief within 21 days of service of appellant's brief.

Gleicher, J., disqualified herself from participating in this matter.