MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

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COURT OF APPEALS

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COURT OF APPEALS CASES

DEPARTMENT OF ENVIRONMENTAL QUALITY v WORTH TOWNSHIP (ON REMAND)

Docket No. 289724. Submitted June 27, 2012, at Lansing. Decided December 11, 2012, at 9:00 a.m. Vacated in part, 494 Mich 860.

The Department of Environmental Quality and the Director of the Department of Environment Quality filed an action in the Ingham Circuit Court against Worth Township, seeking injunctive relief. Plaintiffs alleged that defendant lacked a sanitary-sewerage system; that defendant relied on private septic systems; that many of those systems were failing, releasing effluent into the waters of the state, including Lake Huron. Plaintiffs argued that defendant was responsible for the discharge under part 31 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., and asked the court to require defendant to construct a sanitary-sewerage system. The court, Joyce Draganchuk, J., granted plaintiffs' motion for summary disposition and denied defendant's motion for summary disposition. The circuit court ordered defendant to take corrective action to cease the discharge, set forth a time frame for defendant to design and construct the project that defendant selected for the corrective action, imposed a $60,000 fine and awarded attorney fees. The Court of Appeals, OWENS, P.J., and SAWYER, J. (O'CONNELL, J., dissenting), reversed the circuit court's order, concluding that MCL 324.3109(2) did not impose a responsibility on defendant to repair failing septic systems owned by private individuals. 289 Mich App 414 (2010). The Supreme Court reversed, concluding that, under the NREPA, a municipality can be held responsible for, and required to prevent, the discharge of effluent when raw sewage originates within its border. The Supreme Court remanded the case to the Court of Appeals to address defendant's remaining issues that had not been addressed during the original appeal. 491 Mich 227 (2012).

On remand, the Court of Appeals *held*:

1. Const 1963, art 9, § 29 prohibits the state Legislature from requiring any new or expanded activities by local governments without full state financing. This so-called Headlee Amendment seeks to eliminate the financial burden imposed on local units of

government whenever the state by statute shifts to local government the burden of performing and funding essential services that were previously funded at the state level. Conversely, a statutory increase in the cost of services already performed predominantly by units of local government does not violate the Headlee Amendment because the increase does not lessen the state's financial burden. The NREPA's requirement that defendant take corrective action in regard to the discharge of raw sewage in its township, MCL 324.3109(2), does not violate the Headlee Amendment because, while it may financially burden defendant, it did not shift the financial burden from the state to defendant or impose a new burden. Rather, it required defendant to comply with legislation that has historically made municipalities responsible for the discharge of raw sewage that originates within its borders.

2. The DEQ has authority to take all appropriate steps to prevent any pollution the department considers to be unreasonable and against public interest. In addition MCL 324.3115(1) allows a court to impose a civil fine of not less than $2,500 and award reasonable attorney fees and costs to the prevailing party in an action brought under the NREPA. The circuit court had authority under MCL 324.3115(1) to require compliance with the NREPA by creating a timeframe during which defendant was required to propose and implement a corrective plan, and to impose a fine and award attorney fees.

Affirmed.

1. CONSTITUTIONAL LAW — HEADLEE AMENDMENT — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — MUNICIPAL CORPORATION — DISCHARGE OF RAW SEWAGE.

An order requiring a municipality to take corrective action to stop the discharge of raw sewage from private septic systems within its borders, in accordance with the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., does not violate the Headlee Amendment's prohibition against the Legislature requiring any new or expanded activities by local governments without full state financing; municipalities have historically been responsible for the discharge of raw sewage that originates within its border and such an order would not improperly shift the financial burden from the state to a municipality or impose a new burden (Const 1963, art 9, § 29).

2. FINES — NATURAL RESOURCES AND ENVIRONMENTAL ACT — VIOLATIONS — COSTS AND ATTORNEY FEES.

A circuit court may impose a civil fine of not less than $2,500 and award attorney fees and costs to the prevailing party in an action

brought under the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. (MCL 324.3115[1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Alan F. Hoffman*, Special Assistant Attorney General, for the Department of Environmental Quality and the Director of the Department of Environmental Quality.

The Hubbard Law Firm (by *Michael G. Woodworth*) for Worth Township.

ON REMAND

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

SAWYER, J. This case, which turns on the interpretation of Michigan's Natural Resources and Environmental Protection Act (NREPA)[1], originally came to us on appeal of the circuit court's decision granting summary disposition to plaintiff, Department of Environmental Quality (DEQ),[2] and requiring defendant, Worth Township, to take necessary actions to remedy failing private septic systems within its borders. The trial court's order additionally imposed a $60,000 fine and awarded attorney fees. We reversed the lower court's order, holding that MCL 324.3109(2) did not impose a responsibility on defendant for failing septic systems owned by individuals. *Dep't of Environmental Quality v Worth Twp*, 289 Mich App 414; 808 NW2d 260 (2010).

The Supreme Court reversed our decision and remanded to this Court to address defendant's remaining

[1] MCL 324.101 *et seq*.

[2] Although the Director of the DEQ is listed as a separate plaintiff, for ease of reference, "plaintiff" or "DEQ" will be used interchangeably to mean either or both the DEQ and its Director.

arguments on appeal: (1) whether the remedial action ordered by the trial court violates the Headlee Amendment, Const 1963, art 9, § 29, and (2) whether MCL 324.3115(1) authorizes the trial court's order imposing a schedule for remedial action, a fine, and an award of attorney fees. *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 231 n 4; 814 NW2d 646 (2012). We conclude that the lower court's order does not violate the Headlee Amendment and that MCL 324.3115(1) does authorize the circuit court to "require compliance" to NREPA and assess fines and attorney fees at its discretion.

Defendant, a common-law township located in Sanilac County along Lake Huron, does not operate a public sanitary-sewerage system. Instead, all residences and businesses within the township use private septic systems. Several of these private septic systems, all of which are located on a five-mile stretch of land between M-25 and Lake Huron, have begun to fail, resulting in effluent being discharged into Lake Huron and its tributaries. Despite the urging of plaintiff and the county health department over the past several years, defendant has declined to construct a public sanitary-sewerage system due to the financial burden associated with its construction.

Defendant's refusal to construct a public sanitary-sewerage system resulted in plaintiffs filing suit to force defendant's compliance with NREPA. The parties subsequently filed cross-motions for summary disposition, which was granted to plaintiff. In granting plaintiff's motion for summary disposition, the circuit court issued an opinion and order that established a time frame during which defendant would design and implement a plan to remedy the discharge of raw sewage into state waters by failing septic systems located within defen-

dant's borders.[3] The trial court additionally imposed a $60,000 fine and awarded attorney fees. Defendant then sought to appeal the trial court's decision.

On appeal, we framed the issue as whether MCL 324.3109(2) imposes a responsibility on defendant for the failure of private septic systems within its borders, and our majority concluded it did not. *Worth Twp*, 289 Mich App at 417. Having concluded that defendant was not responsible for the failing septic systems, we did not address the remaining issues raised by defendant on appeal. *Id.* at 424. Our Supreme Court, however, granted plaintiffs' application for leave to appeal, reversed our decision, and remanded the matter to us to decide the remaining issues. *Worth Twp*, 491 Mich at 231. Accordingly, we now conclude that the circuit court may enforce defendant's compliance with MCL 324.3109(2) in accordance with the remedies listed in MCL 324.3115(1) without violating the Headlee Amendment, Const 1963, art 9, § 29.

This Court reviews de novo questions of law requiring constitutional interpretation. *Mich Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). When interpreting Michigan's constitution, this Court seeks to determine "the original meaning of the text to the ratifiers, the people, at the time of ratification." *Id.* at 191. Likewise, "the circumstances surrounding the

[3] The court's order merely set a deadline by which defendant needed to submit a corrective plan for plaintiff's approval and a timeframe to begin the plan's implementation. However, plaintiff's statement that the only practical corrective action would be the construction of a sanitary-sewerage system implies that, in order to meet with plaintiff's approval, defendant's plan must necessarily propose the construction of a sanitary-sewerage system. Therefore, although not directly ordered by the court, the court's order imposes upon defendant the burden of financing, constructing, and maintaining a sanitary-sewerage system. *Worth Twp*, 289 Mich App at 417 n 2.

adoption of a constitutional provision and the purpose sought to be accomplished" should be used to clarify the meaning of the provision's language. *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971).

In 1978, Michigan voters ratified an amendment to the state constitution prohibiting the state from "requiring any new or expanded activities by local governments without full state financing . . . ." Const 1963, art 9, § 25.

That amendment states:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18. [Const 1963, art 9, § 29.]

Our Supreme Court discussed this amendment in a previous decision:

> Article 9, §§ 25-34 was presented to the voters under the popular term "Headlee Amendment," named after its original proponent, Richard Headlee. It was proposed as part of a nationwide "taxpayer revolt" in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level. [*Durant v State Bd of Ed*, 424 Mich 364, 378; 381 NW2d 662 (1985).]

The *Durant* Court also noted that voters "were striving to gain more control over their own level of taxing and over the expenditures of the state." *Id.* at

383. Thus, the Headlee Amendment is construed as "the voters' effort to link funding, taxes, and control." *Id.*

To that extent, the Headlee Amendment seeks to head off the financial burden imposed on units of local government whenever the state statutorily shifts to local government the burden of performing and funding essential services that were previously funded at the state level. *Livingston Co v Dep't of Mgt & Budget*, 430 Mich 635, 645; 425 NW2d 65 (1988). Conversely, increasing the costs of services already "performed predominantly by units of local government does not lessen the state's financial burden" and, therefore, does not implicate Headlee. *Id.*

In sum, Headlee applies whenever legislation enacted on or after December 23, 1978 (the date the Headlee Amendment went into effect) *requires* a unit of local government to increase its level of activity or service. *Id.* at 648 ("[A]rt 9 § 29 refers only to required, not optional, services or activities."). Furthermore, Headlee applies only when a statutory requirement lessens the state's burden by shifting to units of local government the responsibility of providing services once provided or funded by the state. *Id.* at 645.

The act in question in this case, NREPA, became effective March 30, 1995. Furthermore, pursuant to our Supreme Court's holding in the case at hand, "under NREPA, a municipality can be held responsible for, and required to prevent, the discharge when the raw sewage originates within its borders . . . ." *Worth Twp*, 491 Mich at 230-231. Therefore, it appears as if this case meets with the first requirement when applying Headlee. However, where the present case fails to implicate Headlee is on the second requirement because, despite the financial burden imposed upon defendant by this

statute, defendant's increase in services will not lessen the state's financial burden.

In his dissent to our previous opinion on this matter, Judge O'CONNELL addressed this exact issue:

> Historically, townships have been responsible for addressing issues concerning the infrastructure needed to provide proper utilities and access to properties within their boundaries. This includes the responsibility for overseeing proper disposal of sewage generated by businesses and residences within the township. . . .
>
> * * *
>
> After MCL 323.1 *et seq*. was enacted, it went through several amendments and eventually was incorporated into part 31 of NREPA, MCL 324.3101 *et seq*. When it incorporated the statute into NREPA, the Legislature did not alter a township's responsibility for the discharge of raw sewage into state waters. [*Worth Twp*, 289 Mich App at 437-439.]

Because NREPA does not impose a new burden on defendant, but rather requires defendant to comply with legislation that has historically made units of local government responsible for the discharge of raw sewage that originates within its borders, we conclude that enforcing the remedial measures contained in NREPA does not violate the Headlee Amendment.

Next, we consider whether MCL 324.3115(1) authorizes the trial court's order imposing a schedule for implementing corrective action, a $60,000 fine, and an award of attorney fees.

MCL 324.3115(1) states in pertinent part:

> An action under this subsection may be brought in the circuit court for the county of Ingham or for the county in which the defendant is located, resides, or is doing business. If requested by the defendant within 21 days after service of process, the court shall grant a change of venue

> to the circuit court for the county of Ingham or for the county in which the alleged violation occurred, is occurring, or, in the event of a threat of violation, will occur. The court has jurisdiction to restrain the violation and to require compliance. In addition to any other relief granted under this subsection, the court, except as otherwise provided in this subsection, shall impose a civil fine of not less than $2,500.00 and the court may award reasonable attorney fees and costs to the prevailing party. However, all of the following apply:
>
> (a) The maximum fine imposed by the court shall be not more than $25,000.00 per day of violation.

As with constitutional interpretation, we review de novo questions of law requiring statutory interpretation. *Tomkins*, 481 Mich at 190. This Court interprets statutes according to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). Likewise, in the absence of ambiguities, we look first to the plain language of the statute. *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993).

The obvious intent of NREPA is to protect Michigan's natural resources, including (as is pertinent here) its lakes and waterways. To that extent, NREPA authorizes the DEQ to "establish pollution standards for lakes, rivers, streams, and other waters of the state. . . ." MCL 324.3106. Additionally, NREPA empowers the DEQ to "take all appropriate steps to prevent any pollution the department considers to be unreasonable and against public interest. . . ." MCL 324.3106. Additionally, our Supreme Court specifically referenced Judge O'CONNELL's dissent to our earlier opinion, noting "it is clear that, historically, the Legislature intended that a local unit of government, such as a township, be responsible for discharges into state

waters involving raw sewage originating within its boundaries." *Worth Twp*, 491 Mich at 242.

According to the plain language of the statute, "[t]he court has jurisdiction to restrain the violation and to require compliance." MCL 324.3115(1). The statute's language also directs the court to "impose a civil fine of not less than $2,500.00" and gives the court discretion to "award reasonable attorney fees and costs to the prevailing party." MCL 324.3115(1).

Our Supreme Court has concluded that defendant is in violation of MCL 324.3109(2) because raw sewage is being discharged into state waters by failing private septic systems owned by residents and businesses within defendant's borders. *Worth Twp*, 491 Mich at 230-231. Therefore, defendant is subject to the penalties and remedial actions set forth in MCL 324.3115(1). Pursuant to the plain language of the statute, the trial court has jurisdiction to "require compliance" with the act. Creating a timeframe by which defendant must propose and implement a corrective plan is not outside the court's authority. Our Supreme Court addressed this exact issue in its opinion:

> Finally, as noted, we hold that the trial court's decision requiring Worth Township to take necessary corrective action to prevent the discharge was within the court's jurisdiction under part 31 of NREPA. MCL 324.3115(1) grants the trial court jurisdiction "to restrain the violation and to require compliance" with part 31. [*Worth Twp*, 491 Mich at 250.]

Furthermore, the trial court did not explicitly direct defendant to construct a sanitary-sewerage system.[4] Instead, it directed defendant to devise a plan for approval by plaintiff—the party authorized by the stat-

[4] "Although the trial court specifically stated that it was not requiring Worth Township to construct a sewerage system in this case, it appears

ute to determine pollution standards and to take appropriate measures to prevent pollution. Likewise, the trial court acted within its discretion by imposing a $60,000 fine and awarding attorney fees. For these reasons, we affirm the trial court's order creating a time frame for defendant's compliance and imposing a fine and awarding attorney fees.

In sum, we hold that requiring defendant's compliance with MCL 324.3109(2) does not violate the Headlee Amendment because, although it may financially burden the defendant, it does not shift the financial burden from the state to a unit of local government. Additionally, we affirm the trial court's order establishing a timeframe for defendant's compliance and imposing a fine and awarding attorney fees because such an order is within the trial court's jurisdiction under MCL 324.3115(1).

Affirmed. Plaintiffs may tax costs pursuant to MCR 7.219.

OWENS, P.J., and O'CONNELL, J., concurred with SAWYER, J.

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that the parties agree that the most practical and comprehensive method to restrain the discharge is for a sewerage system to be constructed." *Worth Twp*, 491 Mich at 250-251.

VISSER v VISSER

Docket Nos. 301864 and 305900. Submitted August 7, 2012, at Grand Rapids. Decided December 18, 2012, at 9:00 a.m. Leave to appeal sought.

Heather Lynn Visser was granted an ex parte personal protection order (PPO) under MCL 600.2950 against her husband, Donovan J. Visser, in the Kent Circuit Court, Family Division, Nanaruth H. Carpenter, J., on the basis of evidence that had been presented at a hearing before a referee. Petitioner was subsequently granted two extensions of the PPO, the last of which expired on July 19, 2011. Respondent's motions to terminate each of these orders were denied. Respondent separately appealed the original order and its extensions, and the appeals were consolidated.

The Court of Appeals *held*:

1. Respondent's arguments pertaining to the extensions of the PPOs were moot. An issue that will continue to have collateral consequences is not moot. While issues relating to the propriety of the initial PPO entry were not moot because having a PPO on one's record might have some adverse consequences, there were no conceivable collateral consequences that respondent might have suffered arising solely out of the duration of the PPO. Therefore, there was no relief that could be provided to respondent for any possible impropriety in the extensions.

2. The delegation of the evidentiary hearing for the initial PPO to a referee was authorized by the court rules. Under MCL 552.507(2)(a), a referee is authorized to hear all motions in a domestic relations matter, except motions pertaining to an increase or decrease in spousal support, referred to the referee by the court. MCL 552.507 is part of the Friend of the Court Act (FCA), MCL 552.501 *et seq*., which defines "domestic relations matter" in MCL 522.502(m) as a circuit court proceeding as to child custody, parenting time, child support, or spousal support that arises out of litigation under a statute of this state, including, but not limited to, certain enumerated statutory provisions. Although MCL 522.502(m) does not mention MCL 600.2950, the domestic relations PPO statute pursuant to which the instant PPO was issued, MCL 600.2950 unambiguously applies to domestic relations cases. MCR 3.201(A) explains that subchapter 3.200, within which MCR

3.215(B) permits specified types of domestic relations motions to be heard initially by a referee, applies to actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, family support under MCL 552.451 *et seq*., the custody of minors under MCL 722.21 *et seq*., and visitation with minors under MCL 722.27b, and to proceedings that are ancillary or subsequent to the actions listed in MCR 3.201(A)(1) and that relate to the custody of minors, visitation with minors, or the support of minors and spouses or former spouses. "Relate" means to have reference or relation to. Because PPO proceedings between individuals who have a minor child in common had reference or relation to custody or visitation proceedings, a referee was authorized to conduct the initial PPO hearing. Furthermore, subchapter 3.700 of the court rules indicated that PPOs related to existing custody and parenting time orders.

3. The trial court's referral of the PPO hearing to a referee was not an unconstitutional delegation of authority. Judicial power is not improperly delegated as long as the ultimate decision-making responsibility remains with a judge. The trial court signed the challenged orders and the orders were entered under the trial court's authority, not that of the referee. Because the referee made no final binding order or adjudication and was authorized by statute to conduct PPO hearings relating to child custody and visitation, the referee did not exercise judicial power.

4. The trial court's failure to hold a hearing within 14 days of respondent's motion to terminate the PPO as required by MCL 600.2950(14) and MCR 3.707(A)(2) did not require the automatic dismissal of the PPO. The stated time for performance set forth in a statute should be viewed as directory, rather than mandatory, if there is no language precluding or terminating performance after the specified time, and neither MCL 600.2950 nor MCR 3.707 contains any provision suggesting that the failure to hold a timely hearing on a motion to terminate a PPO results in the automatic termination of the PPO.

5. The initial petition for an ex parte PPO was not facially invalid. An ex parte PPO is properly entered if a petitioner demonstrated a reasonable apprehension of violence. Respondent's threats and visible displays of anger that left petitioner frightened were a sufficient basis for the trial court to issue an ex parte PPO. Further, respondent's history of recent threats demonstrated that immediate or irreparable injury, loss, or damage could result from delay in issuing the PPO. Therefore, the trial court did not abuse its discretion by granting an ex parte PPO on the basis of the initial petition.

6. The order granting the initial PPO was not required to contain the reasons for the issuance of the order under MCR 3.705(A)(2) because that court rule applies only to proceedings under MCL 600.2950a and the PPO at issue was based on MCL 600.2950.

Affirmed.

SHAPIRO, J., dissenting, would have remanded the case to the trial court for it to vacate the PPO on the ground that the referee lacked the authority to conduct PPO hearings because this was not a proceeding as to child custody, parenting time, child support, spousal support, or visitation, and therefore was not a domestic relations action under the definitions provided in the FCA and the domestic relations subchapter of the court rules.

1. INJUNCTIONS — PERSONAL PROTECTION ORDERS — EXTENSIONS OF PERSONAL PROTECTION ORDERS — MOOTNESS.

An issue that will continue to have collateral consequences is not moot; challenges to the initial granting of a personal protection order that has expired is not necessarily moot; challenges to the extension of a personal protection order that has expired are moot if there are no conceivable collateral consequences that arose solely out of the duration of the personal protection order.

2. INJUNCTIONS — PERSONAL PROTECTION ORDERS — EVIDENTIARY HEARINGS — REFEREES.

MCL 552.507 provides that the chief judge of a circuit court may designate a referee as provided by the Michigan Court Rules to hear all motions in a domestic relations matter except motions pertaining to an increase or decrease in spousal support; petitions for personal protection orders pursuant to MCL 600.2950 are domestic relations matters for which a referee may be directed to hear the initial motions under MCL 552.507 and MCR 3.215(B).

3. CONSTITUTIONAL LAW — DELEGATION OF JUDICIAL AUTHORITY — INJUNCTIONS — PERSONAL PROTECTION ORDERS — EVIDENTIARY HEARINGS — REFEREES.

Judicial power is not improperly delegated to a referee as long as the ultimate decision-making responsibility remains with a judge; a court's referral of a hearing on a motion for a personal protection order to a referee is not an unconstitutional delegation of authority under Const 1963, art 6, § 1.

4. INJUNCTIONS — PERSONAL PROTECTION ORDERS — MOTIONS TO MODIFY, RESCIND, OR TERMINATE PERSONAL PROTECTION ORDERS — FAILURE TO TIMELY SCHEDULE A HEARING.

A court's failure to schedule a hearing on a motion to modify,

rescind, or terminate an ex parte personal protection order within 14 days after the motion was filed as required by MCL 600.2950(14) and MCR 3.707(A)(2) does not require the automatic dismissal of the personal protection order.

5. INJUNCTIONS — PERSONAL PROTECTION ORDERS — STATEMENT OF REASONS FOR ISSUING PERSONAL PROTECTION ORDERS.

MCR 3.705(A)(2) requires a court that issues a personal protection order under MCL 600.2950a to state in writing the specific reasons for issuing the order; this requirement does not apply to personal protection orders issued under MCL 600.2950.

Joseph S. Smigiel, Jr., for petitioner.

Visser and Associates, PLLC (by *Donald R. Visser* and *Donovan J. Visser*), for respondent.

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

RONAYNE KRAUSE, J. In this consolidated appeal, stemming from one underlying case, respondent, Donovan J. Visser, raises a number of challenges to the personal protection order (PPO) entered against him. We conclude that the original PPO was properly issued. Therefore, we affirm.

Respondent's wife, Heather Lynn Visser, filed a petition for a "domestic relationship" PPO, MCL 600.2950, against respondent on January 27, 2010. The petition was granted, and orders extending the PPO were subsequently entered on July 16, 2010, and January 18, 2011. The PPO expired on July 19, 2011. Respondent filed motions to terminate each order. His first motion was denied after a hearing. The latter motions were denied without hearings.

We agree with respondent that the issue of the propriety of the initial PPO entry is not necessarily moot. An issue that will continue to have collateral

consequences is not moot, and this Court has previously held that an expired PPO may, in fact, have collateral consequences. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). We note that respondent does not actually articulate what collateral consequences are likely to befall him. Ordinarily, we do not believe it is the duty of this Court to contemplate potential collateral consequences for a party. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). But we do not doubt that having a PPO on one's record may have some adverse consequences. In contrast, any of the challenges respondent brings to the *extensions* of the PPO, as distinct from its initial entry, *are* moot. The last extension of the PPO has expired, and we are unable to conceive of any possible collateral consequences that respondent might suffer arising solely out of the duration of the PPO. Therefore, there is no relief this Court could provide to respondent for any possible impropriety in the extensions. Because they are moot, we decline to consider any of respondent's arguments pertaining to the extensions. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

With respect to the initial entry of the PPO, respondent first argues that the delegation of the evidentiary hearing to a referee was not authorized by the court rules. Statutory interpretation and construction of court rules are questions of law subject to review de novo. *Ballard v Ypsilanti Twp*, 216 Mich App 545, 549; 549 NW2d 885 (1996); *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 397; 554 NW2d 345 (1996).

MCL 552.507 is part of the Friend of the Court Act (FCA), MCL 552.501 *et seq*. MCL 552.507(2)(a) allows a referee to "[h]ear all motions in a domestic relations matter, except motions pertaining to an increase or

decrease in spouse support, referred to the referee by the court." The FCA defines "domestic relations matter" as

> a circuit court proceeding as to child custody, parenting time, child support, or spousal support, that arises out of litigation under a statute of this state, including, *but not limited to*, the following:
>
> (*i*) 1846 RS 84, MCL 552.1 to 552.45.
>
> (*ii*) The family support act, 1966 PA 138, MCL 552.451 to 552.459.
>
> (*iii*) The child custody act of 1970, 1970 PA 91, MCL 722.21 to 722.31.
>
> (*iv*) 1968 PA 293, MCL 722.1 to 722.6.
>
> (*v*) The paternity act, 1956 PA 205, MCL 722.711 to 722.730.
>
> (*vi*) The revised uniform reciprocal enforcement of support act, 1952 PA 8, MCL 780.151 to 780.183.
>
> (*vii*) The uniform interstate family support act, 1996 PA 310, MCL 552.1101 to 552.1901. [MCL 552.502(m)(*i*) to (*vii*) (emphasis added).]

Thus, MCL 552.502(m) enumerates a number of statutory provisions, litigation arising out of which will be considered "domestic relations matters." MCL 552.502(m) explicitly states that matters that will be considered "domestic relations matters" are "not limited to" that list. By its own terms, therefore, the list is not exclusive. "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire and Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Interestingly, MCL 552.502(m) does not mention MCL 600.2950, the domestic relations PPO statute pursuant to which the instant PPO was issued, which unambiguously applies to domestic relations cases. See

MCL 600.2950(1) (providing that a court may enter a PPO against "a spouse, a former spouse, an individual with whom he or she has had a child in common, . . . or an individual residing or having resided in the same household as the petitioner"). Likewise, the domestic violence prevention and treatment act, MCL 400.1501 *et seq*., clearly also implicates domestic relations, as does the domestic assault statute, MCL 750.81a(2).

MCR 3.215 implements MCL 552.507 and provides further guidance for the conduct of referee hearings. MCR 3.201(A) explains that "[s]ubchapter 3.200," within which MCR 3.215(B) permits "specified types of domestic relations motions [to] be heard initially by a referee," applies to:

> (1) actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, family support under MCL 552.451 *et seq*., the custody of minors under MCL 722.21 *et seq*., and visitation with minors under MCL 722.27b and to
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> (2) proceedings that are ancillary or subsequent to the actions listed in subrule (A)(1) and that relate to
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> (a) the custody of minors,
>
> (b) visitation with minors, or
>
> (c) the support of minors and spouses or former spouses.

The phrase "relate" is not defined by the court rule, nor could we find binding precedent interpreting the relevant provisions; therefore, it is proper to consult a dictionary. See *Mich Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 485; 637 NW2d 232 (2001). "Relate" is defined in relevant part to mean "to have reference or relation (often [followed] by *to*)." *Random House Webster's College Dictionary* (1997).

It is clear, bordering on axiomatic, that PPO proceedings between individuals who have a minor child in

common "have reference or relation" to custody or visitation proceedings. Therefore, a referee is authorized to conduct a hearing. Subchapter 3.700 expressly indicates how a PPO relates to existing custody and parenting time orders. MCR 3.706(C)(1) requires the court issuing the PPO to "contact the court having jurisdiction over the parenting time or custody matter as provided in MCR 3.205, and where practicable, the judge should consult with that court, as contemplated in MCR 3.205(C)(2), regarding *the impact upon custody and parenting time rights* before issuing the personal protection order." (Emphasis added.) The rule plainly refers to the custody of minor children and appears to recognize that a PPO may relate to an already entered custody or parenting time order. This interpretation is further reinforced by MCR 3.706(C)(2), which provides:

> If the respondent's custody or parenting time rights will be adversely affected by the personal protection order, the issuing court shall determine whether conditions should be specified in the order which would accommodate the respondent's rights or whether the situation is such that the safety of the petitioner and minor children would be compromised by such conditions.

Further, MCR 3.706(C)(3) provides that a PPO "takes precedence over any existing custody or parenting time order until" the PPO expires or until "the court having jurisdiction over the custody or parenting time order modifies the custody or parenting time order to accommodate the conditions of the personal protection order." The foregoing language appears to establish that a PPO proceeding may relate to a matter involving custody or visitation. MCR 3.201(A)(2).

Further, while not directly addressing the issue, this Court in several unpublished opinions has noted, without critical comment, that a referee conducted a PPO

hearing. We remind the bench and bar that unpublished opinions are not binding, MCR 7.215(C)(1). Nevertheless, this Court *may* consider them to be persuasive. *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004). For the sake of completely addressing the parties' arguments, we recognize that respondent claims that *Baker v Holloway*, unpublished opinion per curiam of the Court of Appeals issued January 26, 2010 (Docket No. 288606), supports his argument that a referee cannot conduct a PPO hearing. Even if *Baker* were considered binding, respondent would be incorrect. The *Baker* Court concluded that a referee could not order the parties to mediation and that the court was required to conduct a hearing; by necessary implication, *Baker* actually held that the referee *could* have properly conducted the hearing. Therefore, respondent's reliance on *Baker* is doubly misplaced.

Respondent's second argument is that the trial court's referral of the PPO hearing to a referee, even if authorized by statute or court rule, was an unconstitutional delegation of authority. Our Supreme Court has held that judicial power is not improperly delegated as long as the ultimate decision-making responsibility remains with a judge. See *Underwood v McDuffee*, 15 Mich 361, 368-370 (1867); *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959) (" 'The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.' "), quoting *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884). In this case, the trial court signed the challenged orders, and the orders were entered under the trial court's authority, not that of the referee. Because a referee makes no final binding order or adjudication and the referee was authorized by statute to conduct PPO hearings relating to child custody and visitation as

discussed earlier, the referee does not exercise judicial power. Therefore, respondent's argument that the trial court unconstitutionally delegated its authority is incorrect.

Respondent next argues that the failure of the trial court to hold a hearing within 14 days of his motion to terminate the PPO should automatically result in dismissal of the PPO. MCL 600.2950(14) provides, in relevant part, that "the court shall schedule a hearing on the motion to modify or rescind the ex parte personal protection order within 14 days after the filing of the motion to modify or rescind." See also MCR 3.707(A)(2). However, the stated time for performance set forth in a statute should be viewed as directory, rather than mandatory, when there is no language precluding or terminating performance after the specified time. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 494-495; 740 NW2d 734 (2007). In this case, neither the statute nor the court rule contains any provision suggesting that the failure to hold a timely hearing on a motion to terminate a PPO results in the automatic termination of the PPO. Indeed, such a rule would punish the person who sought the PPO for the tardiness of the court itself, over which the parties have little, if any, control, and would potentially undermine the purpose of PPOs altogether.

Respondent next argues that the January 27, 2010, petition for an ex parte PPO was facially invalid. Petitioner's affidavit stated she was afraid of respondent and had been "threatened by him for over a year." The affidavit reflected that respondent had recently attempted to commit suicide and that there had been a "struggle to get a gun from the basement" of the parties' residence. At a meeting with the parties' pastor following the suicide attempt, respondent indicated he

was not certain what he would have done if he had obtained the gun. Petitioner stated that his response "felt very much like intimidation" and made her "very scared." Additionally, the affidavit reflected that petitioner frequently told respondent she was afraid of him when he was angry, and in response to these comments, respondent told petitioner, "[Y]ou haven't seen me angry." The day before petitioner sought the PPO, respondent called her while she was at her mother's house and threatened her.

An ex parte PPO is properly entered if the petitioner demonstrates a " 'reasonable apprehension of violence.' " *Pickering v Pickering*, 253 Mich App 694, 701; 659 NW2d 649 (2002), quoting MCL 600.2950(1)(j). Respondent's threats and visible displays of anger that left petitioner frightened were a sufficient basis for the trial court to issue an ex parte PPO. See *id.* at 702. Further, the history of recent threats, including the day before the petition was filed, was sufficient to justify an ex parte order because the affidavit demonstrated that "immediate and irreparable injury, loss, or damage" could result from delay in issuing the PPO. MCR 3.705(A)(2); see also *Kampf v Kampf*, 237 Mich App 377, 385; 603 NW2d 295 (1999). The trial court did not abuse its discretion by granting an ex parte PPO on the basis of the January 27, 2010, petition.

Respondent also objects that the order granting the January 27, 2010, PPO did not contain the reasons for the issuance of the order, citing MCR 3.705(A)(2). That court rule states in part, "In a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order." Respondent fails to note that MCL 600.2950a was not the basis for the PPO in the present case. MCL 600.2950a governs PPOs issued for stalking. Instead, MCL 600.2950 was the

basis for the PPO because it involved a spouse and a child in common. The plain language of MCR 3.705(A)(2) only requires written findings for "a proceeding under MCL 600.2950a"; consequently, this argument also fails.

Again, we decline to address any of respondent's arguments pertaining to the extensions of the PPO because that issue is moot.

Affirmed. Petitioner, being the prevailing party, may tax costs.

MARKEY, P.J., concurred with RONAYNE KRAUSE, J.

SHAPIRO, J. (*dissenting*). I respectfully dissent. Referees are not authorized by statute or court rule to conduct personal protection order (PPO) hearings.

It is axiomatic that referees may only be appointed if specific statutory authority permits it. *Lindhout v Ingersoll*, 58 Mich App 446, 453; 228 NW2d 415 (1975). In this case, the unambiguous language of the relevant statute does not provide such authority. Neither does the related court rule.

MCL 552.507(2)(a), part of the Friend of the Court Act (FCA), MCL 552.501 *et seq.*, allows a referee to "[h]ear all motions in a domestic relations matter, except motions pertaining to an increase or decrease in spouse support, referred to the referee by the court." "Domestic relations matter" is then defined by MCL 552.502(m) as

> a circuit court proceeding *as to child custody, parenting time, child support, or spousal support*, that arises out of litigation under a statute of this state, including, but not limited to, the following:
>
> (*i*) 1846 RS 84, MCL 552.1 to 552.45.

(*ii*) The family support act, 1966 PA 138, MCL 552.451 to 552.459.

(*iii*) The child custody act of 1970, 1970 PA 91, MCL 722.21 to 722.31.

(*iv*) 1968 PA 293, MCL 722.1 to 722.6.

(*v*) The paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(*vi*) The revised uniform reciprocal enforcement of support act, 1952 PA 8, MCL 780.151 to 780.183.

(*vii*) The uniform interstate family support act, 1996 PA 310, MCL 552.1101 to 552.1901. [Emphasis added.]

The majority misreads this provision by emphasizing the use of the nonexclusive phrase "including, but not limited to" without considering what that phrase is modifying. The phrase allows for expansion of the list of statutes from which a domestic relations case may arise, but it does not expand the types of cases defined as domestic relations matters for the purposes of the act. Whatever statute the case arises under, the proceeding must still be one "as to child custody, parenting time, child support, or spousal support." If a statute defines a term, that definition controls, regardless of whether another definition is possible. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

The PPO in this case was issued under MCL 600.2950, which governs protective orders between individuals who are married or share a child. While this statute may be broadly said to involve domestic relations because the parties are married or are parents of the same child, issuance of a PPO, in and of itself, is not a "proceeding as to child custody, parenting time, child support, or spousal support." Therefore, contrary to the majority's conclusion, MCL 552.502(m) does not provide a basis for the referee to hear petitioner's PPO request.

MCL 552.507(1) provides another possible source of statutory authority, as it allows the chief judge of a circuit to "designate a referee as provided by the Michigan court rules." As noted by the majority, MCR 3.215(B)(1) allows a chief judge to "direct that specified types of domestic relations motions be heard initially by a referee." Subchapter 3.200 of the court rules is titled "Domestic Relations Actions," and MCR 3.201(A) explains that this subchapter covers:

> (1) actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, family support under MCL 552.451 *et seq*., the custody of minors under MCL 722.21 *et seq*., and visitation with minors under MCL 722.27b and to
>
> (2) proceedings that are ancillary or subsequent to the actions listed in subrule (A)(1) and that relate to
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> (a) the custody of minors,
>
> (b) visitation with minors, or
>
> (c) the support of minors and spouses or former spouses.

The majority misreads this provision as well, erring in a similar manner as it did in its analysis of the FCA. MCR 3.201(A) states that subchapter 3.200 covers several specific types of actions and any other action relating to custody, visitation, or support *but only if* that action is ancillary or subsequent to one of the actions listed in subrule (A)(1). The PPO proceedings in this case are not part of an action for divorce, separate maintenance, annulment, paternity, child support, custody, or visitation. Further, the proceedings are not ancillary or subsequent to any such action.

The majority claims that PPO actions between individuals who share a minor child necessarily relate to the custody and visitation of minors and that MCR 3.201(A)(2) therefore allows a referee to hear these

PPO cases. That these matters are related in a general sense is, however, irrelevant. If a proceeding is not an action for divorce, separate maintenance, annulment, paternity, child support, custody, or visitation and is not ancillary or subsequent to any such action, it is not governed by subchapter 3.200 of the court rules. For example, a criminal case may severely affect an individual's custody or visitation rights, but it is not governed by subchapter 3.200. Similarly, because the present case is not one of the types of actions listed in MCR 3.201(A)(1) and is not ancillary to any such action, it would not be governed by subchapter 3.200 even if it had some effect on respondent's visitation rights (which the PPO in this case explicitly disavows). Therefore, the court rules do not authorize a referee to hear a PPO request under these circumstances.

Because this was not a domestic relations action under the explicit definitions provided in the FCA or the domestic relations subchapter of the court rules, the referee lacked the authority to conduct PPO hearings. I would therefore remand this case to the trial court for it to vacate the PPO. I express no opinion regarding the merits of the PPO or its extensions.

PEOPLE v CAIN

Docket No. 301492. Submitted December 4, 2012, at Detroit. Decided December 20, 2012, at 9:00 a.m. Leave to appeal sought.

A jury in the Wayne Circuit Court, Michael M. Hathaway, J., convicted Darryl W. Cain of carjacking, MCL 750.529a; unlawfully driving away a motor vehicle (UDAA), MCL 750.413; being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for approaching a car that was stopped at a red light, ordering the driver out at gunpoint, and stealing the car along with the driver's pants, boots, wallet, and cell phone. Defendant appealed.

The Court of Appeals *held*:

1. The prosecutor's statements regarding the victim's bravery and honesty did not amount to plain error requiring reversal. Prosecutors may not comment on their personal knowledge or belief with respect to a witness's credibility, but they may argue and make reasonable inferences from the evidence to support a witness's truthfulness and may respond to defense allegations that the prosecution's witnesses testified dishonestly by arguing that the witnesses had no motive to lie. The prosecutor's comments were made in response to defense counsel's challenges to the victim's credibility during closing argument and did not imply that she had special knowledge about the victim's truthfulness. Any prejudice was cured by the court's jury instructions. Because the prosecutor's statements were permissible, defense counsel was also not ineffective for failing to object to them.

2. The trial court did not violate defendant's constitutional right to a jury trial by referring to him as a perpetrator in front of the jury. A defendant's constitutional right to a fair and impartial trial is violated when the trial court's conduct pierces the veil of judicial impartiality through conduct or comments that unduly influence the jury. Under the Sixth and Fourteenth Amendments of the United States Constitution, a criminal defendant is entitled to a jury determination on all elements of the charges against him or her. A court may not direct a guilty verdict. The trial court did not instruct the jury that defendant had committed the carjacking;

rather, the court restated the evidence already on record, which was that the victim had identified defendant as the perpetrator of the crime. Further, the challenged statement was made in isolation, the court instructed the jury that the court's statements did not constitute evidence and that defendant was presumed innocent, and the prosecution had already presented considerable evidence linking defendant to the crime. Any error that occurred was not outcome-determinative.

3. Convicting defendant of both carjacking and UDAA did not violate the Double Jeopardy Clauses of the United States and Michigan Constitutions. No double jeopardy violation occurs if the Legislature clearly expressed an intent to allow multiple punishments for two offenses. If the Legislature did not clearly express that intent, the same-elements test is employed to determine whether each offense contains an element not contained in the other; if not, they are the same offense and the Double Jeopardy Clauses bar additional punishment and successive prosecution. The carjacking statute, MCL 750.529a, was amended by 2004 PA 128, along with the statutes governing robbery and armed robbery, and now provides that a person who uses force or violence or the threat of force or violence in the course of committing a larceny of a motor vehicle, including acts that occur in an attempt to commit the larceny or during commission of the larceny, is guilty of carjacking. As a result of 2004 PA 128, carjacking, like robbery and armed robbery, no longer requires a completed larceny to support a conviction. The UDAA statute, MCL 750.413, states that any person who willfully and without authority takes possession of and drives or takes away any motor vehicle belonging to another is guilty of a felony. A carjacking conviction requires proof of the use of force or violence, or the threat of force or violence, while a UDAA conviction does not. A UDAA conviction requires the completed larceny of a motor vehicle, while the carjacking statute does not. Therefore, convicting a defendant of both offenses does not violate double jeopardy protections.

4. The trial court did not err by failing to suppress evidence on the ground that police officers lacked probable cause to arrest defendant. A motion to suppress evidence must be made before trial or at trial with the trial court's permission. Although defendant asked the court about an evidentiary hearing before trial, he never requested an evidentiary hearing and never argued that his arrest was unlawful or that any evidence should be suppressed. After the court explained the purpose of an evidentiary hearing, defendant moved on to a different subject. Further, because there was probable cause to arrest defendant, it would have been

erroneous to suppress any evidence as the fruit of an unlawful arrest. A police officer may arrest a person without a warrant if he or she has reasonable cause to believe that a felony has been committed and that the particular person committed it. An individual who has been lawfully arrested may be searched without further justification. The arresting officer saw defendant standing near the carjacked vehicle with the hood up in the backyard of an apparently vacant home where another stolen vehicle was found. This provided reasonable cause to believe that defendant was involved in the carjacking or a related felony such as receiving and concealing stolen property.

5. The court did not err by admitting evidence from a photographic lineup. Generally, a photographic lineup should not be used for identification when the suspect is in custody. However, this rule is subject to certain exceptions, including when a corporeal lineup is not feasible because there are insufficient numbers of people available with the defendant's physical characteristics. In this case, there were not enough young black men at the police station with physical characteristics similar to defendant's. Under the circumstances, a photographic lineup was proper given that defendant would have suffered significant prejudice if he had been placed in a corporeal lineup with men of different races or ages. Further, the photographic lineup was not unduly suggestive. An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. The photographic array consisted of six mug shots, one of defendant and five others of men of similar age with similar complexions, facial hair, and haircuts. There was no indication that this process was impermissibly suggestive or that it gave rise to a substantial likelihood of misidentification.

6. The delay between defendant's arrest and his arraignment did not constitute plain error affecting defendant's substantial rights. An individual who has been arrested must be brought before a magistrate for arraignment without unnecessary delay under MCL 764.13 and MCL 764.26. A delay of more than 48 hours after arrest is presumptively unreasonable unless there are extraordinary circumstances. The exclusionary rule applies whenever a statutorily unlawful detention has been employed as a tool to directly procure any type of evidence from a detainee; however, an improper delay does not entitle a defendant to dismissal of the prosecution. Although the delay between defendant's arrest on June 7, 2010, and arraignment on June 10, 2010, was presump-

tively unreasonable, the proper remedy was the suppression of any evidence directly procured as a result of that delay, and no such evidence existed.

7. The alleged failure of the prosecution to provide defendant with a copy of the felony complaint and the felony warrant did not constitute plain error requiring reversal. Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests disclosure. MCR 6.101 provides that a complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense and must be signed and sworn to before a judicial officer or court clerk. MCR 6.104(D) provides that if an individual is arrested without a warrant, a complaint must be filed at or before the arraignment. When a court receives the complaint and finds probable cause, the court must either endorse the complaint or issue a warrant. Both the complaint and the warrant were part of the lower court file, signed by a magistrate and file-stamped for June 9, 2010. In addition, the court's register of actions indicated that defendant was arraigned on the warrant on June 10, 2010. MCR 6.104(E)(1) required the court to inform defendant of the offenses charged and their possible prison sentences at the arraignment, and there were no allegations or indications that this did not occur. Further, when trial was set to begin, defense counsel specifically stated that he had a copy of the complaint. Even if the prosecution had been required to provide defendant with a copy of both the complaint and the warrant, the failure to do so did not constitute plain error given that defendant was made aware of the charges against him at his arraignment and that there was clearly probable cause for his arrest.

8. Defendant's argument that his convictions must be set aside because the arrest warrant was based on a complaint that lacked facts and contained only legal conclusions was without merit. Under MCL 764.1a, the issuance of an arrest warrant requires the presentation of a proper complaint alleging the commission of an offense and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense. A finding of probable cause can be based on the factual allegations of the complainant in the complaint, the complainant's sworn testimony, the complainant's affidavit, or the supplemental sworn testimony or affidavits of other individuals presented by the complaint or required by the magistrate. After defendant was arrested without a warrant, the prosecution filed a complaint listing each offense with which defendant was charged, along with statutory citations and brief explanations for each offense, as

required by MCR 6.101(A). The complaint was also signed by and sworn to before a magistrate, as required by MCR 6.101(B). The magistrate found probable cause to believe that defendant had committed the offenses charged and issued a warrant for his arrest. This finding was supported by the allegations in the complaint that defendant had used a firearm and the threat of force or violence to take the victim's car, that defendant drove the car away, and that defendant had a previous felony conviction and was ineligible to carry a firearm. These factual allegations provided probable cause to issue a warrant for defendant's arrest with respect to the offenses for which he was ultimately convicted. A lack of probable cause with respect to any other charges could not amount to plain error because defendant was not convicted of those offenses.

9. Defendant's convictions of both felon-in-possession and felony-firearm did not violate double jeopardy principles because the Legislature intended to allow the imposition of an additional sentence whenever a person possessing a firearm committed a felony other than those explicitly enumerated in the felony-firearm statute, which do not include felon-in-possession.

10. The trial court did not lack jurisdiction over defendant because the prosecution did not timely file an information. Pursuant to MCR 6.112(C), the prosecutor must file the information or indictment on or before the date set for the arraignment. Although an information and amended information appear in the court file, they were not file-stamped by the court. However, any error was harmless under MCR 6.112(G), which provides that absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing. Defendant did not timely object or show prejudice. Defendant was represented by counsel, who had a copy of the complaint and thus knew the charges against defendant, and the charges were presumably read at defendant's arraignment pursuant to MCR 6.104(E)(1).

Affirmed.

1. PROSECUTING ATTORNEYS — MISCONDUCT — VOUCHING FOR CREDIBILITY OF WITNESSES.

Prosecutors may not comment on their personal knowledge or belief with respect to a witness's credibility; prosecutors may argue and make reasonable inferences from the evidence to support a witness's truthfulness and may respond to defense allegations that the prosecution's witnesses testified dishonestly by arguing that the witnesses had no motive to lie.

2. CRIMINAL LAW — CARJACKING — ELEMENTS OF CARJACKING — CONSTITUTIONAL LAW — DOUBLE JEOPARDY — UNLAWFULLY DRIVING AWAY A MOTOR VEHICLE.

A completed larceny is not necessary to sustain a conviction for the crime of carjacking; a defendant may be convicted of both carjacking and unlawfully driving away a motor vehicle without violating the constitutional protections against double jeopardy (US Const, Am V; Const 1963, art 1, § 15; MCL 750.529a, 750.413).

3. CRIMINAL LAW — PRETRIAL IDENTIFICATION PROCEDURES — PHOTOGRAPHIC DISPLAYS — LINEUPS.

A photographic lineup generally should not be used to identify the person accused of having committed a crime when the suspect is in custody; this rule is subject to exceptions, including when a corporeal lineup is not feasible because there are insufficient numbers of people available with the defendant's physical characteristics; an identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.

4. CRIMINAL LAW — EVIDENCE — PREARRAIGNMENT DELAY.

An individual who has been arrested must be brought before a magistrate for arraignment without unnecessary delay under MCL 764.13 and MCL 764.26; a delay in arraignment of more than 48 hours after the arrest is presumptively unreasonable unless there are extraordinary circumstances; an improper delay in arraignment may necessitate the suppression of evidence obtained as a result of that delay, but it does not entitle a defendant to a dismissal of the charges.

5. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — FELON-IN-POSSESSION — FELONY-FIREARM.

A defendant may be convicted of both being a felon in possession of a firearm and possessing a firearm during the commission of a felony without violating the constitutional protections against double jeopardy (US Const, Am V; Const 1963, art 1, § 15; MCL 750.224f, 750.227b).

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

Neil J. Leithauser and Darryl W. Cain, *in propria persona*, for defendant.

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

SAAD, P.J. A jury convicted defendant of carjacking, MCL 750.529a, unlawfully driving away a motor vehicle (UDAA), MCL 750.413, two counts of receiving and concealing a stolen motor vehicle, MCL 750.535(7), being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant appeals and, for the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

This case arises from a carjacking that occurred in Detroit on June 4, 2010. Courtney Spires was driving home in his mother's 1995 gold Saturn. When he stopped at a red light at the intersection of East Grand Boulevard and Mack, a van pulled up next to Spires on the driver's side of his vehicle. Spires could not see the driver of the van, but he testified that defendant appeared at his window, pointed a silver revolver at him, and told him to get out of the car. Defendant ordered Spires to take off his pants and boots and stole them, along with Spires's wallet and cell phone. Defendant then sat in the driver's seat of the Saturn, a woman got into the front passenger seat, and they drove away as the van followed. Shortly thereafter, Spires reported the crime to the police and described the perpetrators as a black male and a black female.

On June 7, 2010, at about 12:40 p.m., Sergeant Frank Carroll of the Detroit Police Department was driving in

an unmarked car near 11908 Wayburn in Detroit. Carroll worked with a multijurisdictional task force focused on automobile theft in Detroit and other nearby communities, including Grosse Pointe. As he was driving past 11908 Wayburn, Carroll noticed a gold Saturn in the backyard of an apparently vacant home. Two black males, one of whom was defendant, were standing near the car's raised hood. Using binoculars, Carroll was able to see the car's license plate number. He called the license plate number in to the Grosse Pointe Park police dispatcher and discovered that the Saturn was a carjacked vehicle.

Carroll called other officers and, when they arrived, they walked into the backyard. At that time, Carroll saw a third man near the front of the Saturn. He also saw a gray Ford Explorer in the backyard, which he learned was also a stolen vehicle. In addition, Carroll saw tools in the yard, including a lug wrench that was attached to a wheel of the Ford Explorer. Carroll and his team placed defendant and the two other men, Denzel Walker and William Johnson, under arrest. The officers searched defendant and found a key for the Saturn and two bullets. They impounded and searched the van that had been used in the carjacking and found a wallet and several cell phones, including Spires's.

Carroll took defendant, Walker, and Johnson to the Grosse Pointe Park police station for processing. Carroll informed defendant of his rights, asked defendant questions, and wrote down defendant's responses. Defendant said that someone had told him about the stolen cars and he denied ever carjacking any. He said that he was taking parts off the Ford Explorer to scrap them. Defendant denied owning a handgun and said that he found the bullets that were in his pocket. He then refused to sign the statement.

On June 8, 2010, officers called Spires to tell him they had recovered his mother's car. Spires went to the Grosse Pointe Park police station to identify the perpetrator in a photographic lineup. Although defendant was in custody at the station, Carroll explained that the station did not have enough young black men or the facilities required to conduct a live lineup. To conduct the photographic lineup, Sergeant Cregg Hughes compiled six mug shots, one of defendant and five others of men of similar age, with similar complexions, facial hair, and haircuts. When Spires saw the photographs, he immediately identified defendant from the array.

As noted, on October 27, 2010, a jury convicted defendant of carjacking, UDAA, two counts of receiving and concealing a stolen motor vehicle, felon-in-possession, and felony-firearm.

II. DISCUSSION

A. CONDUCT OF THE PROSECUTOR

Defendant argues that the prosecutor improperly vouched for Spires's credibility during her rebuttal argument. " 'Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.' " *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant did not object when the prosecutor made the statements at issue during her rebuttal argument. Therefore, this issue is unpreserved. Generally, this Court reviews unpreserved claims of prosecutorial misconduct for plain error. *Unger*, 278 Mich App at 235. " 'Reversal is warranted only

when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " *Id*., quoting *Callon*, 256 Mich App at 329. In addition, there is no error if " 'a curative instruction could have alleviated any prejudicial effect.' " *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010), quoting *Callon*, 256 Mich App at 329.

We hold that the prosecutor's statements did not amount to plain error requiring reversal. When considering a claim of prosecutorial misconduct, the prosecutor's statements should be considered in context, which includes defense counsel's arguments. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009); see also *Bennett*, 290 Mich App at 475. It is improper for prosecutors to comment on their personal knowledge or belief with respect to a witness's credibility. *Bennett*, 290 Mich App at 478. It is also improper for a prosecutor to " 'vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness.' " *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011), quoting *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Although a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue and make reasonable inferences from the evidence to support a witness's truthfulness. *Bennett*, 290 Mich App at 478. In addition, a prosecutor is generally "given great latitude to argue the evidence and all inferences relating to his theory of the case." *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). When a defendant argues that the prosecution's witnesses testified dishonestly, the prosecutor may respond by arguing that the witnesses had no motive to lie. See *id*.

Defendant argues that the following statements by the prosecutor improperly bolstered Spires's credibility:

> I don't, I don't think he would even come in — I don't think he would come in here and lie. Absolutely not. He was brave coming in here and indicating that because stuff gets around in this city and, and he wouldn't have done it unless it was absolutely what had happened to him.
>
> * * *
>
> You know, I would say to you that this — I think he was very honest about everything. He tried, you know, to be very honest. And the young man was very brave in coming here. And I ask that you find [defendant] guilty on all charges in the information.

These statements did not amount to plain error. The prosecutor's comments were made in response to defense counsel's numerous challenges to Spires's credibility during his closing argument. Again, a prosecutor's statements should be viewed in the context of the defendant's arguments. See *Seals*, 285 Mich App at 22. After defendant argued that Spires was not a credible witness, the prosecutor could permissibly argue in response that Spires had no motive to lie. See *Thomas*, 260 Mich App at 456. In essence, this was the prosecutor's argument when she said that Spires was brave to come in and testify, presumably because he could be retaliated against for testifying against defendant.

Further, the prosecutor's comments did not imply that she had special knowledge about Spires's truthfulness. Rather, the prosecutor made logical inferences from the evidence that a person generally does not go to the trouble of fabricating a carjacking and lying about who did it. The jury heard that Spires reported the carjacking to the police the night of June 4, 2010, and went to the police station on June 8, 2010, to view a

photo array of suspects and give another statement. In addition, the jury heard Spires testify at trial. From this evidence, the prosecutor could reasonably infer that Spires would go to these lengths only if he had actually been carjacked.

Moreover, were we to find any impropriety in the prosecutor's remarks, any alleged prejudice was cured by the trial court's jury instructions. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235 (citations omitted). The trial court reminded the jurors that they took an oath to return a verdict based only on the evidence and the court's instructions on the law. It further instructed the jurors that it was their responsibility alone to determine the facts of the case. The court told the jury that the attorneys' statements and arguments were not evidence and should not be considered during deliberations. Moreover, the court also instructed the jurors that they should evaluate the witnesses' credibility on the basis of their own observations and common sense. For these reasons, defendant has not demonstrated plain error.

Defendant also claims his attorney was ineffective for failing to object to the prosecutor's remarks.[1] As dis-

[1] To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that " 'counsel's representation fell below an objective standard of reasonableness' " and that "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Smith v Spisak*, 558 US 139; 130 S Ct 676, 685; 175 L Ed 2d 595 (2010), quoting *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, counsel has discretion to choose a method of trial strategy, and this Court will not substitute its own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d

cussed, no error occurred because the prosecutor made reasonable inferences on the basis of the evidence presented and, therefore, counsel was not ineffective for failing to object. See also *People v Russell*, 297 Mich App 707, 720; 825 NW2d 623 (2012).

B. TRIAL COURT'S REFERENCE TO DEFENDANT

Defendant maintains that the trial court violated his right to a trial by jury when the following exchange occurred during defense counsel's cross-examination of Sergeant Carroll:

> *Defense Counsel*: Anywhere does it ever show that the other two defendants were ever put in a photo show up?
>
> *Sergeant Carroll*: No, not to my knowledge.
>
> *Defense Counsel*: Yet you charged [defendant] with the carjacking?
>
> *Prosecutor*: I'd object. That's not true, your honor.
>
> *Defense Counsel*: You requested a warrant for it and got it.
>
> *The Court*: Well, it's — I'm not sure how or why it's relevant.
>
> *We know that from this witness the only perpetrator that was in the photo lineup was the defendant.* Beyond what the others were doing or why they weren't or who charged them or who made the decision to charge, I don't know how that's relevant. They weren't in the photo lineup. [Emphasis added.]

Specifically, defendant argues that the trial court's reference to him as the "perpetrator" in front of the jury directed a verdict of guilt in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

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714 (2009). Counsel is not ineffective for failing to make a meritless argument or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

This issue is unpreserved because defendant raised it for the first time on appeal. *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). This Court reviews unpreserved constitutional errors for plain error affecting substantial rights. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005). A defendant has the right to a fair and impartial trial under both the United States and Michigan Constitutions. See US Const, Am VI; Const 1963, art 1, § 20. This right is violated when the trial court's conduct "pierces the veil of judicial impartiality . . . ." *People v Conley*, 270 Mich App 301, 307-308; 715 NW2d 377 (2006) (citation and quotation marks omitted). Although a trial court has significant discretion and power with respect to trial proceedings, this power is limited. *Id*. A trial court's conduct will be held to have pierced the veil of judicial impartiality, thus requiring reversal of the defendant's convictions, when "the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.' " *Id*. at 308, quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975) (citation and quotation marks omitted).

Under the Sixth and Fourteenth Amendments, a criminal defendant is indisputably entitled to a jury determination on all elements of the charges against him. *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). It is impermissible for a court to direct a guilty verdict. *Id.* at 630. However, the trial court here did not instruct the jury that defendant committed the carjacking. Rather, the court merely restated the evidence already on record—that Spires identified defendant as the perpetrator of the crime. This in no way directed the jury to reach a guilty verdict.

Further, were we to conclude that the trial court misspoke, the single statement was made in isolation and the court instructed the jury that the court's statements do not constitute evidence. The court also instructed the jurors that defendant was presumed innocent and that it was their duty to weigh the evidence and determine whether defendant was guilty beyond a reasonable doubt. Finally, the prosecution had already presented considerable evidence linking defendant to the crime. Carroll testified that he found defendant near the stolen Saturn with the hood up, defendant had a key for the Saturn in his pocket, and, again, Spires unequivocally identified defendant as the carjacker during the photographic lineup and at trial. Therefore, if any error occurred, it was clearly not outcome-determinative.

C. DOUBLE JEOPARDY

Defendant contends that his convictions for both carjacking and UDAA violate the Double Jeopardy Clauses of the United States and Michigan Constitutions, which prohibit imposing multiple punishments for the same offense. While defendant failed to raise this issue at trial, we will address it because "a double jeopardy issue presents a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). However, this Court reviews "an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that . . . affected the outcome of the lower court proceedings." *Id*.

If the Legislature clearly expressed an intent to allow the imposition of multiple punishments, no double

jeopardy violation occurs when a court does so. *People v Smith*, 478 Mich 292, 296; 733 NW2d 351 (2007); *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). When the Legislature has not clearly intended to impose multiple punishments, the same-elements test is used to determine if multiple punishments are permissible under the Double Jeopardy Clauses of the United States and Michigan Constitutions. See *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993); *Smith*, 478 Mich at 296. The same-elements test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *Dixon*, 509 US at 696; see also *Smith*, 478 Mich at 296.

The carjacking statute, MCL 750.529a, provides:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence . . . is guilty of carjacking . . . .
>
> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur *in an attempt to commit the larceny*, or during commission of the larceny . . . . [Emphasis added.]

The UDAA statute, MCL 750.413, states:

> Any person who shall, willfully and without authority, take possession of *and drive or take away* . . . any motor vehicle, belonging to another, shall be guilty of a felony . . . . [Emphasis added.]

It is clear that a carjacking conviction requires proof of the use of force or violence, or the threat of force or violence, while a UDAA conviction does not. See MCL 750.413; MCL 750.529a. The issue is whether UDAA contains an element that carjacking does not. Otherwise, UDAA is a lesser included offense of carjacking and the same offense

for purposes of the same-elements test. See *Dixon*, 509 US at 696; see also *Smith*, 478 Mich at 296.

In two unpublished opinions, *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket Nos. 292238 and 292920), and *People v Baker*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2010 (Docket No. 289844), this Court ruled that carjacking and UDAA are the same offense for purposes of double jeopardy because carjacking requires a completed larceny. However, a recent case from our Supreme Court, *People v Williams*, 491 Mich 164; 814 NW2d 270 (2012), is dispositive on this issue. The question in *Williams*, 491 Mich at 166, was whether a conviction for armed robbery required a completed larceny. The Court noted that in 2004 PA 128, the Legislature amended three of the statutes governing robbery offenses.[2] Before the 2004 amendments, the general robbery statute stated, in part:

> Any person who shall assault another, and shall feloniously *rob, steal and take* from his person, or in his presence, any money or other property, which may be the subject of larceny . . . shall be guilty of a felony . . . . [MCL 750.530, as enacted by 1931 PA 328 (emphasis added).]

After the robbery statute was amended in 2004, it read, in relevant part:

> (1) Any person who, *in the course of committing a larceny* of any money or other property that may be the subject of larceny . . . is guilty of a felony . . . .
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur *in an attempt to commit the larceny*, or during commission of the larceny . . . . [MCL 750.530 (emphasis added).]

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[2] 2004 PA 128 amended MCL 750.529 (armed robbery), MCL 750.529a (carjacking), and MCL 750.30 (robbery).

The Supreme Court held that, in 2004 PA 128, the Legislature "demonstrated a clear intent to remove the element of a *completed* larceny, signaling a departure from Michigan's historical requirement and its common law underpinnings." *Williams*, 491 Mich at 172. Consequently, "an attempted robbery or attempted armed robbery with an incomplete larceny is now sufficient to sustain a conviction under the robbery or armed robbery statutes, respectively." *Id*.

Like the armed robbery statute, the carjacking statute was amended to describe the offense as one that occurs during the course of committing a larceny, with that phrase defined as including acts "that occur in an attempt to commit the larceny . . . ." MCL 750.529a; see also MCL 750.530. In *People v Williams*, 288 Mich App 67, 79-80; 792 NW2d 384 (2010), which was affirmed by *Williams*, 491 Mich at 184 (discussed above), this Court emphasized the almost identical language of the robbery and carjacking statutes. This Court observed "that the revised statute was intended to include attempts to commit the designated crime." *Williams*, 288 Mich App at 80. As the Supreme Court and this Court ruled in the *Williams* opinions, we also hold that, under MCL 750.529a as amended, a carjacking conviction does not require a completed larceny. Therefore, UDAA contains an element that carjacking does not—the completed larceny of a motor vehicle—and the same-elements test is not violated. See *Dixon*, 509 US at 696; see also *Smith*, 478 Mich at 296. Accordingly, defendant's convictions for both offenses did not violate his double jeopardy rights.

D. SUPPRESSION OF EVIDENCE

Defendant asserts that the trial court erred by admitting various pieces of evidence because police offic-

ers lacked probable cause to arrest him. A motion to suppress evidence must be made before trial or at trial with the trial court's permission. *People v Gentner, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004). In his Standard 4 Brief,[3] defendant claims that he requested an evidentiary hearing on October 25, 2010, to determine the legality of his arrest and the admissibility of evidence. The record reflects that, on October 25, 2010, the day trial was scheduled to begin, defendant expressed his various "grievances" to the trial court, which the court addressed in detail. Defendant and the court had the following exchange about an evidentiary hearing:

> *Defendant*: What about the evidentiary hearing?
>
> *The Court*: What evidentiary hearing?
>
> *Defendant*: All the evidence they have. That's it, just the police report?
>
> *The Court*: The trial is the evidentiary hearing unless there is a[n] issue about the admissibility of any evidence before trial. That's what trials are for. . . .
>
> Now, if you know that there is any specific evidence that you think the prosecution is going to use, which they shouldn't use or shouldn't be allowed to use, then that gets raised in a[n] evidentiary hearing before trial. But this is what I'm trying to get at with you is what such evidence do you think there is? So far I haven't heard you give me any. I haven't heard you tell me what evidence you think they have against you that should not be used or shouldn't be permitted to be used. Nothing so far has registered.
>
> *Defendant*: Can I do a motion to withdraw counsel?

As the transcript shows, defendant never explicitly requested an evidentiary hearing and he never argued that his arrest was unlawful or that any evidence

[3] See Administrative Order No. 2004-6.

should be suppressed. After the court explained the purpose of an evidentiary hearing, defendant moved on to a different subject. The trial court did not err by failing to hold an evidentiary hearing that was never requested on an issue—the legality of defendant's arrest—that was never raised.

We further hold that there was probable cause to arrest defendant and that it would have been erroneous to suppress any evidence as the fruit of an unlawful arrest. "A police officer may arrest a person without a warrant if he or she has reasonable cause to believe that a felony has been committed and that the particular person committed it." *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011), citing MCL 764.15(1)(d). " 'Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' " *Id*. at 75, quoting *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). An individual who has been lawfully arrested may be searched without further justification. *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008).

In this case, as discussed, Sergeant Carroll testified that he observed defendant standing near a Saturn, with the hood up, in the backyard of an apparently vacant home. Carroll was able to see the license plate number of the Saturn using binoculars. He called the number into the Grosse Pointe Park police dispatcher and discovered that the Saturn had been reported as a carjacked vehicle. Carroll also saw a Ford Explorer in the yard that had been reported stolen. There were tools used to work on cars in the yard, including a lug wrench that was attached to the wheel of the Ford Explorer.

Because there were two stolen vehicles in the yard, Carroll had reasonable cause to believe a felony had been committed. See *Cohen*, 294 Mich App at 74. Further, in light of defendant's proximity to the stolen vehicles, Carroll had reasonable cause to believe that defendant was somehow involved in the carjacking of the Saturn or a related felony, such as receiving and concealing stolen property. Because there was probable cause to arrest defendant, the evidence resulting from that arrest could be introduced at trial. See *Reese*, 281 Mich App at 295; see also *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). Accordingly, defendant is not entitled to relief on this issue.

E. LINEUP

Defendant argues that the trial court should not have admitted evidence from the photographic lineup because he was in custody and was available for a corporeal lineup and because the lineup was unduly suggestive. Defendant raises this claim for the first time on appeal and, therefore, it is unpreserved. This Court reviews unpreserved constitutional errors for plain error affecting substantial rights. *Bauder*, 269 Mich App at 180.

This Court has held that, generally, a photographic lineup should not be used for identification when the suspect is in custody. *People v Currelley*, 99 Mich App 561, 564; 297 NW2d 924 (1980). However, this rule is subject to certain exceptions, including situations in which a corporeal lineup is not feasible because "there are insufficient numbers of persons available with the defendant's physical characteristics . . . ." *Id*. at 565 n 1. Sergeant Hughes explained that, at the police station, there were not enough young black men with

similar physical characteristics to defendant. Under the circumstances, a photographic lineup was clearly proper. See *id*. at 564-565. Indeed, defendant would have suffered significant prejudice if he had been placed in a corporeal lineup with men of different races or ages.

We further hold that the photographic lineup was not unduly suggestive. "An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Hughes testified that he compiled six mug shots for the photographic array, one of defendant and five others of men of similar age with similar complexions, facial hair, and haircuts. There is no indication that this process was impermissibly suggestive or that it gave rise to a substantial likelihood of misidentification. See *Harris*, 261 Mich App at 51.

F. ARRAIGNMENT

Defendant avers that he was denied due process because, though he was arrested on June 7, 2010, he was not arraigned until June 10, 2010. Defendant failed to raise this issue in the trial court and, therefore, it is unpreserved. *Metamora Water Serv*, 276 Mich App at 382. Again, this Court reviews unpreserved constitutional errors for plain error affecting substantial rights. *Bauder*, 269 Mich App at 180. Defendant must show that the error was clear or obvious and that it was outcome-determinative. *Id*.

An individual who has been arrested must be brought before a magistrate for arraignment "without unnecessary delay . . . ." MCL 764.13; MCL 764.26; see also *People v Manning*, 243 Mich App 615, 622; 624 NW2d 746 (2000). When an individual is arrested

without a warrant, a prompt arraignment is particularly important because it provides a judicial determination of probable cause. *People v Mallory*, 421 Mich 229, 239; 365 NW2d 673 (1984). A delay of more than 48 hours after arrest is presumptively unreasonable unless there are extraordinary circumstances. *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991). The exclusionary rule applies "whenever a statutorily unlawful detention has been employed as a tool to directly procure *any* type of evidence from a detainee." *Mallory*, 421 Mich at 240-241. However, "[w]hile an improper delay in arraignment may necessitate the suppression of evidence obtained as a result of that delay, the delay does not entitle a defendant to dismissal of the prosecution." *People v Harrison*, 163 Mich App 409, 421; 413 NW2d 813 (1987).

Defendant is correct that he was arrested without a warrant on June 7, 2010, and arraigned on June 10, 2010. Because defendant was arraigned more than 48 hours after his arrest, this delay is presumptively unreasonable. See *Riverside*, 500 US at 56-57. However, the proper remedy for this delay is the suppression of any evidence directly procured as a result of that delay. See *Mallory*, 421 Mich at 240. Defendant claims that his arraignment was delayed because the police were manufacturing evidence and asks this Court "to suppress the evidence as a result of that delay." However, defendant does not specify what evidence was allegedly procured by his unlawful detention. And the record reflects that defendant's position is untenable. Spires identified defendant from a photo lineup on June 8, 2010. The keys to the Saturn, the bullets, and the stolen vehicles were obtained when defendant was arrested, on June 7, 2010. Defendant's statement to Sergeant Carroll was also made on the date of his arrest. Therefore, no evidence was obtained as a direct result of the

"undue delay," which would have begun on June 9, 2010, 48 hours after defendant's arrest. Because there was no evidence to suppress, the delay in defendant's arraignment was not outcome-determinative, and he is not entitled to relief on this issue. See *Bauder*, 269 Mich App at 180.

G. DOCUMENTS FROM THE PROSECUTION

We reject defendant's claim that the prosecution failed to provide him with a copy of the felony complaint and felony warrant. "Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). MCR 6.101 provides in part:

> (A) Definition and Form. A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense.
>
> (B) Signature and Oath. The complaint must be signed and sworn to before a judicial officer or court clerk.

MCR 6.104(D) provides that if an individual is arrested without a warrant, a complaint must be filed at or before the arraignment. When the court has received the complaint and finds probable cause, the court must either endorse the complaint or issue a warrant. See *id*.

Both the complaint and the warrant are part of the lower court file, signed by Magistrate Steve Lockhart, and file-stamped for June 9, 2010. In addition, the court's register of actions indicates that defendant was arraigned on the warrant on June 10, 2010. At this arraignment, the court was required to inform defen-

dant of the offenses charged and their possible prison sentences. See MCR 6.104(E)(1). There are no allegations or indications that this arraignment did not occur. Therefore, defendant was presumably made aware of the contents of the complaint and the warrant at that time. See *id*. Further, when trial was set to begin on October 25, 2010, defense counsel specifically stated that he had a copy of the complaint. Moreover, we are unaware of any court rule or case that requires the prosecution to give the defendant a copy of both the complaint and the warrant.

Were we to hold that the prosecution was required to provide defendant with a copy of both the complaint and the warrant, the failure to have done so would not constitute plain error. Defendant claims that if he had these documents, he could have objected to the lack of probable cause for his arrest and moved to suppress evidence. It is not clear why defendant needed these documents to object to his arrest, given that he was made aware of the charges against him at his arraignment. See MCR 6.104(E)(1). In addition, there was clearly probable cause to arrest defendant, as discussed above. Therefore, any alleged error would not be outcome-determinative.

H. CONTENTS OF THE FELONY COMPLAINT

Defendant urges the Court to set aside his convictions on the ground that the arrest warrant was based on a complaint that lacked facts and contained only legal conclusions. Again, this issue is unpreserved and we review it for plain error affecting substantial rights. *Bauder*, 269 Mich App at 180.

The issuance of an arrest warrant requires "(1) the presentation of a proper complaint alleging the commission of an offense and (2) a finding of 'reasonable cause'

to believe that the individual accused in the complaint committed that offense." *Manning*, 243 Mich App at 621, quoting MCL 764.1a(1). A finding of probable cause can be based on "the factual allegations of the complainant in the complaint, the complainant's sworn testimony, the complainant's affidavit, or the supplemental sworn testimony or affidavits of other individuals presented by the complaint or required by the magistrate." *Manning*, 243 Mich App at 621.

On June 7, 2010, defendant was arrested without a warrant. On June 9, 2010, the prosecution filed a felony complaint. The complaint listed each offense with which defendant was charged, along with statutory citations and brief explanations for each offense, as required by MCR 6.101(A). The complaint was also signed by and sworn to before a magistrate, as required by MCR 6.101(B). On June 9, 2010, the magistrate also found probable cause to believe that defendant committed the offenses charged and issued a warrant for his arrest. This finding of probable cause was supported by the allegations in the complaint. The complaint alleged that defendant used a firearm and the threat of force or violence against Spires to take Spires's 1995 Saturn. It also alleged that defendant drove the Saturn away. Finally, the complaint contended that defendant had a previous felony conviction and was ineligible to carry a firearm. Given these factual allegations, there was probable cause to issue a warrant for defendant's arrest with respect to the offenses of which he was ultimately convicted. See *Manning*, 243 Mich App at 621; see also MCL 764.1a. A lack of probable cause with respect to any other charges could not amount to plain error because defendant was not convicted of those offenses. For these reasons, defendant's claim is without merit.

I. FELON-IN-POSSESSION AND FELONY-FIREARM CONVICTIONS

Defendant complains that his convictions of both felon-in-possession and felony-firearm violated double jeopardy principles. In *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), the Michigan Supreme Court ruled that the Legislature intended to impose an additional sentence "whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute." The offense of felon-in-possession is not one of the four exceptions specifically listed in the felony-firearm statute. See MCL 750.227b. Therefore, pursuant to clearly established precedent, defendant's convictions for felon-in-possession and felony-firearm did not violate his double jeopardy rights. See *Calloway*, 469 Mich at 452.

J. JURISDICTION

Defendant complains that the trial court lacked jurisdiction over him because the prosecution did not timely file an information. Pursuant to MCR 6.112(C), "[t]he prosecutor must file the information or indictment on or before the date set for the arraignment." The record is unclear with regard to whether the prosecution properly filed an information. Although an information and amended information appear in the court file, they are not file-stamped by the court. If the prosecution did not properly file an information with the trial court, it violated MCR 6.112(C). However, if it was not properly filed, any error was harmless. See MCR 6.112(G); *People v Waclawski*, 286 Mich App 634, 706-707; 780 NW2d 321 (2009). MCR 6.112(G) provides that, "[a]bsent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing . . . ."

Defendant did not make a timely objection and, indeed, raises this issue for the first time on appeal. Defendant also has not made a showing of prejudice. Defendant was represented by counsel, who clearly had a copy of the complaint and, thus, knew the charges against defendant. Defendant was arraigned on the information, and presumably the charges against him were read at that time. See MCR 6.104(E)(1). Defendant has not provided a transcript of the arraignment or otherwise shown that the charges were not read, and defendant has the burden of proving prejudice. See MCR 6.112(G). Accordingly, defendant is not entitled to any relief on this claim.

Affirmed.

K. F. KELLY and M. J. KELLY, JJ., concurred with SAAD, P.J.

PEOPLE v FAWAZ

Docket No. 307214. Submitted December 11, 2012, at Detroit. Decided December 20, 2012, at 9:05 a.m.

Mona Hussein Fawaz was convicted by a jury in the Wayne Circuit Court of one count of arson of a dwelling house, one count of arson of insured property, and two counts of making false statements about material matters for an insurance claim. Defendant was sentenced by the court, Thomas E. Jackson, J., to five years' probation plus fines, costs, and $29,408.74 in restitution. The prosecution appealed.

The Court of Appeals *held*:

1. Under offense variable (OV) 3 of the sentencing guidelines, MCL 777.33, a trial court must assess 10 points if bodily injury requiring medical treatment occurred to a victim. The term victim includes any person harmed by the actions of the charged party and it is not limited to only the actual victim of the charged offense. In this case, the trial court erred by assessing zero points for OV 3. Two firefighters constituted victims for purposes of OV 3 because they suffered injuries requiring medical attention while combatting the fire set by defendant. The trial court should have assessed 10 points for OV 3.

2. Under OV 9 of the sentencing guidelines, MCL 777.39, a trial court must assess 10 points if there were 2 to 9 victims who were placed in danger of physical injury or death. A victim is defined in MCL 777.39(2)(a) as each person who was placed in danger of physical injury or loss of life or property. In this case, the trial court erred by assessing zero points for OV 9. Two firefighters suffered physical injuries requiring medical attention and a neighbor from the house next to defendant's was escorted from her house by a police officer for her personal safety. Because all three were victims under the unambiguous language of MCL 777.39(2)(a), the trial court should have assessed 10 points for OV 9.

3. Defendant's sentence was outside the recommended range of the sentencing guidelines. Because OV 3 and OV 9 were scored incorrectly and resentencing was necessary the Court of Appeals declined to address the departure issue.

4. Restitution to crime victims is governed by the Crime Victim's Rights Act, MCL 780.751 *et seq*. A victim is defined in MCL 780.766(1) as an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime and includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of the crime. Restitution is mandatory, MCL 780.766(2), and the amount of restitution to be paid by a defendant is calculated on the basis of the actual loss suffered by the victim. The prosecution bears the burden of establishing the proper amount of restitution by a preponderance of the evidence. In this case, Farmers Insurance insured the house that defendant was found guilty of burning down. The trial court clearly erred by failing to award Farmers, a corporate victim, restitution for those costs associated with investigating defendant's arson. The resources Farmers spent determining that defendant's claim was fraudulent were part of the actual loss suffered by the victim and should have been included in the restitution amount. However, the trial court did not clearly err when it found that Farmers' legal and court reporter fees should be excluded from the restitution award. The prosecution failed to meet its burden to establish that those fees were incurred in the investigation of the arson because neither the record nor the prosecution's brief reveals when those costs arose.

Sentence reversed in part and case remanded for resentencing.

1. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 3 — PHYSICAL INJURY TO VICTIM — DEFINITION OF VICTIM.

Offense variable (OV) 3 of the sentencing guidelines, MCL 777.33, considers physical injury to a victim, and a trial court must assess 10 points if bodily injury requiring medical treatment occurred to a victim; the term "victim" includes any person harmed by the actions of the charged party and it is not limited to only the actual victim of the charged offense; a firefighter who is injured while responding to a fire later determined to be arson is a victim for purposes of OV 3.

2. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 9 — DANGER OF PHYSICAL INJURY OR DEATH.

Offense variable (OV) 9 of the sentencing guidelines, MCL 777.39, considers the number of victims; a victim is defined as each person who was placed in danger of physical injury or loss of life or property; a firefighter who was injured while responding to a fire later determined to be arson, and a neighbor living in a house next door who had to be evacuated from his or her house due to the

danger of the fire spreading, constitute victims for purposes of assessing point under OV 9 of the sentencing guidelines.

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

Daniel J. Rust for defendant.

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

PER CURIAM. Defendant was convicted by a jury of one count of arson of a dwelling house, MCL 750.72, one count of arson of insured property, MCL 750.75, and two counts of making false statements about material matters for an insurance claim, MCL 500.4511(1). Defendant was sentenced to five years' probation plus fines, costs, and $29,408.74 in restitution. The prosecution appeals by right the trial court's judgment of sentence. On appeal the prosecution argues that the trial court erred when it concluded that two firefighters and defendant's neighbor were not "victims" for purposes of assessing points for offense variable 3 (OV 3) and offense variable 9 (OV 9). The prosecution also argues that the trial court erred regarding the amount defendant is required to pay in restitution. With respect to the calculation of the sentencing guidelines, we agree with the prosecution and reverse the judgment of sentence. With respect to restitution, we agree with the prosecution that the trial court abused its discretion by failing to include the victim's investigatory costs as part of the restitution amount; however, we conclude that the prosecution has failed to meet its burden to establish that the victim's legal fees should be included in the restitution amount. We remand for resentencing consistent with this opinion.

I. BASIC FACTS

On September 26, 2009, defendant's house caught fire. By 3:16 p.m., police and firefighters had arrived. Two of the firefighters, Walter Radu and Rudy Cervantes, who spent over a half-hour combating the blaze, suffered heat exhaustion requiring medical care from the advanced life support units at the scene. Radu received intravenous fluid and was placed on a heart monitor, and Cervantes received oxygen and intravenous therapy. Defendant's elderly neighbor, Mary Fras, had to be carried from her home by a police officer after her home filled with smoke. Fras's house stood approximately four feet from defendant's house.

The two fire examiners who conducted an investigation into the cause of the blaze testified at trial that the fire at defendant's house was set intentionally. In addition to the examiners, the jury heard testimony from other police and fire officials; Mary Fras's son; representatives of Farmers Insurance, the company which insured defendant's home; and other witnesses to the fire. The jury convicted defendant.

At sentencing, the prosecution requested that the trial court assign 10 points for OV 3, which addresses physical injury to a victim, because Radu and Cervantes suffered heat exhaustion requiring medical treatment. With respect to OV 9, which addresses the number of victims, the prosecution requested that the trial court assign 10 points for OV 9 because Radu, Cervantes, and Fras were placed in danger of injury. The trial court disagreed that Radu, Cervantes, or Fras were "victims" for purposes of OV 3 and OV 9. The trial court explained that it agreed that Radu, Cervantes, and Fras suffered injuries or were in danger of suffering injuries. However, the trial court disagreed that they were "victims" for purposes of OV 3 and OV 9 because "they would not

be within that circle of what we would define as a victim" under Michigan law. The trial court implied that Radu and Cervantes could not be "victims" under the sentencing guidelines because, as first responders, they put themselves in danger every time they respond to a fire. With respect to Fras, the trial court explained that every time a house catches fire, neighbors are in danger, and accordingly, Fras was not a victim. Ultimately, the trial court assigned zero points for both OV3 and OV 9.

At sentencing, the trial court also addressed the issue of restitution. Prior to sentencing, Farmers had submitted documentation of the expenses it had incurred following the fire at defendant's home. Specifically, Farmers claimed that it had incurred the following expenses:

> Board Up: $978.80
>
> Origin and Cause Investigation: $2,698
>
> Lab Analysis: $745
>
> Exam Under Oath: $7,975.78[1]
>
> Court Reporter: $706.75
>
> Contents Advance: $5,000
>
> Additional Living Expenses: $23,429.99
>
> Investigation Expenses: $928.00
>
> Legal Expenses for Defending Suit Filed by [defendant]: $5,950.20

The presentence investigation report (PSIR) recommended a restitution amount that included all these expenses, for a total recommended restitution amount of $48,411.72. However, at sentencing the trial court concluded that only "Board Up," "Contents Advance," and "Additional Living Expenses" should be included in

[1] This item includes the cost of legal counsel used during defendant's deposition.

the restitution amount. The trial court explained that, based on its understanding of the restitution statute, restitution is appropriate only for expenses that were "directly the result of the [defendant's] action." Accordingly, the trial court ordered $29,408.79 in restitution. On appeal, the prosecution only requests $42,462.32. Apparently, Farmers no longer requests the $5,950.20 for "Legal Expenses for Defending Suit Filed by [defendant]."

II. SENTENCING GUIDELINES

The accuracy of scoring under the sentencing guidelines is a question of law that we review de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). However, we review for clear error a trial court's findings of fact at sentencing. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred." *People v Buie*, 491 Mich 294, 315-316; 817 NW2d 33 (2012) (citation and quotation marks omitted).

A. OV 3

The prosecution first argues that the trial court erred by concluding that Radu and Cervantes were not "victims" for purposes of scoring OV 3, and assigning zero points for OV 3. We agree, and remand for resentencing on OV 3.

OV 3 is governed by MCL 777.33, and addresses physical injury to victims. MCL 777.33(1). A trial court must assign 10 points for OV 3 if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). MCL 777.33 does not expressly define "victim." However, in *People v Laidler*, 491 Mich

339; 817 NW2d 517 (2012), the Supreme Court concluded that "*any* person who is harmed by the defendant's criminal actions" is a "victim" for purposes of OV 3. *Id.* at 348 (emphasis added). The Court reasoned that its construction of the word "victim" was consistent with the dictionary definition of the word, as well as prior caselaw interpreting the word "victim" under OV 3. *Id*. at 348-349. Accordingly, the *Laidler* Court concluded that a coperpetrator killed in a robbery was a "victim" for purposes of OV 3 because he was harmed by the defendant's conduct. *Id*. at 349.

Similarly, in *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003), this Court concluded that "for purposes of OV 3, the term 'victim' includes any person harmed by the criminal actions of the charged party." In *Albers*, the defendant had argued that "the Legislature's use of the term 'victim' in the singular in MCL 777.33 is indicative of its intent that OV 3 apply only to the victim of the charged offense." *Id*. at 592. This Court disagreed, and reasoned that nothing in the plain text of the statute indicated a legislative intent to limit the definition of "victim" to only the victim of the charged offense. *Id*. at 593. The Court ultimately concluded that "[b]ecause we find no authority indicating otherwise . . . for purposes of OV 3, the term 'victim' includes any person harmed by the criminal actions of the charged party." *Id*.

We find *Laidler* and *Albers* instructive, and conclude that first responders can be "victims" for purposes of OV 3. Had the Legislature intended to limit the term "victim" to exclude first responders, it could have done so. See *People v Hock Shop, Inc*, 261 Mich App 521, 528; 681 NW2d 669 (2004) ("The Legislature is presumed to be familiar with the rules of statutory construction, and when it is promulgating new laws it is presumed to be

aware of the consequences of its use or omission of statutory language."). Nothing in the text of MCL 777.33 indicates a legislative intent to limit the term "victim" to exclude first responders. See *Albers*, 258 Mich App at 593. Moreover, neither *Laidler* nor *Albers* indicated that the term "victim" should be limited to exclude first responders; indeed, the Courts in each of those cases broadly defined "victim" for purposes of OV3 as "any person" harmed by a defendant's actions. *Laidler*, 491 Mich at 348; *Albers*, 258 Mich App at 593.

Radu and Cervantes suffered injuries requiring medical attention while combating the blaze set by defendant. Accordingly, they are "victims" for purposes of OV 3. The trial court should have assigned 10 points for OV 3, but instead assigned zero points. Accordingly, the trial court erred with respect to OV 3.

B. OV 9

The prosecution next argues that the trial court erred in its determination that there were no victims of the arson for purposes of OV 9, and therefore erred by assigning zero points for OV 9. Again, we agree, and remand for resentencing on OV 9.

OV 9 is governed by MCL 777.39, and addresses the number of victims. A trial court must assign 10 points for OV 9 if, *inter alia*, "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). Unlike OV 3, the statute governing OV 9 does expressly define "victim." Specifically, trial courts must count "each person who was placed in danger of physical injury or loss of life or property as a victim" under OV 9. MCL 777.39(2)(a).

"The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, [courts must] assume that the Legislature

intended its plain meaning and . . . enforce the statute as written. Accordingly, when statutory language is unambiguous, judicial construction is not required or permitted." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (citation and quotation marks omitted). A statutory provision is ambiguous "only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *Id*. at 50 n 12 (citation and quotation marks omitted). In the instant action, the statutory language defining "victim" under OV 9 does not conflict with any other statutory provision, and is susceptible to but one interpretation: "each person who was placed in danger of physical injury or loss of life" by defendant's actions is a "victim" for purposes of OV 9. MCL 777.39(2)(a). As with the statute governing OV 3, nothing in the text of the statute governing OV 9 indicates a legislative intent to limit the term "victim" to exclude first responders, see MCL 777.39, and if the Legislature had intended to so limit the definition of "victim" under OV 9, it could have done so. *Hock Shop, Inc*, 261 Mich App at 528.

Cervantes, Radu, and Fras were each "placed in danger of physical injury or loss of life" because of the fire defendant started. MCL 777.39(1)(c). Cervantes and Radu actually suffered physical injuries requiring medical attention, and Fras had to be escorted from her home by a police officer for her personal safety. Accordingly, all three were "victims" under the unambiguous language of OV 9.[2] The trial court should have assigned

[2] Moreover, the Supreme Court has already held that civilians who assume a risk of injury when intervening to stop a crime are "victims" for purposes of OV 9. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). Defendant makes no argument, and we see no reason, why the same rationale should not apply to first responders who assume a risk of injury when responding to a crime.

10 points for OV 9, but instead assigned zero points. Accordingly, the trial court erred with respect to OV 9.

The prosecution also argues that the trial court erred by departing downward from the sentencing guidelines without a substantial and compelling reason. However, having concluded that resentencing is required with regard to OV 3 and OV 9, we need not address the departure issue.

III. RESTITUTION

The prosecution next argues that the trial court erred when it excluded some costs requested by the victim, Farmers, from the amount of restitution. We agree in part.

This Court reviews a trial court's restitution order for an abuse of discretion. *In re McEvoy*, 267 Mich App 55, 59; 704 NW2d 78 (2005). The trial court's findings of fact are reviewed for clear error. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). We review de novo the trial court's interpretation of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*. *People v Law*, 459 Mich 419, 423; 591 NW2d 20 (1999).

The CVRA governs restitution to crime victims. As a threshold matter, for purposes of restitution, the CVRA defines "victim" as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 780.766(1). The definition of "victim" "includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime." *Id*. Accordingly, Farmers is a victim under the CVRA for purposes of restitution. See also *People v Norman*, 183

Mich App 203, 206; 454 NW2d 393 (1989) ("[R]estitution may be ordered to a reimbursing insurance company.").

Under the CVRA, restitution is mandatory, not discretionary:

> [W]hen sentencing a defendant convicted of a crime, the court *shall* order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. [MCL 780.766(2) (emphasis added).]

"[T]he prosecution bears the burden of establishing the proper amount" of restitution by a preponderance of the evidence. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997); MCL 780.767(4). "The amount of restitution to be paid by a defendant must be based on the actual loss suffered by the victim . . . ." *People v Bell*, 276 Mich App 342, 347; 741 NW2d 57 (2007). Moreover, when it enacted the CVRA, "the Legislature plainly intended to shift the burden of losses arising from criminal conduct—as much as practicable—from crime victims to the perpetrators of the crimes; thus, it is remedial in character and should be liberally construed to effectuate its intent." *People v Allen*, 295 Mich App 277, 282; 813 NW2d 806 (2011) (citation and quotation marks omitted).

In *Allen*, this Court addressed the scope of recovery for a corporate victim under the CVRA. The defendant, a sales representative for Blue Cross/Blue Shield (BCBS), had used fraudulent prescriptions and the name of a BCBS subscriber to obtain prescription drugs. *Id*. at 279-280. BCBS spent over $5,000 having another employee from its investigations department, Nina Burnett, spend 44 hours investigating the defen-

dant's actions. *Id*. This Court concluded that BCBS was entitled to the costs it had incurred paying Burnett to investigate the losses that resulted from the defendant's fraud, despite the fact that Burnett's role within the company was to investigate fraud. This Court explained:

> Burnett's department had numerous claims to investigate and she plainly could have spent the 44 hours that she spent investigating [the defendant's] fraud on other matters. Accordingly, Blue Cross essentially lost the time-value of the 44 hours that Burnett had to spend investigating [the defendant's] fraud, rather than some other fraud. That is, the loss to Blue Cross was *not* Burnett's salary or the department's budget; Blue Cross would likely have incurred those costs regardless of Allen's criminal conduct. Rather, it was the loss of time that amounted to a direct financial harm, which can be measured by assigning a value to the hours spent on the investigation. [*Id*. at 282-283.]

Similarly, in *People v Gubachy*, 272 Mich App 706; 728 NW2d 891 (2006), this Court concluded that the value of lost property included the labor cost that the corporate victim incurred determining the amount of the loss. *Id*. at 713.

Accordingly, under the CVRA and its attendant case law, a corporate victim is entitled to costs associated with investigating a defendant's illegal activity. Here, as in *Allen* and *Gubachy*, the victim spent time and labor costs investigating defendant's fire when it could have spent those resources investigating other, nonfraudulent insurance claims. The resources Farmers spent determining that defendant's claim was fraudulent were part of the "actual loss suffered by the victim," and should have been included in the restitution amount. *Bell*, 276 Mich App at 347. We are therefore left with a "definite and firm conviction that an error

occurred" when the trial court found that Farmers' costs for "Origin and Cause Investigation," "Lab Analysis," and "Investigation Expenses," should not be included in the restitution amount. *Buie*, 491 Mich at 315-316 (citation and quotation marks omitted). We reverse this portion of the trial court's restitution order, and direct the trial court to include these costs at resentencing.

However, we conclude that the prosecution has failed to meet its burden to show that Farmers' legal and court reporter fees in connection with defendant's deposition were investigatory under *Allen* and *Gubachy*. Accordingly, the trial court did not clearly err when it found that these costs should be excluded from the restitution award.

The prosecution simply argues that all the costs requested by Farmers are investigatory under *Allen* and *Gubachy*. Neither the record nor the prosecution's brief reveals when these costs arose. It is noteworthy that Farmers originally included in its loss amount submitted to the probation department a separate item for "Legal Expenses for Defending Suit Filed by [defendant]." Farmers no longer requests restitution for these expenses, but continues to request restitution for expenses related to defendant's deposition. These costs appear to be associated with Farmers' defense of a separate civil suit filed by defendant against Farmers, presumably *after* Farmers denied her claim because Farmers had *already* determined it was fraudulent. Even if these costs were not incurred in precisely this way, the prosecution has nonetheless failed to explain why defendant's deposition was part of Farmers' investigation into whether defendant's insurance claim was fraudulent, and therefore properly included as an "actual loss to the victim" under the caselaw. See *Allen*,

295 Mich App at 282-283; *Bell*, 276 Mich App at 347. Therefore, we are not left with a "definite and firm conviction that an error occurred" when the trial court found that Farmers' legal fees should be excluded from the restitution award. *Buie*, 491 Mich at 315-316 (citation and quotation marks omitted).

Remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

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

PEOPLE v HEFT

Docket No. 307150. Submitted December 11, 2012, at Lansing. Decided December 20, 2012, at 9:10 a.m. Leave to appeal sought.

Leonard J. Heft was convicted by a jury in the Saginaw Circuit Court, Fred L. Borchard, J., of entering without breaking with the intent to commit a felony or larceny therein, MCL 750.111, and conspiracy to commit entering without breaking with the intent to commit a felony or larceny therein, MCL 750.157a. Defendant appealed, arguing in part that the court had erred by failing to instruct the jury on entering without permission, MCL 750.115, as a lesser included offense.

The Court of Appeals *held*:

1. There are two elements that must be proved when the prosecution charges a person under MCL 750.115(1) with entering a dwelling or certain structures without breaking without permission: (1) entering without breaking and (2) entering without the owner's permission.

2. There are two elements that must be proved when the prosecution charges a person under MCL 750.111 with entering a dwelling or certain structures without breaking with the intent to commit a felony or larceny therein: (1) entering a building or structure without breaking and (2) having the intent to commit a felony or larceny therein when entering.

3. Entering without breaking without permission is not a lesser included offense of entering without breaking with the intent to commit a felony or larceny therein because the elements of the latter crime do not entirely subsume the elements of the former crime.

4. When dealing with a crime that includes alternative elements, a court must examine only the specific elements necessary to the defendant's charge in the case. The lesser offense of entering without breaking without permission contains an additional element (the lack of permission) that is not necessary to prove entering without breaking with the intent to commit a felony or larceny therein. The trial court did not err when it refused to instruct the jury on entering

without permission as a lesser included offense of entering without breaking with the intent to commit a felony or larceny therein.

5. Defendant failed to show that if the police had photographed certain footprints in the snow at the crime scene, the resulting photographic evidence would have exonerated him. Defendant failed to demonstrate that the state, in bad faith, failed to preserve material evidence that might have exonerated him. Defendant's due process rights were not violated.

6. A defendant is prejudiced as a result of defense counsel's errors when, but for defense counsel's errors, the result of the proceeding would have been different.

7. Defense counsel is not required to make objections that have no merit. Defendant's counsel was not ineffective as a result of failing to move to dismiss the charges on the bases of the state's failure to take and preserve photographs of the footprints in the snow or to object to certain testimony by police officers that did not contain improper opinions about defendant's guilt. Defendant failed to overcome the strong presumption that his counsel's failure to object to certain testimony by the police officers was sound trial strategy. There is no indication that counsel's failure to challenge the statements prejudiced the outcome of the trial.

Affirmed.

1. CRIMINAL LAW — ENTERING WITHOUT PERMISSION — ENTERING WITHOUT BREAKING WITH INTENT TO COMMIT LARCENY OR FELONY — LESSER INCLUDED OFFENSES.

The offense of entering a dwelling or certain structures without permission is not a lesser included offense of entering a dwelling or certain structures without breaking with the intent to commit a felony or larceny therein (MCL 750.111; MCL 750.115[1]).

2. CONSTITUTIONAL LAW — DUE PROCESS — EVIDENCE — FAILURE TO PRESERVE MATERIAL EVIDENCE.

A criminal defendant can show that the state violated his or her due process rights under the Fourteenth Amendment by showing that the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant; if the defendant cannot show bad faith by the state or that the evidence was potentially exculpatory, the state's failure to preserve evidence does not deny the defendant due process.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

State Appellate Defendant (by *Randy E. Davidson*) for defendant.

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM. Defendant, Leonard Heft, appeals as of right his convictions, following a jury trial, of entering without breaking with intent to commit a larceny (entering with intent to commit a larceny)[1] and conspiracy to commit entering with intent to commit a larceny (conspiracy).[2] We affirm.

I. FACTS

A. BACKGROUND FACTS

Jessie Chavez testified that at 1:30 a.m. on January 24, 2011, he heard pounding noises that he believed were coming from his home at 214 Cambrey. His mother called 911, and Saginaw Police Officers Mark Walker and Jeffery Madaj responded to the dispatch. Officer Walker testified that he noticed that two people in the area were running but then began walking, which he considered suspicious. Officers Walker and Madaj made contact with the individuals (Heft and Adam Kinville), separated them, and seated them in the patrol vehicles while they investigated.

Officer Walker testified that Heft told him that he was just walking around and that he and Kinville had walked

[1] MCL 750.111.

[2] MCL 750.157a.

there from Cronk Street. Officer Walker testified that, because Cronk Street was several miles from Cambrey, it was 1:30 a.m., and the temperature was about zero degrees but Heft was breathing hard and perspiring, he "felt like something was not right." Officer Madaj questioned Kinville and, on the basis of Kinville's statement and the same facts, determined that Kinville was not being truthful. Officers Walker and Madaj both testified that they found footprints in the snow and traced them back to 220 Cambrey, the house next door to 214 Cambrey. Officer Walker testified that he compared Heft's boots to the footprints and thought the boots could have made them.

The door on the house at 220 Cambrey was broken. Inside, the officers saw freshly tracked snow, a pile of heating registers, and that the hot water heater had been broken off from the pantry. The officers testified that they could not tell when the registers or heater had been broken. Several witnesses testified that Kinville had resided at 220 Cambrey at some point, but Chavez testified that the house had been vacant for four to six months before January 2011. Chavez testified that he had been inside the house while it was vacant and had been able to just "walk right in."

Officer Madaj testified that Kinville later stated that he had gone into the house to check on it because his grandfather owned it. Officer Walker testified that Heft stated that he had walked up to the door but had not entered the house.

Kinville eventually told Officer Madaj that his vehicle was parked around the corner, and the officers discovered a van parked about one block away. Heft possessed the van's keys and it was registered in his name. Officer Madaj testified that the van contained flooring tools, which a person could use to acquire scrap metal for sale.

B. JURY INSTRUCTIONS AND VERDICT

Kinville's counsel requested that the trial court instruct the jury on entering without permission[3] as a lesser included offense of entering with intent to commit a larceny, and Heft's counsel joined in the request. The trial court declined to issue the instruction. The jury found Heft guilty of entering with intent to commit a larceny and conspiracy. Heft now appeals. The jury found Kinville guilty of the same crimes, but he is not a party to this appeal.

II. LESSER INCLUDED OFFENSES

A. STANDARD OF REVIEW

This Court reviews de novo questions of law, including whether an offense is a lesser included offense and whether an instructional error violated a defendant's due process rights under the Fourteenth Amendment.[4]

B. LEGAL STANDARDS

The trier of fact may find a defendant guilty of a lesser offense if the lesser offense is necessarily included in a greater offense.[5] If the trial court does not instruct the jury on a lesser included offense, the error requires reversal if the evidence at trial clearly supported the instruction.[6]

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[3] MCL 750.115.

[4] *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

[5] MCL 768.32(1); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *Wilder*, 485 Mich at 41.

[6] *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002) (opinion by TAYLOR, J.).

However, the trier of fact may only consider offenses that are "inferior to the greater offense charged."[7] The trier of fact may *not* consider cognate offenses: those offenses that contain an element not found in the greater offense.[8] To be a lesser included offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense.[9] The elements of the lesser offense are subsumed when "*all* the elements of the lesser offense are included in the greater offense . . . ."[10]

C. STATUTORY LANGUAGE

Under MCL 750.111, it is a crime for a person to enter a variety of locations with the intent to commit larceny:

> Any person who, without breaking, enters any dwelling, house, . . . or structure used or kept for public or private use, or any private apartment therein, with intent to commit a felony or any larceny therein, is guilty of a felony . . . .

Thus, the crime has two elements: (1) entering a building or structure without breaking and (2) having the intent to commit a larceny therein when entering.

Under MCL 750.115(1), it is a crime for a person to enter a variety of private locations without permission from the owner:

> Any person who, without breaking, enters any dwelling, house, . . . or structure used or kept whether occupied or unoccupied, without first obtaining permission to enter

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[7] *Cornell*, 466 Mich at 354.

[8] *Id*. at 355.

[9] *Wilder*, 485 Mich at 41.

[10] *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003) (emphasis added); see *People v Smith*, 478 Mich 64, 70-71; 731 NW2d 411 (2007).

> from the owner or occupant, agent, or person having immediate control thereof, is guilty of a misdemeanor.

Thus, when the prosecution charges a person under MCL 750.115(1) with entering without breaking without permission, the crime has two elements: (1) entering without breaking and (2) entering without the owner's permission.

D. APPLYING THE STANDARDS

We conclude that entering without permission is not a lesser included offense of entering with the intent to commit a larceny. The elements of entering with intent to commit a larceny do not entirely subsume the elements of entering without permission.

Heft argues that, because entering without permission is necessarily included in breaking and entering with intent to commit larceny,[11] entering without permission is necessarily included in entering with intent to commit larceny. We disagree. When dealing with a crime that includes alternative elements, this Court must be careful to examine *only* the specific elements necessary to the defendant's charge in our case.[12] When we consider only those elements necessary for a defendant to commit entering without breaking, we must reject Heft's argument.

In *People v Cornell*, the Michigan Supreme Court held that breaking and entering without permission is necessarily included in breaking and entering with intent to commit larceny.[13] We must distinguish the Court's decision in *Cornell* because it expressly concerned a situation in which the prosecution charged the

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[11] See *Cornell*, 466 Mich at 360.

[12] *Wilder*, 485 Mich at 44-45.

[13] *Cornell*, 466 Mich at 360.

defendant with "breaking and entering," not merely entering.[14] A breaking is any use of force, however slight, to access whatever the defendant is entering.[15] As noted in *People v Toole*, cited in *Cornell*, "[t]here is no breaking if the defendant had the right to enter the building."[16] Thus, a breaking only exists if the defendant entered *without permission*: "breaking and entering" subsumes the "without permission" element of "entering without permission" because a person cannot commit a breaking with permission. However, simply entering does not subsume this element.

When determining whether the elements of one crime are subsumed in another, " '[t]he controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense.' "[17] The lesser offense of entering without permission contains an additional element—the lack of permission—on which the prosecution would have to prove additional facts that are not necessary for the prosecution to prove entering with intent to commit a larceny. Indeed, the defendants' theories of this case were inconsistent with entering without permission.

Kinville's theory of the case was that, as he told the officers at the scene, he was checking on his grandfather's house, he believed that his grandfather owned the house, he used to live in the house, he noticed that the door was open, and he went into the house to determine if everything was okay. Heft's attorney also argued in closing that there was no evidence that Heft

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[14] *Id*.

[15] *People v White*, 153 Mich 617, 620; 117 NW 161 (1908); *People v Wise*, 134 Mich App 82, 88; 351 NW2d 255 (1984).

[16] *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998).

[17] *Cornell*, 466 Mich at 354, quoting *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997).

and Kinville knew that the property was vacant before they entered it and that Heft was aware that Kinville had lived at the property because Kinville's wife is Heft's sister. The prosecution was not required to prove that Heft and Kinville did not have permission to enter the house to prove entering with intent to commit larceny, but would have been required to prove that Heft and Kinville did not have permission to enter the house to prove entering without permission.

Further, for an offense to be a lesser included offense, " ' "proof of the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." ' "[18] Breaking and entering subsumes entering without permission because "[i]t is impossible to commit the greater offense without first committing the lesser offense."[19] The opposite is true in this case. When faced with a factual situation in which a defendant entered a home *with* permission, a jury could find the defendant guilty of entering with the intent to commit a larceny, but innocent of entering without permission.[20] Here, unlike with breaking and entering, it is not impossible to commit the greater offense without first committing the lesser offense.

Heft argues that entering without permission is a lesser included offense of home invasion, but this is also

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[18] *Cornell*, 466 Mich at 352, quoting *People v Stephens*, 416 Mich 252, 263; 330 NW2d 675 (1982), quoting *United States v Whitaker*, 144 US App DC 344, 347; 447 F2d 314 (1971).

[19] *Cornell*, 466 Mich at 361; *Smith*, 478 Mich at 71, 74.

[20] See *People v St Lawrence*, unpublished opinion per curiam of the Court of Appeals, issued August 16, 2007 (Docket No. 268639), p 2, in which we concluded that the defendant was properly convicted of entering with intent to commit a larceny when the defendant entered a resort building with permission.

inapplicable. In *People v Silver*, the Michigan Supreme Court held that breaking and entering without permission is a lesser included offense of first-degree home invasion.[21] "Entering without permission" is an alternative element of any degree of home invasion, under which the trier of fact can find the defendant guilty of home invasion for entering without permission with a variety of aggravating circumstances.[22] Thus, home invasion subsumes the "without permission" element of entering without permission. As stated above, that element is not subsumed here.

We conclude that under the elements applicable to this case, the trial court did not err when it refused to instruct the jury on entering without permission because entering without permission is not a lesser included offense of entering (without breaking) with the intent to commit a larceny.

III. EXCULPATORY EVIDENCE

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

A defendant must raise an issue in the trial court to preserve it for our review.[23] Heft did not challenge the state's alleged failure to preserve exculpatory evidence in the trial court. Thus, this issue is unpreserved. This Court reviews unpreserved issues alleging constitutional error for plain error affecting a defendant's substantial rights.[24] Plain error affected the defendant's

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[21] *Silver*, 466 Mich at 392 (opinion by TAYLOR, J.); *id*. at 394-395 (opinion by KELLY, J.).

[22] MCL 750.110a.

[23] *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

[24] *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

substantial rights if (1) there was an error, (2) the error was clear or obvious, and (3) the error prejudiced the defendant.[25]

B. LEGAL STANDARDS

A criminal defendant can demonstrate that the state violated his or her due process rights under the Fourteenth Amendment if the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant.[26] However, "[t]he prosecutor's office is not required to undertake discovery on behalf of a defendant."[27] If the defendant cannot show bad faith or that the evidence was potentially exculpatory, the state's failure to preserve evidence does not deny the defendant due process.[28]

C. APPLYING THE STANDARDS

Heft argues that the state violated his due process rights when the police failed to photograph the tread pattern of the footprints in the snow leading away from 220 Cambrey. We disagree. The defendant must show that the evidence might have exonerated him or her.[29] Even assuming for the purposes of argument that the police maliciously failed to photograph the footprints in the snow, Heft told Officer Walker that he had walked up to 220 Cambrey. Therefore, Heft's footprints would have been in the snow whether he committed the charged crime or not. Thus, Heft has failed to demon-

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[25] *Id.* at 763.

[26] *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007).

[27] *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991).

[28] *Youngblood*, 488 US at 57-58.

[29] *Hanks*, 276 Mich App at 95-96.

strate that a photograph of the footprints would have exonerated him. We conclude that Heft has not demonstrated a clear error because he has not shown that the police failed to preserve exculpatory evidence.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Generally, whether a defendant had the effective assistance of counsel "is a mixed question of fact and constitutional law."[30] This Court reviews findings of fact for clear error and questions of law de novo.[31] But a defendant must move in the trial court for a new trial or an evidentiary hearing to preserve the defendant's claim that his or her counsel was ineffective.[32] When a defendant did not move in the trial court for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent from the record.[33]

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.[34] However, it is the defendant's burden to prove that counsel did not provide effective assistance.[35] To prove that defense counsel was not effective, the defendant must show that (1)

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[30] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[31] *Id*.

[32] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

[33] *People v Hoag*, 460 Mich 1, 7; 594 NW2d 57 (1999); *Odom*, 276 Mich App at 415.

[34] US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[35] *Ginther*, 390 Mich at 442-443; *Odom*, 276 Mich App at 415.

defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant.[36] The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.[37]

C. FAILURE TO MOVE FOR DISMISSAL

Heft argues that defense counsel was ineffective because he failed to move in the trial court to dismiss the charges against him on the ground that the police had failed to preserve the footprint evidence. Defense counsel is not required to make meritless motions.[38] Because we have concluded that this evidence was not exculpatory, it does not provide the basis for such a motion. Thus, we reject this argument.

D. EXPRESSION OF GUILT

Heft argues that his trial counsel was ineffective because he failed to object when the officers improperly opined about his guilt. A witness may not opine about the defendant's guilt or innocence in a criminal case.[39] Officer Walker testified in response to the prosecution's questioning as follows:

> *Q.* Did [Heft's] explanation make sense to you of what they were doing?

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[36] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[37] *Pickens*, 446 Mich at 312.

[38] *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

[39] *People v Row*, 135 Mich 505, 506-507; 98 NW 13 (1904); *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

A. Not at all.

Q. Why is that?

A. It was about zero degrees, 1:30 in the morning. I didn't want to be out even though I had to, so it—them just walking around at 1:30 in the morning with it almost below zero just did not make sense. They were—while [Heft], I did speak with him, he was breathing hard, he was perspiring, and so that made me feel like something was afoot, something was not right.

Officer Madaj testified in response to the prosecution's questioning as follows:

A. [Kinville] said that he and [Heft] were out for a walk, and they had came from, I believe it was, Cronk Street, which Cronk Street, is it's on the northwest side of the city almost to the city limits. It's—I'm just going to take a stab at it. It's probably four miles as the crow flies north, maybe a little bit less.

Q. So that's quite a ways away?

A. Yes.

Q. It's zero degrees out?

A. Yes.

Q. It's 1:30 in the morning?

A. Yes.

Q. In the dead of winter?

A. Yes.

Q. Did that seem reasonable to you?

A. No it did not.

Q. What did you do based on the fact he made that statement?

A. Based on his statement and the culmination of loud banging noises coming from the—the neighbor had reported, I didn't think that he was being truthful, so I had him have a seat in the rear of my vehicle.

The testimony of the officers here was not similar to statements that we have concluded are improper opinions about a defendant's guilt.[40] Neither officer testified about Heft's guilt in general. Thus, an objection would have been meritless because a fair reading of the officers' testimony reveals that they did not opine about Heft's guilt but, instead, were explaining the steps of their investigations from their personal perceptions.[41] Defense counsel is not required to make meritless objections.[42] We conclude that defense counsel was not ineffective by failing to challenge these statements.

E. HEFT'S STATEMENT TO OFFICER WALKER

Heft argues that defense counsel was ineffective when he did not move to suppress Heft's statement to Officer Walker. We conclude that Heft has not overcome the presumption that defense counsel's decision was sound trial strategy. We give defense counsel wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case.[43] To show that defense counsel's performance was objectively unreasonable, the defendant must overcome the strong presumption that defense counsel's decisions constituted sound trial strategy.[44] This Court will not substitute its judgment for that of defense counsel or review decisions with the benefit of hindsight.[45]

Officer Walker testified that Heft told him that he and Kinville had walked to the area from Cronk Street.

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[40] See *Row*, 135 Mich at 506-507; *Bragdon*, 142 Mich App at 199.

[41] See MRE 701.

[42] *Fonville*, 291 Mich App at 384.

[43] *Pickens*, 446 Mich at 325.

[44] *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *Odom*, 276 Mich App at 415.

[45] *Odom*, 276 Mich App at 415.

Heft argues that this testimony damaged his case because the jury likely concluded that Heft had lied to the police after hearing Officer Walker testify that he discovered Heft's van one block away. But Heft's statement also included an exculpatory explanation for why Heft and Kinville were in the area, which defense counsel may have wanted the jury to consider because the explanation was consistent with the defense theory of the case. As stated already in this opinion, the defense theory of the case was that Heft and Kinville were simply checking on a house that they believed belonged to Kinville's grandfather. This strategy would not "constitute ineffective assistance of counsel simply because it [did] not work."[46] We conclude that Heft has not overcome the strong presumption that defense counsel's decision not to challenge this testimony constituted sound trial strategy.

Nor is there any indication that defense counsel's failure to challenge these statements prejudiced the outcome of Heft's trial. Even had the officers not testified that Heft and Kinville had said that they had walked from Cronk Street, the officers had validly testified that they had stopped Heft and Kinville at 1:30 a.m. after a neighbor reported loud banging noises, that Heft and Kinville were observed running and were sweaty, that footprints led to the house and snow was tracked inside the house, and that Heft's van contained tools that could be used to obtain scrap metal and was parked one block away. Heft has not demonstrated that it is reasonably likely that the results of the proceedings would have been different if defense counsel had challenged Officer Walker's statement. Because Heft has not overcome the presumption that defense counsel's decision not to challenge the statement constituted

[46] *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

sound trial strategy or shown that the admission of the evidence affected the outcome of his proceedings, we conclude that Heft has not shown ineffective assistance of counsel.

V. CONCLUSION

We conclude that entering without permission is not a lesser included offense of entering without breaking with the intent to commit larceny. We further conclude that Heft has not demonstrated that the police failed to preserve exculpatory evidence or that defense counsel's alleged errors were objectively unreasonable.

We affirm.

WHITBECK, P.J., and FITZGERALD and BECKERING, JJ., concurred.

SPEICHER v COLUMBIA TOWNSHIP BOARD OF ELECTION COMMISSIONERS

Docket No. 307368. Submitted December 12, 2012, at Grand Rapids. Decided December 20, 2012, at 9:15 a.m. Leave to appeal sought.

Kenneth J. Speicher brought an action in the Van Buren Circuit Court against the Columbia Township Board of Election Commissioners, alleging violations of the Open Meetings Act (OMA), MCL 15.261 *et seq*. The court, Paul E. Hamre, J., granted summary disposition in favor of plaintiff, but denied plaintiff's request for injunctive relief. Plaintiff sought attorney fees and costs totaling $32,484.25 under MCL 15.271(4). Defendant contested the request, asserting that the claimed attorney fees were clearly excessive. The court held that a successful litigant is entitled to actual attorney fees under MCL 15.271(4) when the claimed attorney fees are for the OMA action, but that some of the attorney fees claimed by plaintiff were not for the OMA action and, therefore, plaintiff could not recover those fees. The court further held that the requested fees were clearly excessive in violation of the Michigan Rules of Professional Conduct. The court ultimately ruled that plaintiff was only entitled to recover $7,500 in attorney fees. Plaintiff appealed as of right.

The Court of Appeals *held*:

1. Under MCL 15.271(4), a successful plaintiff in an OMA action is entitled to receive his or her actual attorney fees. The term "actual" means (1) existing in act, fact, or reality or (2) real. The imposition of attorney fees under the OMA is mandatory. However, those fees must be for the OMA action and cannot be unrelated to the OMA claims. The burden of proving the fees rests on the claimant of those fees. In this case, the research performed by plaintiff's attorney that concerned election law was not related to plaintiff's OMA claims, and the time that plaintiff's attorney billed for election law research could not be included in the calculation of plaintiff's actual attorney fees under MCL 15.271(4). Given a lack of clarity in the billing records of plaintiff's attorney, however, remand was necessary for an evidentiary hearing to determine what time was spent by plaintiff's attorney on the OMA action.

2. MRPC 1.5(a) generally bars attorneys from charging illegal or clearly excessive fees. The Legislature cannot exempt attorneys

from compliance with the rules of professional conduct, and courts have the authority and obligation to take affirmative action to enforce the ethical standards set forth by those rules. The Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary in MCL 600.904. Thus, conduct that violates the rules of professional conduct violates public policy. MRPC 1.5(a) is a public policy restraint on illegal or clearly excessive fees, and the broad prohibition in the rule extends to all situations in which attorney fees are sought to be collected in Michigan courts. Accordingly, the public policy restraint on illegal or clearly excessive attorney fees set forth in MRPC 1.5(a) is applicable to actions for actual attorney fees under the OMA.

3. Under MRPC 1.5(a), a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. MRPC 1.5(a) sets forth a nonexhaustive list of factors to consider when determining if a fee is unreasonable and, therefore, clearly excessive. That list includes (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, (3) the fee customarily charged in the locality for similar legal services, (4) the amount involved and the results obtained, (5) the time limitations imposed by the client or by the circumstances, (6) the nature and length of the professional relationship with the client, (7) the experience, reputation, and ability of the lawyer or lawyers performing the services, and (8) whether the fee is fixed or contingent. Although the circuit court was correct that the public policy against excessive attorney fees also applies to awards for actual attorney fees under the OMA, evidence was not submitted by either party regarding the majority of the factors set forth in MRPC 1.5(a), and the circuit court's conclusion that $7,500 was the appropriate fee was not supported by an adequate factual basis. Further fact-finding was required on remand to determine whether the claimed attorney fees for the OMA action were clearly excessive.

Affirmed in part, award vacated, and case remanded for an evidentiary hearing to determine the appropriate amount of actual attorney fees for the OMA action.

1. ACTIONS — OPEN MEETINGS ACT — ATTORNEY FEES.

A successful plaintiff in an action brought under the Open Meetings Act (OMA), MCL 15.261 *et seq*., is entitled to receive his or her

actual attorney fees; the term "actual" means (1) existing in act, fact, or reality or (2) real; the imposition of attorney fees under the OMA is mandatory, but the claimed fees must be for the OMA action and cannot be unrelated to the OMA claims; the burden of proving the fees rests on the claimant of those fees (MCL 15.271[4]).

2. ACTIONS — OPEN MEETINGS ACT — ATTORNEY FEES — ILLEGAL OR EXCESSIVE FEES.

MRPC 1.5(a) generally bars attorneys from charging illegal or clearly excessive fees; the Legislature cannot exempt attorneys from compliance with the Michigan Rules of Professional Conduct, and the broad prohibition in MRPC 1.5(a) extends to all situations in which attorney fees are sought to be collected in Michigan courts, including actions for actual attorney fees under the Open Meetings Act, MCL 15.261 *et seq*.

3. ATTORNEY FEES — CLEARLY EXCESSIVE FEES — FACTORS TO CONSIDER.

Under MRPC 1.5(a), a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee; MRPC 1.5(a) sets forth a nonexhaustive list of factors to consider when determining if a fee is unreasonable and, therefore, clearly excessive, including (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, (3) the fee customarily charged in the locality for similar legal services, (4) the amount involved and the results obtained, (5) the time limitations imposed by the client or by the circumstances, (6) the nature and length of the professional relationship with the client, (7) the experience, reputation, and ability of the lawyer or lawyers performing the services, and (8) whether the fee is fixed or contingent.

Silverman, Smith & Rice, P.C. (by *Robert W. Smith*), for plaintiff.

Plunkett Cooney (by *Christine D. Oldani* and *Robert A. Callahan*) for defendant.

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM. In this attorney-fee case, plaintiff Kenneth J. Speicher appeals as of right the trial court's order denying his requested actual attorney fees under the Open Meetings Act (OMA), MCL 15.261 *et seq.*, and granting him an alternative amount of fees deemed reasonable by the trial court. We affirm in part because we conclude that actual attorney fees recoverable under MCL 15.271(4) may not be clearly excessive and only fees for the OMA action are recoverable; however, we vacate the award and remand for further proceedings consistent with this opinion because an evidentiary hearing is necessary for determination of the appropriate amount of actual attorney fees and the number of hours allocated to the OMA action.

This case arises from plaintiff's successful OMA action against defendant, the Columbia Township Board of Election Commissioners. On August 10, 2011, the trial court entered an order granting plaintiff's motion for summary disposition and finding that defendant twice violated the OMA. The trial court denied plaintiff's request for injunctive relief, but granted plaintiff's request for actual attorney fees and costs pursuant to MCL 15.271(4). Thereafter, plaintiff moved to recover attorney fees and costs totaling $32,484.25. Defendant responded to plaintiff's motion, arguing that the requested attorney fees were clearly excessive. The trial court heard arguments regarding the attorney fees at a hearing held on October 10, 2011. The trial court took the matter under advisement and issued a written opinion on November 8, 2011, holding that a litigant is entitled to actual attorney fees pursuant to MCL 15.271(4) only if the litigant is successful and the claimed attorney fees are for the action commenced. The trial court further held that plaintiff was successful, but that some of the claimed attorney fees were not for the OMA action; therefore, plaintiff could not re-

cover those fees. Finally, the trial court held that the requested attorney fees were clearly excessive in violation of the Michigan Rules of Professional Conduct and concluded that plaintiff was entitled to recover only $7,500 in attorney fees. Plaintiff now appeals as of right.

I. LIMITATIONS ON THE RECOVERY OF "ACTUAL ATTORNEY FEES"

On appeal, plaintiff first argues that the trial court erred by reducing the amount of his award of attorney fees after concluding that his claim for actual attorney fees was clearly excessive. Plaintiff maintains that the trial court lacked the authority to reduce his actual attorney fees on the basis of its conclusion that the fees were clearly excessive because MCL 15.271(4) specifically permits recovery of "actual attorney fees" and does not include any provision permitting reduction based on other considerations.

Plaintiff's argument presents an issue of statutory interpretation. We review de novo issues of statutory interpretation. *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 426; 733 NW2d 380 (2007). The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247.

MCL 15.271(4) provides that a successful plaintiff is entitled to receive his or her "actual attorney fees" incurred in an OMA action.[1] Within the context of MCL

[1] MCL 15.271(4) provides:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive

15.271(4), the Michigan Supreme Court interpreted the term "actual" with regard to attorney fees to mean " 'existing in act, fact, or reality; real.' " *Omdahl*, 478 Mich at 428, quoting *People v Yamat*, 475 Mich 49, 54 n 15; 714 NW2d 335 (2006) (quotation marks and citation omitted). In addition, this Court has held that in light of the plain language of the statute, the imposition of actual attorney fees under the OMA is mandatory. *Manning v East Tawas*, 234 Mich App 244, 253; 593 NW2d 649 (1999).

However, MRPC 1.5(a) generally bars attorneys from charging illegal or clearly excessive fees. Specifically, MRPC 1.5(a) mandates that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." The Legislature cannot exempt attorneys from compliance with the Michigan Rules of Professional Conduct. See *Attorney General v Pub Serv Comm*, 243 Mich App 487, 503-504; 625 NW2d 16 (2000). Moreover, courts have the authority and obligation to take affirmative action to enforce the ethical standards set forth by the Michigan Rules of Professional Conduct, and the rules apply to cases involving the imposition of attorney fees and the fees charged by attorneys. See MCL 600.904;[2] *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 194; 650 NW2d 364 (2002);

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relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

[2] MCL 600.904 provides:

> The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

Smith v Khouri, 481 Mich 519, 529-531, 537; 751 NW2d 472 (2008); *Reed v Breton*, 279 Mich App 239, 242; 756 NW2d 89 (2008). Further, the Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary pursuant to MCL 600.904; thus, conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy. *Evans & Luptak*, 251 Mich App at 195; *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2003).

In *Evans & Luptak*, this Court considered the effect of the Michigan Rules of Professional Conduct on the enforceability of a referral-fee agreement. In that case, the plaintiff brought a breach of contract action to recover payment of a referral fee; in defense to the lawsuit, the defendant argued that the fee agreement was unenforceable because the referral gave rise to a conflict of interest in violation of the rules. *Evans & Luptak*, 251 Mich App at 192. This Court held that the referral-fee agreement was unenforceable because the referral violated the rules of professional conduct and because conduct that violates those rules is against public policy, this Court declined to enforce the contract. *Id.* at 189, 195-197. Similarly, in *Morris & Doherty*, 259 Mich App at 45, this Court considered whether a referral-fee agreement between an attorney and an attorney with an inactive bar membership was enforceable. This Court concluded that because enforcement of the referral-fee agreement would violate the rules of professional conduct, the agreement was unenforceable because contracts in violation of those rules are void as a matter of public policy. *Id.* at 60.

Consistently with the holdings in both *Evans & Luptak* and *Morris & Doherty*, in which this Court refused to enforce attorney-fee agreements because the agree-

ments violated the public policy expressed in certain sections of the rules of professional conduct, we conclude that MRPC 1.5(a) also reflects this state's public policy concerning fee agreements. Specifically, MRPC 1.5(a) is a public policy restraint on illegal or clearly excessive fees.

In this case, plaintiff is requesting that defendant be ordered to pay the actual attorney fees that were accrued by the attorney he hired to pursue this OMA action. In this context, we must determine whether the policy stated by MRPC 1.5(a) is applicable to an action for actual attorney fees under the OMA. MRPC 1.5(a) specifically prohibits a lawyer from entering into an agreement for an illegal or clearly excessive fee and from charging or collecting such a fee. From this broad prohibition, it is clear that the public policy expressed in MRPC 1.5(a) against illegal or clearly excessive fees was meant to extend to all situations in which attorney fees are sought to be collected in the courts of this state. To hold otherwise would be in direct contravention of the clearly established public policy set forth by MRPC 1.5(a) because ultimately the intent of the rule is to prevent attorneys from receiving excessive payment for their work. Thus, we conclude that the public policy restraint on illegal or clearly excessive attorney fees is applicable to actions for actual attorney fees under the OMA.

II. PLAINTIFF'S CHALLENGES TO THE TRIAL COURT'S FINDINGS

Alternatively, plaintiff argues that the trial court should have held an evidentiary hearing before determining that the claimed attorney fees were clearly excessive under MRPC 1.5(a). Plaintiff further argues that the trial court's decision to award $7,500 in attorney fees was not explained by the trial court and that

because there was no support for that amount in the record, the trial court merely selected an arbitrary number and, accordingly, abused its discretion. Finally, plaintiff argues that the trial court erred by reducing his claimed attorney fees on the basis of its finding that 36.65 hours billed by his attorney were not for the OMA action.

We turn first to plaintiff's argument regarding the trial court's conclusion that the claimed fees were clearly excessive and that $7,500 was an appropriate amount of compensation. We review a trial court's determination of the reasonableness of requested attorney fees for an abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). "If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Id.* Additionally, the trial court's factual findings, if any, are reviewed for clear error. *Id.* "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009) (quotation marks and citation omitted).

Pursuant to MRPC 1.5(a), "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." MRPC 1.5(a) also provides a nonexhaustive list of factors to consider when determining if a fee is unreasonable and, therefore, clearly excessive. These factors include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [MRPC 1.5(a).]

The record shows that the hearing on plaintiff's motion for attorney fees was brief and plaintiff's attorney was not given the opportunity to testify in regard to the work performed on the case or the total fee. Plaintiff similarly did not testify. Thus, the trial court lacked an evidentiary basis on which to make findings in regard to many of the factors set forth in MRPC 1.5(a).

Despite lacking an evidentiary basis, the trial court concluded that the fee charged by plaintiff was clearly excessive. When making its decision, the trial court cited the factors found in MRPC 1.5(a) and concluded as follows:

> Reviewing the above factors in light of the relative simplicity of the case, leads the court to conclude that an award of attorney fees to Plaintiff in excess of $30,000.00 [sic] is clearly excessive and not justified. The case was not complex as the Defendant admitted to the violations of the Open Meetings Act. In addition, the Plaintiff was not successful in obtaining injunctive relief in this case. Based

> on a review of the file and the above factors, the court finds that thirty hours at $250.00 per hour for a total of $7500.00 is a reasonable fee.

Initially, we agree with plaintiff that he should have had an opportunity to defend the amount of the claimed attorney fees and to present evidence in regard to the eight factors listed in MRPC 1.5(a). The record in this case reveals that neither party submitted evidence to the trial court regarding the majority of the factors set forth in MRPC 1.5(a). Moreover, neither party specifically addressed the factors set forth in MRPC 1.5(a). Rather, the arguments before the trial court focused on whether the court could even consider if the fee was clearly excessive. Because the parties did not present evidence regarding the MRPC 1.5(a) factors to the trial court in this case, we conclude that an evidentiary hearing is necessary to create a record that will enable meaningful appellate review. See *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 92-93; 669 NW2d 862 (2003). We also agree with defendant that the factual basis supporting the trial court's conclusion that $7,500 is the appropriate fee was inadequate. The trial court explained its decision only by stating that it was "[b]ased on a review of the file" and the factors set forth in MRPC 1.5(a). While the trial court file might contain an adequate factual basis to support the trial court's conclusions, we cannot review those conclusions without speculating about the trial court's factual basis. Consequently, we also remand this case for further fact-finding in regard to whether the claimed attorney fees are clearly excessive. On remand, the trial court should conduct an evidentiary hearing and thereafter make specific factual findings to support its conclusion regarding the actual attorney fees to be awarded and explain whether and why any greater attorney fee award would be clearly excessive.

Next, we address plaintiff's argument that the trial court erred by concluding that only fees related to an OMA action are recoverable under MCL 15.271(4) and that the trial court's factual findings leading to its conclusion that 36.65 hours of work were not performed for the OMA action were clearly erroneous. First, we consider plaintiff's argument that the trial court erred by concluding that MCL 15.271(4) only permits recovery of attorney fees that are specifically for an OMA action. This issue raises a question of statutory interpretation that we review de novo. *Omdahl*, 478 Mich at 426. When interpreting statutes, as noted earlier in this opinion, we apply the clear and unambiguous language of the statute to discern and give effect to the intent of the Legislature. *Driver*, 490 Mich at 246-247.

As enacted by the Legislature in 1968, the OMA was intended to foster governmental accountability and disclosure. *Omdahl*, 478 Mich at 427. The original language employed in the OMA lacked adequate enforcement mechanisms or penalties for noncompliance with the act. *Id.* As a result, the Legislature repealed the act and reenacted it with new enforcement provisions in 1976 PA 267. *Omdahl*, 478 Mich at 427. "One of these newly enacted enforcement provisions was MCL 15.271(4), which provided that a successful party could recover court costs and actual attorney fees." *Id.* Specifically, MCL 15.271(4) provides as follows:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, *the person shall recover court costs and actual attorney fees for the action*. [Emphasis added.]

Although MCL 15.271(4) provides for the imposition of "actual attorney fees," the statute declares that such

fees must be "for the action." When this Court interprets a statute, "[w]e presume that every word of a statute has some meaning and must avoid any interpretation that would render any part of a statute surplusage or nugatory. As far as possible, effect should be given to every sentence, phrase, clause, and word." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 132; 807 NW2d 866 (2011) (citation omitted). Giving effect to the plain meaning of the requirement that actual attorney fees be "for the action," the fees charged by a successful litigant under the OMA must be for that action and cannot be unrelated to the OMA claims. Because the plain language of MCL 15.271(4) requires that the fees charged must be "for the action," we agree with the trial court that a litigant cannot include within its list of "actual attorney fees" matters unrelated to the OMA action.

We next consider plaintiff's claim that the trial court erred by concluding that 36.65 hours of the claimed attorney fees were not for the OMA action. As noted earlier, we review for clear error a trial court's factual findings underlying an award of attorney fees. *Marilyn Froling Trust*, 283 Mich App at 296. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id.* (quotation marks and citation omitted).

In its brief in response to plaintiff's motion for actual attorney fees, defendant identified 36.65 hours for which plaintiff's attorney had billed plaintiff that defendant asserted were unrelated to plaintiff's OMA case. In its written opinion, the trial court stated that it was "in agreement with Defendant's position that 36.65 hours of attorney fees at $250.00 per hour for a total of

$9,162.50 requested attorney fees are not related to the violations complained of in Plaintiff's lawsuit."

On appeal, plaintiff admits in his brief that many of the billed hours related to election law violations; however, plaintiff contends that his attorney had to conduct research on election law in order to determine whether he had legitimate OMA claims as well as to determine whether he should seek injunctive relief given defendant's repeated failure to comply with election law. We disagree.

Research of election law was not necessary to determine if plaintiff had a viable OMA claim. Rather, to determine if plaintiff had a viable OMA claim, plaintiff's attorney needed only to determine whether defendant's failure to allow public comment and its failure to read the minutes from the previous meeting were violations of the OMA. These issues were straightforward and largely undisputed before the trial court. Plaintiff's claims regarding election law violations were not relevant to whether defendant violated the OMA. Those claims may have been relevant to explain why plaintiff attended the meeting in the first instance, but they had no relevance to whether defendant violated the OMA. Additionally, the alleged election law violations had no bearing on whether plaintiff should have sought injunctive relief. Indeed, the complaint reveals that plaintiff sought injunctive relief to "[e]njoin[ ] the Township from further non-compliance with the OMA . . . ." Contrary to plaintiff's assertions on appeal, plaintiff's request for injunctive relief was not related to his concerns that defendant would continue to violate election law.

Further, we reject plaintiff's claim that his attorney had a duty to research election law under MCR 2.114(D)(2), which provides that an attorney's signature on a document certifies that "to the best of his or her knowledge,

information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law[.]" In this case, the only claims for which plaintiff sought relief in his complaint were his OMA claims; he did not request relief for any of the alleged election law violations. Therefore, in order for the complaint to be "warranted by existing law," plaintiff's attorney only had to determine whether the alleged OMA violations were warranted by existing law. Election law research was not a necessary part of that inquiry.

Therefore, we conclude that the time billed by plaintiff's attorney for election law research was not for the OMA action and, accordingly, cannot be included in the calculation of plaintiff's actual attorney fees under MCL 15.271(4). However, we note that the record is unclear with regard to the subject matter of all the billed hours. Specifically, several of plaintiff's attorney's billing entries fail to identify whether the attorney's research concerned election law or the OMA case. Further, several billing entries appear to refer to both OMA-related work and election law matters. Given the lack of clarity in plaintiff's attorney's billing records, we are unable to determine whether the trial court's finding that he billed 36.65 hours that were not "for the action" was clearly erroneous. Thus, we conclude that remand is necessary for an evidentiary hearing to determine what time was spent by plaintiff's attorney on the OMA action and what time was spent on election law issues.[3] See *Van*

[3] On remand the trial court should also recalculate the dollar amount that corresponds to the number of billed hours it concludes were not related to the OMA action because in its previous order it failed to account for plaintiff's attorney's rate increase after January 1, 2011. Thus, the trial court must multiply each hour billed before January 1, 2011, by $250, but must multiply billed hours after January 1, 2011, by

Elslander v Thomas Sebold & Assoc, Inc, 297 Mich App 204, 219; 823 NW2d 843 (2012) (remanding an action involving an award of case evaluation sanctions for an evidentiary hearing because it was unclear from the attorney's billing records which tasks could be taxed as costs because the billing entries lumped several tasks together).

In summary, we hold that the prohibition of illegal or clearly excessive attorney fees under MRPC 1.5(a) applies to and limits the "actual attorney fees" a party is entitled to under MCL 15.271(4). We remand for an evidentiary hearing to determine the appropriate amount of attorney fees and to allow plaintiff to present evidence in support of his claim that the requested attorney fees are not excessive. We note that "[t]he burden of proving the fees rests upon the claimant of those fees." *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 517; 791 NW2d 747 (2010). Thus, on remand plaintiff bears the burden of establishing that his requested fees are not clearly excessive. Finally, we conclude that the trial court correctly held that attorney fees awarded under MCL 15.271(4) are limited to fees related to the OMA action; however, we remand for an evidentiary hearing to clarify the exact number of hours allocated to the OMA action because the billing statement of plaintiff's attorney is ambiguous in that regard.

We affirm in part, vacate the award, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ., concurred.

$275 because the record indicates that after January 1, 2011, plaintiff's attorney began billing at the higher rate.

YONO v DEPARTMENT OF TRANSPORTATION

Docket No. 308968. Submitted November 9, 2012, at Lansing. Decided December 20, 2012, at 9:20 a.m. Leave to appeal sought.

Helen Yono brought an action in the Court of Claims against the Department of Transportation, seeking damages for injuries sustained when she fell while walking near the sidewalk next to her car that was parked in a paved and striped area of M-22 designated for parallel parking. The court, Clinton Canady, III, J., denied defendant's motion for summary disposition on the basis that the highway exception to governmental immunity from tort liability, MCL 691.1402(1), applied. The court determined that the portion of the highway designated for parallel parking was designed for vehicular travel within the meaning of MCL 691.1402(1). Defendant appealed.

The Court of Appeals *held*:

For purposes of the highway exception to governmental immunity, MCL 691.1402(1), a governmental agency's duty to repair and maintain highways, and liability for that duty, extends only to the improved portion of the highway designed for vehicular travel. The trial court did not err by denying defendant's motion for summary disposition on the basis that the highway exception to governmental immunity applied. M-22 and the portion of it designated for parallel parking are part of a contiguous whole; there was no physical separation like a median, driveway, or other barrier between the center of the highway and the parallel parking area. The lanes designated for parallel parking were clearly designed to permit vehicles to merge from the center lanes to the parking lanes and from the parking lanes to the center lanes. When unoccupied, the parallel parking lanes were also designed to be used for passing around stopped or slowed vehicles, as well as for turning off, or even as a thoroughfare at times given its width. MCL 257.637(1)(b) makes such driving legal when the highway has unobstructed pavement not occupied by parked vehicles of sufficient width for two or more lines of moving vehicles in each direction. The character of the parallel parking area was not altered simply because a person may legally park within the designated parallel parking area because it is plainly designed for

regular if limited vehicular travel. Unlike the shoulder of a highway, which is not designed for vehicular travel, the area along M-22 that was designated for parallel parking serves a dual purpose by being integrated into the highway's main travel lanes and being designed for regular vehicular travel in a variety of contexts. Accordingly, defendant could not claim governmental immunity to evade liability.

Affirmed.

TALBOT, P.J., dissenting, would have reversed the trial court's order denying defendant's motion for summary disposition. Judge TALBOT would have concluded that the marks for parallel parking made it clear that the area was not designed for vehicular travel and that the lack of a barrier between the highway and parallel parking area was irrelevant to whether the area was designed for vehicular travel.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — PARALLEL PARKING AREAS ADJOINING HIGHWAYS.

For purposes of the highway exception to governmental immunity, a governmental agency's duty to repair and maintain highways, and liability for that duty, extends only to the improved portion of the highway designed for vehicular travel; an area of a highway that is designated for parallel parking that is not separated from the center of the highway by a median, driveway, or other barrier and has a dual-purpose design for use (when unoccupied) to travel around stopped or slow vehicles and for turns constitutes an improved portion of the highway designed for vehicular travel (MCL 691.1402[1]).

Smith & Johnson, Attorneys, P.C. (by *L. Page Graves*), for Helen Yono.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Justin Gray*, Assistant Attorney General, for the Department of Transportation.

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

M. J. KELLY, J. In this suit involving a trip and fall, defendant, the Department of Transportation (Depart-

ment), appeals by right the trial court's order denying the Department's motion to dismiss plaintiff Helen Yono's claim on the basis that it was barred by governmental immunity. See MCR 7.202(6)(a)(v). On appeal, the Department's sole issue is whether the trial court erred when it determined that Yono's fall occurred on a highway as defined under the highway exception to governmental immunity. See MCL 691.1402(1). Because we conclude that the trial court did not err, we affirm.

I. BASIC FACTS

In July 2011, Yono drove with her daughter to Suttons Bay, Michigan to shop. Yono parked in a parallel parking spot along M-22, which is otherwise known as St. Joseph Street within Suttons Bay, across the street from the business she wished to patronize. She went to the business, and after she discovered that the business was closed, she crossed back to her car. As she was nearing the sidewalk next to her car, Yono stepped into a depression, rolled her ankle, and fell. She suffered a broken ankle along with other injuries.

Yono sued the Department in November 2011 for damages arising from her injuries. In her complaint, Yono alleged that under MCL 691.1402(1), the Department had a duty to keep M-22 in reasonable repair, breached that duty, and proximately caused her injuries.

The Department moved for summary disposition later that same month. In its motion, the Department argued that it was entitled to have Yono's complaint dismissed under MCR 2.116(C)(7) because it was immune from liability. The Department agreed that it had a duty to maintain the "improved portion of the highway designed for vehicular travel," see MCL 691.1402(1), but contended that the only area of the highway that was designed for vehicular travel was that portion that its expert witness

identified as the "travel lanes." The Department's expert opined that the travel lanes were the first 11 feet on either side of the highway's center line. Stated another way, the Department took the position that it only had a duty to maintain the centermost 22 feet of the highway because that was the portion that was commonly used as a thoroughfare. Because the area where Yono fell was for parallel parking and not for travel, the Department maintained that it could not be liable for any defects within that area under MCL 691.1402(1). Accordingly, it asked the trial court to dismiss Yono's claim on that basis.

In response, Yono argued that the highway at issue extended from curb to curb and that the parallel parking lanes are designed for vehicular travel. Yono attached an affidavit from her own expert to support her contention. Yono's expert explained that the "entire paved surface consists of travel lanes designed for vehicular travel." These lanes, he explained, are given different labels to identify their location and purpose, but all the lanes are still for travel. Indeed, he noted that motorists may lawfully use a parking lane to merge into a through lane from a parked position and may enter an unoccupied parking lane in an approach to make a right turn. Yono also noted that the facts of her case closely matched those in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), in which our Supreme Court held that the governmental entity in that case was not entitled to immunity even though the plaintiff fell near the edge of the highway where she had parked.

The trial court examined the photographs and determined that the portion of the highway designated for parallel parking was designed for vehicular travel within the meaning of MCL 691.1402(1) because it was clear that cars "have to travel on that to park." The

court also noted that the parallel parking lane was not a shoulder and not intended for emergencies alone. Because the parallel parking lanes were for travel, the Department had a duty to keep that portion of the highway in reasonable repair under MCL 691.1402(1) and, accordingly, was not entitled to immunity. For that reason, the trial court entered an order denying the Department's motion in February 2012.

The Department then appealed in this Court.

II. THE HIGHWAY EXCEPTION

A. STANDARDS OF REVIEW

On appeal, the Department argues that the trial court should have dismissed Yono's claim under MCR 2.116(C)(7) because it was immune to suit and the highway exception to that immunity did not apply to the defect at issue. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation and application of statutes such as the highway exception to governmental immunity. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

B. DESIGNED FOR VEHICULAR TRAVEL

The Department is generally immune from tort liability when engaged in the exercise or discharge of a governmental function, such as constructing and maintaining a highway. MCL 691.1401(f); MCL 691.1407(1). Our Legislature has, however, established an exception to this immunity for those governmental agencies that have jurisdiction over a highway. In pertinent part, MCL 691.1402(1) provides:

> A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

But because the Legislature's grant of immunity is broad and the exceptions are limited, our Supreme Court has held that the exceptions—including the highway exception—must be narrowly construed. *Nawrocki*, 463 Mich at 158-159.

A governmental agency's duty—and, accordingly, its potential for liability—does not extend to the whole highway; rather, the Legislature provided that "the duty of [a governmental agency] to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel . . . ." MCL 691.1402(1). And, consistently with its holding that the exception must be narrowly construed, our Supreme Court has determined that the statutory reference to the "improved portion designed for vehicular travel" limits the governmental agency's duty on the basis of the "*location* of the alleged dangerous or defective condition; if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach." *Nawrocki*, 463 Mich at 162. The Court clarified that the improved portion designed for vehicular travel encompasses only the " 'traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.' " *Id.* at 180, quoting *Scheurman v Dep't of Transp*, 434 Mich 619, 631; 456 NW2d 66 (1990). Accordingly, a plaintiff "making a claim of inadequate signage, like a plaintiff making a claim of inadequate street lighting or vegetation obstruction, fails to plead

in avoidance of governmental immunity because signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel." *Nawrocki*, 463 Mich at 183.

In *Nawrocki*, the plaintiff was a passenger in a vehicle driven by her husband. After her husband parked next to the curb, she got out of the vehicle, walked to the back, and stepped off the curb onto the roadway. She stepped onto cracked and broken pavement, fell, and was injured. *Id.* at 152.

In Nawrocki's appeal, our Supreme Court had to determine whether the highway exception to governmental immunity applied to pedestrians. *Id.* at 162. The Court determined that it did, stating that: "we are persuaded that the exclusionary language of the fourth sentence . . . narrows the duty . . . with regard to the *location* of the dangerous or defective condition, not to the *type* of travel *or* traveler." *Id.* at 171. The Court then concluded that, because Nawrocki pleaded that she was injured by a dangerous or defective condition on the improved portion of the highway designed for vehicular travel—that is, the traveled portion of the roadbed, she had pleaded in avoidance of governmental immunity. *Id.* at 172.

Our Supreme Court returned to the proper scope of the phrase "improved portion of the highway designed for vehicular travel" in *Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006). In that case, the driver of a truck veered onto the highway's shoulder after running over a mound of dirt. *Id.* at 74. As a result of the grade differential between the shoulder's graveled portion and its paved portion, the driver of the truck lost control as he tried to reenter the highway and struck Michael Grimes, who had just merged onto the highway. *Id.* at 74-75. Grimes later sued the Department for negligently maintaining the shoulder. *Id.* at 75.

On appeal, our Supreme Court had to determine whether the highway's shoulder was "designed for vehicular travel" as that phrase is used in MCL 691.1402(1). And whether it was designed for vehicular travel, the Court explained, depended on the meaning of "travel":

> Taken in its broadest and most literal sense, "travel" in the highway exception could include the shortest incremental movement by a vehicle on an improved surface. Therefore, in an emergency, when a motorist momentarily swerves onto the shoulder, the motorist can be said to have traveled on the shoulder. Were this broadly inclusive definition of "travel" appropriate, we might be persuaded by plaintiffs' argument that a shoulder is designed for vehicular travel. However, we reject this broad definition proposed by plaintiffs. [*Id*. at 89.]

The Court rejected the broad definition of travel because it was clear that the Legislature "did not intend to extend the highway exception indiscriminately to every 'improved portion of the highway.' " *Id.* Rather, the use of the limiting phrase "designed for vehicular travel" showed that the Legislature believed that there were improved portions of the highway that "are not designed for vehicular travel." *Id.* Moreover, the expansive definition conflated the concepts of design and contemplated use. *Id.* at 90. That is, just because the Department contemplates that a driver "might *use* an improved portion of the highway does not mean that that portion was 'designed for vehicular travel.' " *Id.* Instead, the question is whether the improved portion was specifically *designed* for vehicular travel. Hence, the Department only has a duty to repair and maintain that portion of the highway that contains "travel lanes." *Id.* at 91.

The Court then concluded that as a matter of law, shoulders were not designed for vehicular travel within

the meaning of MCL 691.1402(1) and, as such, were not travel lanes. Accordingly, it determined that Grimes's claim against the Department had to be dismissed. *Id.* at 92.

C. APPLYING THE LAW

On appeal, the Department argues that the lanes at issue are parallel parking lanes that were similarly not designed for vehicular travel. More specifically, the Department maintains that parking lanes are necessarily not travel lanes because vehicles do not use those lanes as a thoroughfare. But the Legislature did not limit the duty to maintain and repair highways under the highway exception to a particular type of travel lane, such as a thoroughfare; it imposed a duty to repair and maintain any part of the highway that was specifically designed for vehicular *travel*. MCL 691.1402(1). And while our Supreme Court refused to give the term "travel" its broadest possible definition, it also did not narrow it to exclude specialized, dual-purpose, or limited-access travel lanes. See *Grimes*, 475 Mich at 89-91.

Under the Department's preferred definition, it would have no duty to repair or maintain a variety of highway improvements that were plainly designed for vehicular travel, but nevertheless not part of that portion of the highway commonly used as the thoroughfare; the Department would have no duty to repair or maintain left-turn lanes, merge lanes, on- and off-ramps, right-turn lanes, lanes designed to permit vehicles to access the opposite side of a divided highway, such as median U-turn lanes and emergency turnarounds, or even the excess width provided on rural highways to permit drivers to proceed around vehicles that are waiting to turn left. Yet in each case, the lanes,

or parts of lanes, are plainly designed for vehicular travel—albeit limited travel. We cannot give MCL 691.1402(1) a contrived meaning that contravenes its plain and ordinary sense. See *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196, 694 NW2d 544 (2005). As our Supreme Court explained in *Grimes*, it is the *design* that controls whether the improvement falls within the highway exception. *Grimes*, 475 Mich at 90. As such, if the improvement was *designed* for vehicular travel, it does not matter that it is not located within that portion of the highway that is mainly used for travel.

Here, the highway—including that portion designated for parallel parking—is a contiguous whole; the portion where parallel parking is permitted is not physically separated from the center of the highway by a median, driveway, or other barrier. Absent the painted markings, the area for parallel parking would be indistinguishable from the remainder of the highway. It is also evident that the lanes designated for parking were designed to permit vehicles to merge both from the center lanes to the parking lanes and from the parking lanes to the center lanes.

In addition to this limited—but regular—form of vehicular travel, it is also evident from the record that the parallel parking lanes were designed to be used (when unoccupied) to travel around stopped or slow vehicles that are in the center lanes and for turns. Indeed, when there are few or no cars parked in the parallel parking spots, there is nothing to preclude drivers from using the parking lanes as a thoroughfare. See MCL 257.637(1)(b) (making it legal to use that type of area as a travel lane when the highway has "unobstructed pavement not occupied by parked vehicles of sufficient width for 2 or more lines of moving vehicles in

each direction"). Stated another way, M-22, within the village of Suttons Bay, is an extrawide two-lane or, alternatively, four-lane thoroughfare that contains paint markings in that portion of the highway closest to the curb to facilitate the orderly parking of vehicles. The fact that a driver may legally park within this portion of the highway, and thereby obstruct its use as a thoroughfare, does not alter its character; it is still plainly designed for regular, if limited, vehicular travel.

In an affidavit attached to the Department's motion, Gary Niemi averred that he worked for the Department and had researched the area of the highway at issue. He stated that the "portion of the highway designed for through traffic measures 22 feet wide," as required under federal standards. Nevertheless, it is clear from his averments and the diagram attached to his affidavit that the highway contained more than 15 feet of paved surface on either side of these "travel" lanes—more than enough space for a second travel lane. Despite the fact that the "buffer" areas contain no painted markings at all, and that there is no physical or legal barrier to a driver's use of the area designated for parallel parking for travel, the Department contends that it has no duty to repair or maintain the "parallel parking" and "buffer" areas—that is, no duty to repair or maintain more than half the surface area of the highway at issue—because those areas are outside the *minimum* lane width required under federal standards. Taken to its logical conclusion, the Department's interpretation must mean that any time parking is permitted on a highway, the Department ceases to be responsible for the repair and maintenance of the area outside that used as a thoroughfare. And in the case of a common residential street that allows for on-street parking, this means that the Department would have no duty to maintain the street at all because there might be no

area that could be used as a continuous thoroughfare. We cannot agree with such an extreme position.[1]

For these reasons, the areas of the highway designated for parallel parking are distinguishable from the shoulder at issue in *Grimes*. A highway shoulder is not designed for regular or continuous vehicular travel; rather, it is designed to permit brief moments of travel during an emergency and to provide a vehicle with a safe place to stop without blocking the highway. In contrast, the parallel parking areas at issue here are integrated into the highway's main travel lanes and were designed for regular vehicular travel in a variety of contexts. Moreover, the lanes for parallel parking plainly serve a dual purpose; it is legal to park in the lanes and it is legal to use them for travel beyond accessing them for parking. See, e.g., MCL 257.637(1)(a) (making it legal to use such areas to pass a vehicle that is or is about to make a left turn); MCL 257.637(1)(b). This is in contrast to a highway shoulder, which is not designed for regular or continuous travel and which is illegal to use for those purposes. See MCL 257.637(2) (prohibiting a driver from passing on the right "by driving off the pavement or main-traveled portion of the roadway").[2]

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[1] Just as the placement of a parking meter without paint markings on the pavement does not alter the fundamental character of the curb lanes, the fact that there are paint markings on M-22 does not alter the fact that the curb lanes were designed to permit vehicular travel.

[2] It is noteworthy that the Legislature has referred to the main traveled portion of a highway in the statutes governing the use of highways. See, e.g., MCL 257.672(1) (making it a civil infraction to park a vehicle on the paved or main traveled portion of a highway when it is possible to park off the paved or main traveled portion); MCL 257.637(2). By referring to a main traveled portion, the Legislature recognized that a highway may contain areas that are designed for vehicular travel, even though they are not mainly for such travel.

The undisputed evidence concerning the actual physical features of the improvement at issue—namely the area on M-22 that has been designated for parallel parking—show that the parking lanes were designed for vehicular travel.[3] As such, the Department had a duty to maintain that portion of the highway in reasonable repair under the highway exception to governmental immunity.[4]

III. CONCLUSION

The trial court did not err when it concluded that the area of the highway at issue constituted part of the improved portion of the highway that was "designed for vehicular travel" within the meaning of MCL 691.1402(1). Consequently, it did not err when it denied the Department's motion for summary disposition on the ground that it was immune from liability.

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[3] We agree that whether the parking lanes constituted a portion of the highway "designed for vehicular travel," MCL 691.1402(1), is a question of law when the facts concerning the improvement's physical attributes are undisputed. See *Grimes*, 475 Mich at 91 (deciding as a matter of law that a shoulder is not designed for "travel"). When the facts concerning the physical attributes are not in dispute, it is for the court to decide whether the improvement at issue was designed for vehicular travel. For that reason, we have disregarded the conclusions stated by the parties' experts in the affidavits attached to the parties' summary disposition briefs.

[4] The Department also argues in passing that Yono failed to properly plead the highway exception to governmental immunity. Because the Department failed to properly raise this issue in statement of questions presented in its brief, MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003), and failed to support it by analysis of Yono's complaint and the applicable law, we conclude that the Department has abandoned that issue on appeal. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). In any event, we conclude that Yono's complaint sufficiently alleged facts warranting application of the highway exception. See *McLean v McElhaney*, 289 Mich App 592, 597; 798 NW2d 29 (2010).

Affirmed. There being an important question of public policy, we order that neither party may tax its costs. MCR 7.219(A).

BECKERING, J., concurred with M. J. KELLY, J.

TALBOT, J. (*dissenting*). I respectfully dissent. I believe that the portion of the road on which Helen Yono was allegedly injured was not in the improved portion of the highway designed for vehicular travel, and thus was not within the highway exception to governmental immunity. "[T]he highway exception [to governmental immunity] creates a duty to maintain only the 'traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.' "[1] When interpreting the highway exception, our Supreme Court rejected the broad definition of "travel," which could include "the shortest incremental movement by a vehicle on an improved surface."[2] The Court reasoned that because "[t]he Legislature modified the phrase 'the improved portion of the highway' with the phrase 'designed for vehicular travel,' " it was not intended that the highway exception extend "indiscriminately to every 'improved portion of the highway.' "[3] The Court explained that the distinction was created because the Legislature "believed there are improved portions of highway that are not designed for vehicular travel."[4] The Court cautioned that "[i]f 'travel' [were] broadly construed to include traversing even the smallest distance, then it must follow that every area surrounding the highway that has been improved for highway purposes is 'de-

[1] *Grimes v Dep't of Transp*, 475 Mich 72, 79; 715 NW2d 275 (2006) (citation, quotation marks, and emphasis omitted).

[2] *Id*. at 89, citing *Random House Webster's College Dictionary* (1995).

[3] *Grimes*, 475 Mich at 89.

[4] *Id*.

signed for vehicular travel' since such improved portions could support even momentary vehicular 'travel.' "[5] The Court stressed that the concepts of contemplated use and design should not be conflated.[6] Thus, the mere fact that the public uses a portion of highway for vehicular travel does not mean that it is designed for that use.[7] Accordingly, the Court held that "only the travel lanes of a highway are subject to the duty of repair and maintenance," and excluded "the shoulder from the scope of the highway exception."[8]

The portion of the road on which Yono was allegedly injured clearly was not designed for vehicular travel. Rather, it was at the edge of the parallel parking lane[9] "abutting the concrete gutter and curb." The lane in which the alleged defect was located was designed for parallel parking, as is evidenced by the demarcations on the pavement. While the road may be used to merge between the parking lane and the travel lane or to make a right turn, that use is merely "momentary" and under limited circumstances, when the lane is not occupied by parked vehicles. Similarly, travel in the lane while executing the maneuver of parallel parking requires movement in the lane for merely a short distance. Thus, the lane's limited use for travel does not transform the purpose of its design.[10]

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[5] *Id*. at 90.

[6] *Id*.

[7] *Id*.

[8] *Id*. at 91.

[9] The majority's analysis appears to avoid calling the area where the defect was located a "parallel parking lane" and instead refers to it as "the portion [of the highway] where parallel parking is permitted" seemingly to strengthen its argument. I believe that a review of the record demonstrates that the area is accurately described as a parallel parking lane.

[10] *Grimes*, 475 Mich at 90.

I do not believe that the parallel parking lane at issue was designed to be used, when unoccupied, to travel around stopped or slow vehicles in the travel lane or as a thoroughfare because those contentions are not supported by the record. MCL 257.637, which the majority cites, discusses permissible circumstances in which to overtake and pass moving vehicles on the right and states in pertinent part that "[t]he driver of a vehicle shall not overtake and pass another vehicle upon the right by driving off the . . . main-traveled portion of the roadway."[11] Additionally, although drivers may use the parking lane to pass or as a thoroughfare, use does not establish that the lane was designed for such.[12]

In its opinion, the majority notes that it is not persuaded by the Department of Transportation's (Department) assertion that the parallel parking lane is not a travel lane because it is not part of the thoroughfare. The majority explained that if a travel lane were defined that way it would result in the Department having no duty to maintain various lanes, "parts of lanes," and ramps.[13] The majority's characterization of the Department's argument reveals its failure to comprehend the issue presented on appeal. The Department asserted both in the trial court and before this Court that repair and maintenance of the parallel parking lane is not required because the lane is outside the travel lane. The Department in no way claims that a travel lane is restricted to a lane that is part of the thoroughfare. In fact, the Department conceded during

[11] MCL 257.637(2).

[12] *Grimes*, 475 Mich at 90.

[13] The majority provided the following lanes and ramps as examples of those that are not part of the thoroughfare: left-turn lanes, merge lanes, on- and off-ramps, right-turn lanes, median U-turn lanes, emergency turnarounds, and "the excess width provided on rural highways to permit drivers to proceed around vehicles that are waiting to turn left."

oral argument that an exit ramp, which is not part of the thoroughfare, has been determined to be a travel lane. That notwithstanding, I agree with the majority that a lane "designed for public vehicular travel" should not be limited to one that is part of the thoroughfare. It is important to note, however, that despite their limited use for travel, the lanes, "parts of lanes," and ramps noted by the majority do not contain markings delineating individual parking spaces and thus are distinguishable from the designated parking lane at issue in this case.

Moreover, the majority's assertion that the Department is arguing that it does not have a duty to repair and maintain the "buffer zone," which the majority asserts would result in the Department failing to have a duty to repair and maintain "more than half the surface area of the highway at issue," is misplaced. The affidavit of Gary Niemi, a development engineer for the Department, describes the different areas of the roadway, including the travel lane, the buffer zone, and the parallel parking lane. Niemi's affidavit states that "[t]he portion of the highway designed for through traffic measures 22 feet wide." Although Niemi concludes that "[t]he parallel parking lane is not designed for vehicular travel," his affidavit makes no such conclusion regarding the buffer zone. Nor did the Department make such an assertion before the trial court or this Court. Thus, the record fails to support the majority's argument that the Department contends that it does not have a duty to repair and maintain the buffer zone.

Assuming arguendo that the Department did contend that it does not have a duty to repair and maintain the buffer zone, the Department's duty regarding the buffer zone is wholly irrelevant to the resolution of the

issues on appeal as it is not where the defect is located. Instead of discounting the Department's alleged argument regarding the buffer zone on the basis of relevancy alone, the majority uses the argument in combination with the Department's alleged assertion that a travel lane must be part of the thoroughfare to come to the illogical conclusion that "the Department's interpretation must mean that any time parking is permitted on a highway, the Department ceases to be responsible for the repair and maintenance of the area outside that used as a thoroughfare." The majority reaches a similar conclusion regarding a residential street allowing on-street parking. To reach its conclusion, the majority ignores the argument actually being made by the Department. The Department contends that in the instant case, the roadway at issue is specifically designated by painted markings for parallel parking and is not merely a highway or residential street that permits on-street parking without any designation. At oral argument, the Department specifically denied that it was asserting that when a residential two-lane street allows on-street parking, the Department fails to have a duty to repair and maintain the roadway.

While the majority appears to be persuaded by the fact that the parking lane at issue is not physically separated from the travel lane "by a median, driveway, or other barrier," failure to physically separate the parking lane from the travel lane is not dispositive of whether the lane was designed for vehicular travel.[14] Moreover, there were painted markings on the road indicating that the lane was intended for parking and the parking lane was narrower than the travel lane. As such, the roadway at issue was distinguishable from the

[14] See *Grimes*, 475 Mich at 74, 92.

remainder of the highway, making it clear that the lane was not designed for vehicular travel.

The majority is attempting to judicially legislate and fashion a general rule regarding the Department's duty related to highways that permit parking, as opposed to applying the facts of this case to the rule that our Supreme Court established in *Grimes*. Therefore, I would reverse the trial court's order denying the Department's motion for summary disposition based on governmental immunity.

EDGE v EDGE

Docket No. 308633. Submitted December 11, 2012, at Lansing. Decided December 27, 2012, at 9:00 a.m.

Jo Edge, now known as Jo Darlington, moved the Washtenaw Circuit Court pursuant to MCR 2.114(D)(1) and (E), MCR 7.208(I), and MCR 3.206(C) for costs and attorney fees that she incurred when Joel D. Edge appealed that court's order granting her sole legal and physical custody of the parties' minor child and reducing his parenting time. The court, Archie C. Brown, J., granted plaintiff's motion on the basis of the court rules plaintiff cited, as well as MCR 2.625(A)(2) and MCL 600.2591, and awarded her $14,398.27 on the ground that defendant's appeal was frivolous. Defendant appealed.

The Court of Appeals *held*:

1. The circuit court abused its discretion by awarding plaintiff appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591. Generally, awards of costs and attorney fees are recoverable only if specifically authorized by a statute, a court rule, or a recognized exception. Courts, including trial courts, may sanction a party under MCR 2.114(E) for a document signed in violation of MCR 2.114, which requires a party to certify that a document governed by the court rules is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law and that the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Under MCR 2.114(F), a party pleading a frivolous claim or defense is also subject to costs as provided in MCR 2.625(A)(2), which states that if the court finds on motion of a party that an action was frivolous, costs shall be awarded as provided by MCL 600.2591. MCL 600.2591(1) states that if a court finds that a civil action was frivolous, the court that conducted the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and his or her attorney. The Court of Appeals has held that neither MCR 2.114, MCR 2.625(A)(2), nor MCL 600.2591 provided

a basis for a circuit court to award attorney fees incurred on appeal, and this holding applied regardless of whether the appeal was frivolous. Moreover, the plain language of MCL 600.2591 gives the authority to award costs and fees to the court that conducted the civil action, and the circuit court was not the court that conducted the appeal. Further, the definition of a vexatious appellate proceeding under MCR 7.216(C)(1), for which the Court of Appeals is authorized to assess actual and punitive damages or take other disciplinary action, is much broader than the definition of a frivolous claim or defense under MCL 600.2591(3)(a), which further supported the conclusion that sanctions for vexatious appeals must be considered by the Court of Appeals under MCR 7.216 and not by a trial court under MCR 2.114, MCR 2.625(A)(2), or MCL 600.2591.

2. The circuit court did not grant plaintiff attorney fees and costs under MCR 3.206(C), which provides that, in a domestic relations action, a party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a postjudgment proceeding. A party who requests attorney fees and expenses under MCR 3.206(C) must allege facts sufficient to show either that he or she is unable to bear the expense of the action and that the other party is able to pay or that the attorney fees and expenses were incurred because the other party refused to comply with a previous court order despite having the ability to comply. Although the court noted that plaintiff had moved for attorney fees and costs under MCR 3.206(C), and although it cited MCR 3.206(C) after stating that defendant's claims on appeal were frivolous, the court did not make any factual findings about or even discuss the parties' ability to pay the expense of defendant's appeal or a refusal by defendant to comply with a previous court order despite an ability to do so. Therefore, the court did not base its award on this rule, making it unnecessary to decide whether MCR 3.206 gives circuit courts the authority to grant appellate attorney fees and costs.

3. MCR 7.208(I) did not provide the circuit court with a basis to award plaintiff appellate attorney fees and costs because it lacked the authority to do so under the court rules and statute that it cited. MCR 7.208(I) states that the trial court may rule on requests for costs or attorney fees under MCR 2.403, MCR 2.405, MCR 2.625, or other law or court rule unless the Court of Appeals orders otherwise. MCR 7.208(I) provides trial courts with jurisdiction to award sanctions despite the filing of a claim of appeal, but

it did not authorize a trial court to grant a request for sanctions made under a court rule or statute that did not provide a proper basis for doing so.

Reversed.

1. COSTS — ATTORNEY FEES — CIRCUIT COURTS — FRIVOLOUS APPEALS.

A circuit court does not have the authority to award costs and attorney fees incurred as the result of a frivolous appeal under MCR 2.114, MCR 2.625(A)(2), or MCL 600.2591.

2. COSTS — ATTORNEY FEES — CIRCUIT COURTS — JURISDICTION.

MCR 7.208(I) provides a circuit court with jurisdiction to award sanctions despite the filing of a claim of appeal; it does not authorize a circuit court to grant a request for sanctions made under a court rule or statute that does not provide a proper basis for doing so.

Nichols, Sacks, Slank, Sendelbach & Buiteweg, P.C. (by *Monika Holzer Sacks*), for plaintiff.

Haas & Associates, PLLC (by *Trish Oleksa Haas*), for defendant.

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

BECKERING, J. In this hotly contested child-custody case, we must determine whether the circuit court erred when it awarded plaintiff, Jo Edge, appellate costs and attorney fees incurred as a result of the decision of defendant, Joel D. Edge, to appeal the circuit court's custody determination. After the circuit court awarded plaintiff sole legal and physical custody of the parties' minor child and reduced defendant's parenting time, defendant appealed. We affirmed and awarded plaintiff taxable costs under MCR 7.219 for having fully prevailed on appeal. Plaintiff did not move this Court for damages for a vexatious appeal under MCR 7.211(C)(8) and MCR 7.216(C) or MCL 600.2445. Rather, plaintiff

moved the circuit court for attorney fees and costs incurred in the appeal, citing MCR 2.114(D)(1) and (E), MCR 7.208(I), and MCR 3.206(C). Plaintiff argued that defendant's unsuccessful appeal was frivolous and suggested that only defendant was able to bear the expense. The circuit court granted plaintiff's motion and awarded her $14,398.27 in appellate attorney fees and costs as sanctions on the basis that defendant's appeal in this Court was frivolous. Because neither the statute nor the court rules on which the circuit court relied authorized it to grant appellate attorney fees and costs on the basis of a frivolous appeal in this Court, we hold that the circuit court abused its discretion by doing so. We also hold that, contrary to plaintiff's contention, the circuit court did not grant plaintiff appellate attorney fees and costs under MCR 3.206(C). Accordingly, we reverse.

I. FACTUAL BACKGROUND

Plaintiff and defendant entered into a consent judgment of divorce in June 2008. Under the consent judgment, plaintiff and defendant were to have joint legal custody of their minor child. After holding an evidentiary hearing, the circuit court in September 2010 entered an order that awarded plaintiff sole legal and physical custody of the minor child and reduced defendant's parenting time. Defendant appealed in this Court. We affirmed the circuit court's order and awarded plaintiff taxable costs under MCR 7.219 for having fully prevailed on appeal.[1]

Four months later, plaintiff filed a verified motion in the circuit court for attorney fees and costs pursuant to

[1] *Edge v Edge*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2011 (Docket Nos. 300668 and 300713).

MCR 2.114(D)(1) and (E), MCR 7.208(I), and MCR 3.206(C). Plaintiff requested that the court award her $14,858.27 in appellate attorney fees and costs for defendant's unsuccessful appeal. Plaintiff generally asserted that defendant had "demonstrated an ongoing pattern of unnecessary and unreasonable litigation without regard to the facts or law which . . . caused [her] to needlessly incur superfluous attorney fees and costs." Plaintiff argued that her resources were "limited" and that the "frivolous actions . . . caused a severe drain on those resources." Plaintiff insisted that an "award of appellate attorney fees is generally left to the trial court to decide because the trial court is in a better position to evaluate the need and/or ability for the payment of said fees by the parties." Plaintiff also insisted that a "trial court may order appellate attorney fees under MCR 3.206." Plaintiff noted that her annual salary was $21,600 and that defendant's annual salary was $62,675.08.

Without holding a hearing, the circuit court issued an opinion and order granting plaintiff's motion for attorney fees and costs. At the outset of its opinion, the court noted that it was granting plaintiff attorney fees and costs "as sanctions." In its legal analysis, the court first explained that this Court determined that the circuit court did not err with respect to any of the issues defendant raised in his appeal. The circuit court next explained the following:

> In matters involving domestic relations, attorney fees are at times awarded, within the discretion of the trial court, when necessary to enable a party to carry on or defend a suit. In enforcement proceedings the court may also award attorney fees if one party is unable to bear all or a portion of those fees. . . . Further, the court may award a party attorney fees necessitated by the other party's failure to comply with the divorce judgment.

The circuit court then discussed the factors to consider when determining the reasonableness of an hourly fee and concluded that plaintiff's counsel's hourly rate was "not excessive" and that the services charged were "not unwarranted." The circuit court then opined as follows:

> Overwhelming evidence was presented during the evidentiary hearing to support this Court's findings, and was noted by the Court of Appeals in its ruling that Plaintiff had fully prevailed. The Court finds that Defendant's claims, as presented to the Court of Appeals, were completely without merit.
>
> The Court will acknowledge that merely because a party is unsuccessful on appeal does not automatically mean that he is responsible to reimburse the other party for the costs of the litigation. However, a party that signs a pleading certifies by that signature that the pleading is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. In this case, Defendant's signature, or his attorney's signature on his behalf, created meritless . . . litigation for which no credible evidence existed to support his claims and arguments.
>
> As a result, the Court finds that Defendant's claims on appeal were clearly frivolous pursuant to MCR 2.114(D)(1) and (E), MCR 7.208(1) [sic], and MCR 3.206(C), MCR 2.625(A)(2), and MCL 600.2591.

On this basis, the circuit court awarded plaintiff $153.27 in costs and $14,245 in attorney fees, totaling $14,398.27. Defendant moved the circuit court for reconsideration, which the court denied.

II. ANALYSIS

Defendant argues that the circuit court did not have the authority to award appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), MCR 3.206(C), MCR 7.208(I), or MCL 600.2591. Defendant also argues

that, even if the circuit court had this authority, his appeal in this court was not frivolous and therefore could not justify an award of attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591; the court did not actually award plaintiff fees and costs under MCR 3.206(C); and, even if the court did award plaintiff fees and costs under MCR 3.206(C), it abused its discretion because the factual allegations in plaintiff's motion were insufficient to show that plaintiff was entitled to attorney fees and costs under MCR 3.206(C).

We review for an abuse of discretion a trial court's ruling on a request for attorney fees. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id.* "The findings of fact on which the trial court bases its decision are reviewed for clear error." *Woodington v Shokoohi*, 288 Mich App 352, 369; 792 NW2d 63 (2010). Furthermore, we review de novo issues of statutory interpretation and the interpretation of court rules. *Bint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007).

A. MCR 2.114, MCR 2.625(A)(2), AND MCL 600.2591

Generally, " '[a]wards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception.' "[2] *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576

[2] Trial courts also "possess the inherent authority to sanction litigants and their attorneys. 'This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.' " *Keinz*, 290 Mich App at 142 n 1, quoting *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006).

(2010), quoting *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Both the Michigan court rules and statute provide a method for *this Court* to award attorney fees and costs for litigation before this Court. See MCR 2.114; MCR 7.216(C); MCR 7.219; MCL 600.2445.

This Court may sanction a party under MCR 2.114(E) for a document signed in violation of MCR 2.114. See *BJ's & Sons Constr Co v Van Sickle*, 266 Mich App 400, 413; 700 NW2d 432 (2005) (finding a violation of MCR 2.114(D) and (E) in furtherance of a vexatious appeal). MCR 2.114(E) states that, if a party signs a document in violation of MCR 2.114, "the court, on motion of a party or on its own initiative, shall impose upon the [party] . . . an appropriate sanction, which may include an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." Under MCR 2.114(C)(1), "[e]very document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document." When a party signs a document, the party certifies, to the best of "his or her knowledge, information, and belief formed after reasonable inquiry, [that] the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law[.]" MCR 2.114(D)(2). The party also certifies that "the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(3).

MCR 7.219 addresses taxation of costs and fees on appeal. MCR 7.219(A) states that, "[e]xcept as the

Court of Appeals otherwise directs, the prevailing party in a civil case is entitled to costs."[3] Furthermore, MCR 7.219(I) provides that this Court "may impose costs on a party or an attorney when in its discretion they should be assessed for violation of these rules." Significantly, this Court has consistently held that a trial court does not have jurisdiction to tax costs incurred on appeal to this Court. See, e.g., *Reeves v Cincinnati, Inc*, 208 Mich App 556, 562; 528 NW2d 787 (1995) ("[T]he trial court was without jurisdiction to tax costs incurred by plaintiffs in the prior appeal."); *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 692-693; 476 NW2d 487 (1991) ("The trial court was without jurisdiction to tax costs incurred on appeal."); *Lopez-Flores v Hamburg Twp*, 185 Mich App 49, 53; 460 NW2d 268 (1990) ("[A] circuit court judge may not tax costs incurred on appeal.").

MCR 7.216(C) addresses awards of damages and other disciplinary action for vexatious appellate proceedings:

> (1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8),[4] assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because

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[3] A prevailing party seeking costs must file a certified or verified bill of costs with the clerk and serve a copy on all parties within 28 days after the dispositive order, opinion, or order denying reconsideration is mailed. MCR 7.219(B). The clerk must then promptly verify the bills and tax those costs allowable. MCR 7.219(D). "The action by the clerk will be reviewed by the Court of Appeals on motion of either party filed within 7 days from the date of taxation . . . ." MCR 7.219(E).

[4] MCR 7.211(C)(8) states that a party's request for damages or other disciplinary action under MCR 7.216(C) must be made in a motion. "A party may file [the] motion . . . at any time within 21 days after the date of the order or opinion that disposes of the matter that is asserted to have been vexatious." MCR 7.211(C)(8).

> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
>
> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.
>
> (2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages. The court may remand the case to the trial court or tribunal for a determination of actual damages.

Finally, MCL 600.2445(1) states that costs on appeal in this Court "shall be awarded in the discretion of the court." "The appellant may be awarded the costs on appeal if he improves his position on appeal." MCL 600.2445(2). And "[t]he appellee may be awarded damages for the delay and vexation caused by the appeal, to be assessed in the discretion of the court, in addition to costs on appeal, if the appellant does not improve his position on appeal." MCL 600.2445(3).

In this case, the circuit court did not rely on MCR 7.219, MCR 7.216, or MCL 600.2445 as a basis for its award of appellate attorney fees and costs. Rather, the court opined that it was awarding attorney fees and costs to plaintiff as a sanction against defendant because defendant's claims on appeal were frivolous, citing the following legal authority: MCR 2.114, MCR 3.206(C), MCR 2.625(A)(2), MCR 7.208(I), and MCL 600.2591.

As previously discussed, MCR 2.114(E) grants "the court" the discretion to fashion an appropriate sanction for a violation of MCR 2.114; this includes trial courts.

FMB-First Mich Bank v Bailey, 232 Mich App 711, 727; 591 NW2d 676 (1998) (holding that "MCR 2.114(E) grants the trial court discretion to fashion an 'appropriate sanction' "). In addition to sanctions under MCR 2.114(E), MCR 2.114(F) provides that "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." Under MCR 2.625(A)(2), "if the court finds on motion of a party that an action . . . was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 states that "if a court finds that a civil action . . . was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." MCL 600.2591(1).

In *DeWald v Isola (After Remand)*, 188 Mich App 697, 703; 470 NW2d 505 (1991), this Court concluded that MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591 were not an appropriate basis for a circuit court to award attorney fees incurred on appeal. In *DeWald*, the circuit court dismissed the plaintiff's claim but denied the defendants' request for sanctions pursuant to MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591. The defendants appealed the circuit court's denial of sanctions. *DeWald*, 188 Mich App at 698. This Court reversed, finding that the plaintiff's claim in the circuit court was frivolous, and remanded the case to the circuit court for an assessment and imposition of sanctions. *Id.* On remand, the circuit court awarded the defendants costs and reasonable attorney fees incurred as a result of the frivolous action pursued in the circuit court; however, the court denied the defendants' request for costs and attorney fees incurred as a result of their appeal in this Court. *Id.* So, the defendants appealed again. This Court held that the circuit court properly denied the

defendants' request for appellate attorney fees and costs. *Id.* at 698, 703-704. The *DeWald* Court first distinguished MCR 2.625(A)(2), MCR 2.114, and MCL 600.2591 from the court rules and statute addressing costs and attorney fees in the context of appeals: MCR 7.219, MCR 7.216(C), and MCL 600.2445. *Id.* at 699-700. The Court then favorably quoted the United States Supreme Court's decision in *Cooter & Gell v Hartmarx Corp*, 496 US 384; 110 S Ct 2447; 110 L Ed 2d 359 (1990), wherein the Court distinguished Federal Rule of Civil Procedure 11, the federal analog of MCR 2.114, from Federal Rule of Appellate Procedure 38, which is roughly analogous to MCR 7.216(C). The Supreme Court explained that Rule 11 is " 'understood as permitting an award only of those expenses directly caused by the filing, logically, those *at the trial level*,' " and that Rule 38 "places a 'natural limit' on the scope of FR Civ P 11 by providing the Court of Appeals with the authority to award sanctions if it determines that an appeal is frivolous." *DeWald*, 188 Mich App at 701-702, quoting *Cooter & Gell*, 496 US at 406-407 (emphasis added). The *DeWald* Court then opined as follows:

> The costs, including reasonable attorney fees, incurred by defendants at the trial level were the direct result of plaintiff's pursuit of a frivolous cause of action and were clearly within the scope of the sanctions allowable under MCR 2.114, 2.625(A)(2), and MCL 600.2591[.] However, the expenses incurred by defendants on appeal and remand, after the trial court's refusal to impose sanctions under the statute and court rules, were directly caused by the trial court's erroneous decision and defendants' consequent decision to appeal, *not by plaintiff's initial filing of a frivolous complaint in the circuit court.* This Court determined, in defendants' first appeal, that plaintiff's cause of action was frivolous, *but did not expressly authorize an award of appellate attorney fees. We conclude that it is inappropriate to expand the scope of MCR 2.114,*

> *2.625(A)(2), and MCL 600.2591 . . . to cover costs, including attorney fees, incurred on appeal and remand of a frivolous action*. [*DeWald*, 188 Mich App at 703 (emphasis added).]

Under *DeWald*, the circuit court in the present case did not have the authority to grant plaintiff appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591. See *DeWald*, 188 Mich App at 703. Neither these court rules nor the statute authorizes a circuit court to grant appellate attorney fees and costs on the basis of a frivolous appeal in this Court. Moreover, under *Reeves*, the circuit court did not have jurisdiction to award appellate costs. See *Reeves*, 208 Mich App at 562.

Plaintiff attempts to distinguish *DeWald* from the present case on the ground that defendant's first appeal in this case was frivolous but that the first appeal in *DeWald* was not. Plaintiff essentially tries to limit *DeWald*'s application by arguing that the only reason appellate attorney fees were not awarded in *DeWald* was because the appeal was not found to be frivolous. But *DeWald* is much broader than plaintiff asserts. The issue in *DeWald* was not whether the appeal was frivolous; rather, it was whether "the trial court erred when it ruled that the postjudgment costs and attorney fees incurred by defendants in their original appeal and on remand [were] outside the scope of the statute and court rule providing for an award of costs and reasonable attorney fees to the party who prevails over a frivolous claim or defense," i.e., the application of MCR 2.625(A)(2), MCR 2.114, and MCL 600.2591. *DeWald*, 188 Mich App at 699. The fact that this Court distinguished MCR 2.625(A)(2), MCR 2.114, and MCL 600.2591 from MCR 7.219, MCR 7.216(C), and MCL 600.2445 and favorably cited *Cooter & Gell* illustrates this point. Indeed, the *DeWald* Court explained that

MCR 2.625(A)(2), MCR 2.114, and MCL 600.2591 were not an appropriate basis for the circuit court to award appellate attorney fees because the defendant's appellate expenses were not incurred in response to the plaintiff's *initial filing of a frivolous complaint in the circuit court*. *Id.* at 703. Furthermore, the *DeWald* Court emphasized that, while it determined in the first appeal that the plaintiff's complaint was frivolous, it "did not expressly authorize an award of appellate attorney fees." *Id.* Although the present case is factually distinguishable from *DeWald* because the circuit court here determined that defendant's appeal was frivolous and, thus, awarded appellate fees and expenses, *DeWald* nevertheless applies because both this case and *DeWald* concern whether a circuit court can award appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591; the *DeWald* Court expressly considered the issue and held that a circuit court cannot.

Moreover, we emphasize that the plain language of MCL 600.2591 demonstrates that the circuit court could not award appellate attorney fees and costs in this case. MCL 600.2591 states that "if a court finds that a civil action or defense to a civil action was frivolous, *the court that conducts the civil action* shall award to the prevailing party the costs and fees incurred . . . ." MCL 600.2591(1) (emphasis added). In this case, the circuit court was not the court that conducted the appeal; therefore, it could not award sanctions under MCL 600.2591 for a frivolous appeal.

In addition, the definition of a frivolous claim under MCL 600.2591(3)(a) is different from the definition of a vexatious appellate proceeding under MCR 7.216(C)(1). MCL 600.2591(3)(a) states that a claim is frivolous if one of three conditions is met: (1) a "party's legal position was

devoid of arguable legal merit," (2) the "party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true," or (3) the "party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party." MCL 600.2591(3)(a)(*i*) through (*iii*). In contrast, MCR 7.216(C)(1) provides that an appeal is vexatious in either of the following circumstances: (1) "the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal" or (2) "a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court." MCR 7.216(C)(1)(a) and (b). As can be gleaned from the definitions above, the definition of a vexatious appeal is much broader than the definition of a frivolous claim or defense. The difference in the definitions further supports the conclusion that sanctions for vexatious appeals must be considered by this Court under MCR 7.216 and not by a trial court under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591.

Accordingly, we conclude that the circuit court abused its discretion by awarding plaintiff appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591.[5]

B. MCR 3.206(C) AND MCR 7.208(I)

As previously discussed, the circuit court also cited MCR 3.206(C) and MCR 7.208(I) as a basis for sanction-

[5] In light of this conclusion, we need not address defendant's alternative claim on appeal that the circuit court clearly erred by finding that his appeal in this Court was frivolous.

ing defendant for pursuing a frivolous appeal in this Court. Plaintiff insists that the circuit court properly awarded her appellate attorney fees and costs under these court rules. We disagree.

MCR 3.206(C)(1) provides that, in a domestic-relations action, "[a] party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding." A party who requests attorney fees and expenses under MCR 3.206(C) must allege facts sufficient to show that either (1) he or she is unable to bear the expense of the action and that the other party is able to pay or (2) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order despite being able to comply. MCR 3.206(2)(a) and (b).

In this case, however, the circuit court did not grant plaintiff attorney fees and costs under MCR 3.206(C).[6] The court in its opinion and order made two references to MCR 3.206(C): (1) it stated that plaintiff moved the court for attorney fees and costs under MCR 3.206(C) and (2) it cited MCR 3.206(C) immediately after stating that defendant's claims on appeal were "clearly frivolous." The circuit court did not make any factual findings about—or even discuss—the parties' ability to pay the expense of defendant's appeal or a refusal by defendant to comply with a previous court order despite an ability to do so. Moreover, the circuit court explicitly stated that it was granting plaintiff attorney fees and costs "as sanctions."

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[6] In light of this conclusion, we need not address whether a circuit court has the authority to grant appellate attorney fees and costs under MCR 3.206(C). Therefore, we express no opinion on this issue.

Finally, MCR 7.208(I) did not provide the circuit court with a basis to award plaintiff appellate attorney fees and costs. MCR 7.208(I) states the following: "The trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise." Under MCR 7.208(I), a trial court has jurisdiction to award sanctions despite the filing of a claim to appeal unless the Court of Appeals orders otherwise. The staff comment to the 1999 amendment that added subrule (I) to MCR 7.208 explains:

> The amendment to MCR 7.208 deals with the issue regarding the relationship of appeals and orders awarding or denying attorney fees and costs. The amendment concerns the authority of the trial court to rule on requests for sanctions when an appeal has been taken. See *Co-Jo, Inc v Strand*, 226 Mich App 108 [572 NW2d 251] (1997). New MCR 7.208(I) provides that the trial court has the authority to rule on such requests despite the pendency of an appeal. [461 Mich cxcvi (2000).]

Although MCR 7.208(I) authorizes a trial court to grant a request for sanctions despite the pendency of an appeal, it does not authorize a trial court to grant a request for sanctions made under a court rule or statute that is not a proper basis for the court to grant sanctions. As previously discussed, the circuit court could not award plaintiff appellate attorney fees and costs under the court rules and statute that it cited.

Accordingly, we hold that the circuit court abused its discretion by awarding plaintiff $14,398.27 in appellate attorney fees and costs.

Reversed.

WHITBECK, P.J., and FITZGERALD, J., concurred with BECKERING, J.

ASHLEY ANN ARBOR, LLC v PITTSFIELD CHARTER TOWNSHIP

Docket No. 304904. Submitted July 10, 2012, at Lansing. Decided December 27, 2012, at 9:05 a.m. Appeal to Supreme Court dismissed on stipulation, 494 Mich ___.

Ashley Ann Arbor, LLC, filed an action against Pittsfield Charter Township in the Michigan Tax Tribunal (MTT) on April 22, 2009, challenging a special assessment levied by defendant for a drainage system update. Plaintiff filed a separate complaint in the Washtenaw Circuit Court on December 13, 2010, raising the same arguments, and then filed a motion in the MTT to transfer the original action to the circuit court. On reconsideration the MTT ordered the case transferred to the circuit court, concluding that it lacked jurisdiction under MCL 205.731(a), a section of the Tax Tribunal Act, MCL 205.701 *et seq*., because the special assessment was made under the Drain Code, MCL 280.1 *et seq*. The MTT noted that plaintiff had timely filed its petition within 30 days of defendant's confirmation of the special assessment roll as required by MCL 41.726(3), a section of the public improvements act (PIA), MCL 41.721 *et seq*. Plaintiff and defendant filed competing motions for summary disposition in both circuit court actions. The circuit court, David Scott Swartz, J., granted summary disposition in favor of defendant in both cases, concluding that if the action involved a special assessment under the Drain Code as urged by plaintiff, while the action would properly be in the circuit court, plaintiff's filing was untimely, and the MTT filing had not tolled the 30-day filing requirement for challenging defendant board's confirmation of the special assessment roll as required by MCL 41.726(3) of the PIA. The court determined in the alternative that if the assessment was not made under the Drain Code, but was instead a general assessment as asserted by defendant, the MTT had jurisdiction over the matter. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 205.731(a), the MTT has exclusive and original jurisdiction over a proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to the assessment, valuation, rates, special assessments, allocation or equalization under the property tax laws of Michigan. As long as the assessment is levied under property tax laws, the tribunal's

jurisdiction extends to a taxpayer's challenge to a special assessment levied by a public corporation, such as a township. Section 703(f) of the Tax Tribunal Act, MCL 205.703(f), as amended by 1992 PA 172, provides that the Drain Code is not a property tax law for purposes of jurisdiction within the MTT. The circuit court erred by concluding that it lacked subject matter jurisdiction over plaintiff's claims. The special assessment against plaintiff's property was made under the Drain Code because defendant petitioned the Washtenaw County Drain Commission to request the drain update, MCL 280.463, resulting in the formation of a drainage district and the determination of the percentage of the cost assigned to defendant, MCL 280.464, MCL 280.467. MCL 280.468 and MCL 280.473. Defendant was authorized under MCL 280.490 of the Drain Code to then prepare a special assessment roll and allocate its portion of the assessment to plaintiff and other residents. Even though MCL 280.490 provides that the special assessment shall be made under the statutory or charter provisions governing special assessments in the public corporation, the assessment itself was authorized by the Drain Code and the circuit court had jurisdiction over the cases under MCL 205.703(f) and MCL 205.731. *Eyde v Lansing Twp*, 420 Mich 287 (1984) and *Wikman v Novi*, 413 Mich 617 (1982), which held that the MTT has jurisdiction over challenges to special assessments under the Drain Code, was not binding because those cases were decided before the enactment of 1992 PA 172, which specifically removed from the MTT jurisdiction over special assessment challenges under the Drain Code.

2. Under MCL 600.5856(b), a statute of limitations may be tolled when an action is dismissed or transferred on some ground other than on the merits. MCL 41.726(3) provides that all assessments on a confirmed special assessment roll are final and conclusive unless an action contesting an assessment is filed in a court of competent jurisdiction within 30 days after the date of confirmation. A statutory limitations period is evidence of a legislative determination of that reasonable period of time that a claimant will be given to file an action. The circuit court erred by dismissing plaintiff's complaint on the basis that plaintiff's actions were not timely filed. Plaintiff properly filed its claim in the MTT within 30 days after defendant confirmed the special assessment roll. The 30-day filing period in MCL 41.762(3) is a period of limitations that was tolled when plaintiff filed its original action in the tribunal. Because jurisdiction over most other special assessment challenges that had been levied under the PIA would vest in the MTT, it qualified as a "court of competent jurisdiction" for purposes of MCL 41.726. Accordingly, plaintiff's original action in

the MTT was properly filed within 30 days after the assessment-roll confirmation, the filing tolled the period of limitations, and plaintiff's circuit court filing was therefore timely.

3. Courts possess equitable powers that are reserved for unusual circumstances. Even if plaintiff's April 22, 2009, MTT filing did not toll the statute of limitations pursuant to MCL 600.5856(b), the period was equitably tolled. Any error in jurisdiction was the result of confusion over the interplay between the holdings in *Eyde* and *Wikman* and MCL 205.703(f), as amended by 1992 PA 172, which specifically stated that the MTT did not have jurisdiction over assessments made under the Drain Code.

4. The MTT is required by Mich Admin Code, R 205.1111(4) to look to either the court rules or MCL 24.271 to MCL 24.287 of the Administrative Procedures Act if there is no relevant rule of practice or procedure to guide the tribunal. MCR 2.227(A)(1) provides that when a court determines in a civil action that it lacks subject matter jurisdiction over the action, the court may transfer that action to another court where venue would be proper. In this action, the MTT, as a quasi-judicial agency, had authority under MCR 2.227(A)(1) to transfer plaintiff's petition to the circuit court, which was required to consider the matter as if it had been originally filed in that court.

5. The Court of Appeals declined plaintiff's request to determine whether it was entitled to judgment as a matter of law; the circuit court was directed to review and decide the issue on remand.

Vacated and remanded.

SAAD, J., dissenting, would have affirmed the circuit court's order granting defendant summary disposition. Relying in part on the Supreme Court holdings in *Eyde* and *Wikman*, and the doctrine of stare decisis, he would have held that the MTT has exclusive and original jurisdiction over the instant action, which involves a township's tax assessment against a local property owner. Accordingly, the circuit court had no jurisdiction to hear plaintiff's challenge to the special property tax assessment made by the township under the PIA. He reasoned that only the Supreme Court has authority to interpret MCL 205.703(f), as amended by 1992 PA 172, in light of its precedent.

1. TAXATION — TAX TRIBUNAL — JURISDICTION — SPECIAL ASSESSMENTS — DRAIN CODE.

The Michigan Tax Tribunal (MTT) has exclusive and original jurisdiction over a proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to

the assessment, valuation, rates, special assessments, allocation or equalization under the property tax laws of Michigan; the tribunal's jurisdiction extends to a taxpayer's challenge to a special assessment levied by a public corporation, such as a township, but only if the assessment is levied under property tax laws; the MTT does not have original and exclusive jurisdiction over special assessments made by public corporations under the Drain Code, MCL 280.1 *et seq*., because such an action does not involve a property tax law (MCL 205.703[f]; MCL 205.731[a]).

2. LIMITATION OF ACTIONS — STATUTE OF LIMITATIONS — TOLLING — TAX TRIBUNAL — COURTS OF COMPETENT JURISDICTION.

Under MCL 600.5856(b), a period of limitations may be tolled when an action is dismissed or transferred on some ground other than on the merits; MCL 41.726(3) provides that all assessments on a confirmed special assessment roll are final and conclusive unless an action contesting an assessment is filed in a court of competent jurisdiction within 30 days after the date of confirmation; even though the Michigan Tax Tribunal is a quasi-judicial agency and lacks jurisdiction, the MCL 41.726(3) 30-day filing period for contesting a special assessment is tolled when the plaintiff files an action in the tribunal, which constitutes a court of competent jurisdiction, within that 30-day period.

Kemp Klein Law Firm (by *Richard Bisio*) for Ashley Ann Arbor, LLC.

Reading, Etter & Lillich (by *John L. Etter*) for Pittsfield Charter Township.

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

GLEICHER, P.J. Pittsfield Charter Township levied a special assessment against Ashley Ann Arbor, LLC (Ashley), to recover the cost of updating a drainage system that serviced Ashley's property. Ashley challenged the special assessment, contending that the drain updates prevented flooding on properties outside the special assessment district and did not benefit the properties subject to the tax. Ashley brought actions seeking to invalidate the special assessment in both the

circuit court and the Michigan Tax Tribunal (MTT). After transfer of the MTT petition to the circuit court, the court summarily dismissed both claims. The issues before us concern the jurisdiction of the dispute and the timeliness of the claims.

We hold that the circuit court was the correct forum to hear Ashley's challenge as the special assessment arose under the Drain Code, MCL 280.1 *et seq.*, and was therefore outside the MTT's exclusive and original jurisdiction. MCL 205.703(f); MCL 205.731. The circuit court improperly dismissed Ashley's challenge as the corporation timely raised it before the MTT, which then transferred jurisdiction to the circuit court. Moreover, Ashley's timely filing of its MTT petition tolled the period of limitations, rendering the circuit court's dismissal of Ashley's original complaint improper. We vacate the circuit court's summary dismissal orders and remand for consideration of Ashley's substantive claims.

I. BACKGROUND

Ashley owns undeveloped property north of Michigan Avenue in Pittsfield Township. In 2009, the township created a special assessment district to finance its obligations for the Michigan Avenue East Central Area Drainage District Project. Under the project, the Washtenaw County drain commissioner reconstructed and diverted a section of a stormwater drain because a previous reconstruction had forced overflow waters to pool on residential properties south of the assessment district. The drain commissioner apportioned $1,724,994.45 of the project costs to the township. The township paid half this obligation from its general fund and apportioned the remainder of the debt among the 37 property owners in the special assessment district.

Ashley first objected to the special assessment at a March 24, 2009 public hearing before the township's board of trustees. In the hearing notice provided to the affected landowners, the township advised them of their right to "file a written appeal with the [MTT] within 30 days after confirmation of the special assessment roll."

Ashley subsequently filed a petition in the MTT on April 22, 2009, challenging its inclusion in the special assessment district. Ashley complained in part that "[t]he improvement does not specially benefit the subject property," "[t]he special assessment is not proportional to the benefit, if any, to the subject property," and the lack of proportionality violated MCL 41.725(1)(d) of the public improvements act (PIA), MCL 41.721 *et seq*. The MTT scheduled Ashley's petition for a hearing on the September 16-30, 2011 "Prehearing General Call."

While the MTT petition was pending, Ashley filed a separate complaint in the circuit court on December 13, 2010, raising the same challenges. On December 20, 2010, Ashley also filed a motion in the MTT to transfer the matter to circuit court. After receiving training to serve as a hearing referee in the MTT small claims division, Ashley's attorney learned for the first time that assessments imposed under the Drain Code are not within the MTT's jurisdiction and must be brought before the circuit court. Although it initially denied Ashley's motion, the MTT ordered the transfer on reconsideration. Specifically, the MTT ruled that the special assessment was made under the Drain Code and therefore that it lacked jurisdiction. The MTT noted that Ashley had timely filed its petition within 30 days of the township board's confirmation of the special assessment roll as required by MCL 41.726(3) of the PIA.

In February 2011, only two months after filing its original circuit court action and securing the MTT

transfer, Ashley filed a motion for summary disposition, arguing that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. The township responded that the circuit court lacked jurisdiction over both the original and transferred actions and therefore should dismiss both. If the special assessment was made under the Drain Code as contended by Ashley, the township argued that Ashley would be required to file an original action in the circuit court within 30 days of the March 24, 2009 township board meeting. The township argued that the MTT did not have the authority to transfer Ashley's 2009 petition to the circuit court and that Ashley's 2010 circuit court complaint was untimely, divesting that court of jurisdiction.

In the event that the special assessment was imposed under the PIA as contended by the township, then jurisdiction was proper in the MTT alone. In support of its belief that the special assessment fell under the PIA, the township relied on its board's resolution citing the PIA as authority to impose the special assessment against its property owners. The township further noted that although the Drain Code was integral to the county's approval of the drain project and the assessment of taxes against the township, the township switched gears and proceeded under the PIA.

Ashley responded that the MTT had already considered the jurisdictional issue and ruled that the township's special assessment was made under the Drain Code. Ashley reiterated the merits of its claim that the township's actions were within that code:

> The only statutory authority that the Township has to assess property for this is under the Drain Code. If you look at their resolution approving this assessment . . . it specifically mentions the Drain Code. They started this process

> by . . . doing a petition to the Washtenaw County Drain Commissioner to convene a Drainage Board. They held a public hearing under the Drain Code, as required, for the approval of this project, the Township held that hearing, and the whole process is a two-step process where the Drain Board approves the project, does the project, and after that, they allocate the cost to the municipalities and the public entities that are benefited. They allocated about 90 some percent of the cost to the Township, some to the County, some to the city. The Township then, under the Drain Code, has an option of how they want to pay for that. They can pay for it out of their General Fund. They can charge various fees to people or they can, as they did here, impose a special assessment. In fact, the Township decided to split the cost between 50 percent to their General Fund and 50 percent to the special assessment in this case.
>
> But the authority to do that, the authority to impose a special assessment is under the Drain Code. It's MCL 280.490, and I just want to read one sentence from that so that it's clear how the Township came to impose this assessment. This says, in the Drain Code, "If the legislative body of a public corporation which has been assessed under this chapter determines that a part of the lands in the public corporation will be especially benefitted by the drain project, the legislative body may cause that portion of the assessment under this chapter to be specially assessed according to benefits against the especially benefitted lands." That's MCL 280.490(1). Subsection two of that goes on to say that they're to prepare a special assessment roll. This is all under the Drain Code.
>
> Otherwise, they couldn't do this.

Ashley contended that the PIA authorizes the township to levy a special assessment for the township to make a public improvement. The improvement in this case, however, was made by the county drain commissioner. The PIA provides the procedures and methods for the township to create and implement project plans, actions that were taken by the county in this case.

Ashley further noted that drain improvements are not included in the exhaustive list of projects subject to the PIA.

Ultimately, the circuit court dismissed both cases:

> [T]he [MTT's] decision to transfer the case to the Circuit Court does not grant jurisdiction to this court. Further, if [Ashley] is correct that this is a special assessment under the Drain Code, then appeal is only proper in the Circuit Court. [Ashley's] tol[l]ing argument, however, is without merit because as [the township] persuasively argues, [Ashley] failed to file in a . . . "court of competent jurisdiction," within the 30-day time period. By way of example, if a claim is required to be filed in the Court of Claims and a party erroneously files in Circuit Court and then the statute of limitations runs before the error is corrected, the tol[l]ing provision does not operate to save the claim. The . . . complaint must be properly filed in order for tol[l]ing to operate. Based on [the township's] argument, . . . and despite the [MTT's] conclusion, the [MTT] is not, "a court of competent jurisdiction," if the Circuit Court has jurisdiction over the Drain Code matters. Alternatively, if, as [the township] argues, this is not a special assessment under the Drain Code and instead is a general assessment, this court does not have jurisdiction and the [MTT] is the proper forum. Either way, [Ashley's] case is not properly before this Court.[1]

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision to grant summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate under MCR 2.116(C)(4) when

[1] We note that Ashley initially challenged Washtenaw Circuit Court Judge David S. Swartz's authority to dismiss the transferred case as it had been assigned to a different judge. The circuit court remedied the situation and the case was properly assigned to Judge Swartz before the summary dismissal order was entered. Ashley has not renewed its challenge on this ground.

the court lacks subject matter jurisdiction. "The determination whether the circuit court has jurisdiction is a question of law that we review de novo." *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 544; 747 NW2d 321 (2008). We review underlying questions of statutory interpretation de novo as well. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). Our goal is to ascertain the Legislature's intent from the plain language of the statute. *Id.* at 246-247. Only when a statute is ambiguous may we employ the tools of statutory construction. *Id.* at 247.

III. BECAUSE THE SPECIAL ASSESSMENT WAS IMPOSED UNDER THE DRAIN CODE JURISDICTION WAS IN THE CIRCUIT COURT

The jurisdiction of our circuit courts is broad and covers "all matters not prohibited by law[.]" Const 1963, art 6, § 13. Before the creation of Michigan's first tax tribunal, all tax matters fell within the circuit courts' purview. As noted by our Supreme Court in *Wikman v Novi*, 413 Mich 617, 645; 322 NW2d 103 (1982):

> Historically, the circuit courts exercised jurisdiction over actions to enjoin the collection of special assessments. The courts continue to exercise this jurisdiction except as prohibited by the laws of this state. The divestiture of jurisdiction from the circuit court is an extreme undertaking. Statutes so doing are to be strictly construed. Divestiture of jurisdiction cannot be accomplished except under clear mandate of the law.

MCL 205.731(a) of the Tax Tribunal Act (TTA) declares that the MTT has "exclusive and original jurisdiction" over "[a] proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under

the property tax laws of this state." The MTT's exclusive and original jurisdiction extends to a taxpayer's challenge to "special assessments" levied by a public corporation, such as a township, for various types of public improvement projects so long as the assessment is "levied under property tax laws." *Wikman*, 413 Mich at 633-634. A "special assessment" is a "pecuniary exaction[] made by the government for a special purpose or local improvement, apportioned according to the benefits received." *Id.* at 632-633. As noted by our Supreme Court, "[s]ome special assessments are clearly not related to property taxes" and "are exacted through the state's police power as part of the government's efforts to protect society's health and welfare" or "in connection with a regulatory program to defray the cost of such regulation." *Id.* at 635.

In *Wikman*, the special assessment at issue was levied pursuant to a local ordinance and charter, which were considered part of the state's property laws by way of the Legislature's delegation of power to that local unit of government. *Id.* at 636-637. The Court noted that the General Property Tax Act, MCL 211.1 *et seq.*, itself does "not authorize any special assessments, [and therefore] they must refer to special assessments levied under other . . . statutes, municipal charters and ordinances." *Wikman*, 413 Mich at 637.

In *Eyde v Lansing Twp*, 420 Mich 287, 292; 363 NW2d 277 (1984), our Supreme Court used *Wikman*'s logic to hold that a petitioner's challenge to a special assessment levied by a township upon designated property owners to finance a drain project fell within the MTT's jurisdiction. The Court acknowledged that the assessment arose from the Drain Code, but distinguished between assessments levied against a township (which would fall within the circuit court's jurisdiction)

and assessments levied by the township against property (which, it reasoned, would fall within the MTT's jurisdiction). *Id.* at 294.

The township urges us to follow *Eyde* and hold that the township's special assessment for the drain improvement project falls in the MTT's exclusive and original jurisdiction. We reject this invitation because, as aptly argued by Ashley, *Eyde* is not applicable to the case now before us. Since *Wikman* and *Eyde* were decided, our Legislature has made clear that the property tax laws of this state do "not include the drain code of 1956." MCL 205.703(f), citing MCL 280.1 *et seq*.[2] With the enactment of 1992 PA 172, which added the substance of MCL 205.703(f) (originally as subsection [d]), the plain language of the TTA directs that a special assessment levied by a township under the Drain Code is outside the MTT's exclusive and original jurisdiction. The *Eyde* decision was based on an analysis of the 1980 statute, which did not exclude the Drain Code from the property tax laws of this state, and therefore is not controlling.[3]

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[2] This amendment likely reflects the Legislature's adoption of Justice LEVIN's statement in dissent of *Eyde*, 420 Mich at 295-296: "Because the Drain Code is not a property tax law and thus special drainage assessments are not levied under a 'property tax law,' we would hold that the Eydes may maintain an action against the township in the circuit court challenging the assessment against their property." We cannot conclude, as does our dissenting colleague, that the Legislature's specific exclusion of the Drain Code from the ambit of Michigan's property tax laws "codified and clarified the holdings" in *Eyde* and *Wikman*.

[3] Contrary to the dissent's assertion, we are not overruling Supreme Court precedent; the opinions in question are simply inapplicable because the Legislature has since amended the relevant statutory provisions. See *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 606-607; 822 NW2d 159 (2012); *Bush v Shabahang*, 484 Mich 156, 165-166; 772 NW2d 272 (2009); *In re Nestorovski Estate*, 283 Mich App 177, 196 n 6; 769 NW2d 720 (2009); *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002), lv den 467 Mich 937 (2003); *People v Pfaffle*,

We must strictly construe the Legislature's exclusion of Drain Code matters from the MTT's jurisdiction. *Wikman*, 413 Mich at 645. The special assessment against Ashley's property was certainly made under the Drain Code. Pursuant to MCL 280.463, a township that determines drain updates are necessary may petition the county drain commissioner to initiate the project. In the instant action the township filed such a petition with the Washtenaw County drain commissioner. The commissioner then designated a three-member drainage board pursuant to MCL 280.464 to consider the proposed project. As required by MCL 280.467 and MCL 280.468, the drainage board reached a tentative decision to create the drainage district, estimated the associated costs of the project, and determined the cost percentage to be borne by the township. The drainage board confirmed "the apportionment" and "prepare[d] a special assessment roll assessing" the actual or estimated drain project cost to the township. MCL 280.473.

The burden then shifted to the township to decide how to allocate the financial burden amongst its residents. MCL 280.490 provides in part:

> (1) Subject to the requirements of [MCL 280.489a],[4] if the legislative body of a public corporation, which has been assessed under this chapter, determines that a part of the lands in the public corporation will be especially benefited by the drain project to the extent of a portion of the amount

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246 Mich App 282, 303-304; 632 NW2d 162 (2001), lv den 465 Mich 916 (2001). We agree with our dissenting colleague that the issues presented here are "complex." Complexity aside, we respectfully disagree with the notion that this Court's responsibility to construe the meaning and import of the 1992 amendment is limited by the Supreme Court's interpretation of a predecessor statute. While we lack authority to overrule a Supreme Court opinion, here we interpret a superseding statute.

[4] MCL 280.489a delineates a public corporation's duties leading up to filing a drain project petition.

> assessed under this chapter, the legislative body may cause that portion of the assessment under this chapter to be specially assessed, according to benefits, against the especially benefited lands, if the special assessment method of financing is not inconsistent with local financing policy for similar drains and sewers. The special assessment shall be made under the statutory or charter provisions governing special assessments in the public corporation to the extent applicable. . . .
>
> (2) After determining by resolution to proceed, the legislative body shall cause a special assessment roll to be prepared. After the special assessment roll is prepared, the proceedings with respect to the special assessment roll and the making and collection of the special assessments shall be conducted pursuant to the statute or charter governing special assessments in the public corporation.

The special assessment levied by the township against Ashley was authorized by the Drain Code. Absent the drain code, the township would not have been permitted to prepare the special assessment roll and Ashley would have had no cause for complaint. The special assessment is not removed from the drain code simply because MCL 280.490 incorporates procedures from outside the code, specifically from the "the statutory or charter provisions governing special assessments." MCL 280.490(1). The assessment is nevertheless imposed under the Drain Code and therefore jurisdiction is with the circuit court. MCL 205.703(f); MCL 205.731.

IV. ASHLEY'S MTT FILING TOLLED THE PERIOD OF LIMITATIONS AND THE ORIGINAL CIRCUIT COURT ACTION WAS TIMELY

To levy the special assessment against its property owners, the township had to incorporate and utilize the procedures set forth in the PIA. MCL 41.726(3) provides in relevant part:

> After the confirmation of the special assessment roll, all assessments on that assessment roll shall be final and conclusive unless an action contesting an assessment is filed in a court of competent jurisdiction within 30 days after the date of confirmation.

The township contends that Ashley's claims are barred because it did not file its original circuit court complaint until December 13, 2010, nearly 21 months after the township board confirmed the assessment roll. However, Ashley's filing in the MTT 29 days after the roll confirmation tolled the 30-day statute of limitations. As the limitations period was tolled, Ashley's original circuit court complaint was not belated and that court erred by dismissing it.

Contrary to the township's assertion on appeal, the 30-day filing period in MCL 41.726(3) is a period of limitations and therefore can be tolled.

> A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. A statute of limitations is a statute of presumption. The fact of delay extending to the limit prescribed, without further proof, is itself a conclusive bar to suit. [*Lothian v Detroit*, 414 Mich 160, 165-166; 324 NW2d 9 (1982) (quotation marks and citation omitted).]

The MCL 41.726(3) limitation period is not worded in the general language used to create a statute of limitation. Surely the township would not challenge the nature of MCL 41.726(3) had the Legislature stated, "A person shall not bring or maintain an action contesting an assessment unless the action is commenced within 30 days after the date of confirmation," or "the period of limitations is 30 days after the board confirms the assessment roll." See MCL 600.5805 (delineating the statutory limitation periods for actions based on injury to persons or property). Nevertheless, MCL 41.726(3)

creates a statute of limitations. If an affected landowner does not file his or her action within 30 days, he or she is barred from doing so. The delay in filing "is itself a conclusive bar to suit" and the assessment roll automatically becomes final and conclusive.

MCL 600.5856(b) provides for the tolling of "statutes of limitations or repose . . . [a]t the time jurisdiction over the defendant is otherwise acquired." This tolling provision applies when an action is dismissed or transferred "on some ground other than on the merits (as for example—lack of jurisdiction over the subject matter)." *Kiluma v Wayne State Univ*, 72 Mich App 446, 449; 250 NW2d 81 (1976). Personal jurisdiction in this case was otherwise acquired over the township by the timely filing of Ashley's petition in the MTT. The MTT's jurisdiction is "based either on the subject matter of the proceeding . . . or the type of relief requested." *Wikman*, 413 Mich at 631. Once the MTT determined that it lacked jurisdiction over the subject matter, it transferred the petition instead of dismissing it. This transfer based on the lack of subject matter jurisdiction "falls precisely within the ambit of the tolling statute" and MCL 600.5856 "operated to suspend the running of the limitation period." *Kiluma*, 72 Mich App at 451.

There is no dispute that the township confirmed the assessment roll on March 24, 2009, and that Ashley filed its MTT petition 29 days later on April 22. The parties do dispute, however, whether Ashley's MTT filing satisfied MCL 41.726(3)'s requirement that the contesting party file suit "in a court of competent jurisdiction." We hold that under the facts of this case, it did.

First, when read in harmony with the TTA, the Legislature's use of the term "court" in MCL 41.726(3) must be interpreted within its statutory

context. MCL 205.731(a) directs that the MTT has "exclusive and original jurisdiction" over various types of tax-based challenges, including special assessments, arising "under the property tax laws in this state." The PIA provides for special assessments "against [affected] property" to finance various township-sponsored improvement projects. MCL 41.721; MCL 41.722. Most actions challenging a special assessment levied pursuant to the PIA will fall under the MTT's, not a "court's," exclusive jurisdiction. See generally *Wikman*, 413 Mich 617; *Michigan's Adventure, Inc v Dalton Twp*, 287 Mich App 151; 782 NW2d 806 (2010); *Blaser v East Bay Twp*, 242 Mich App 249; 617 NW2d 742 (2000). That the MTT is a "quasi-judicial agency," MCL 205.721, does not eliminate its jurisdiction over actions to be filed before a "court of competent jurisdiction."

Second, the MTT has "competent jurisdiction" to hear tax actions arising under the property laws of this state. Under the facts of this case, the late-made decision that jurisdiction was actually proper before the circuit court does not mean that the MTT was divested of competent jurisdiction from the onset. In the normal course, Ashley's challenge to a special assessment against its property would certainly fall in the MTT's jurisdiction.

As the MTT was a court of competent jurisdiction and Ashley filed its petition within 30 days after the assessment-roll confirmation, jurisdiction was otherwise acquired over the township. Pursuant to MCL 600.5856(b), the period of limitations was tolled at that point. The limitations clock stood still through Ashley's December 13, 2010 filing of its original circuit court complaint. Accordingly, reading the tolling statute together with MCL 41.726(3), Ashley filed its original

action in the circuit court within 30 days of the assessment-roll confirmation. The circuit court erred by dismissing that complaint.

V. ASHLEY'S MTT FILING EQUITABLY TOLLED THE PERIOD OF LIMITATIONS

Even if Ashley's April 22 MTT filing did not toll the period of limitations pursuant to MCL 600.5856, we would find the period tolled as a matter of equity. Any "failure to comply" on Ashley's part "with the applicable statute of limitations is the product of an understandable confusion about" the proper forum to hear such challenges "rather than a negligent failure to preserve [its] rights." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004).

The courts of this state "undoubtedly possess equitable power, [but] such power has traditionally been reserved for 'unusual circumstances' . . . ." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005). And this case is the epitome of unusual. There has been much confusion about the proper forum to hear Ashley's claims. In its March 4, 2009 public hearing notice, the township advised Ashley to file any challenges to the upcoming assessment-roll confirmation in the MTT. Ashley followed that advice. Because of cases like *Wikman* and *Eyde*, which were decided before the 1992 amendment to the TTA, Ashley, the township, and even the MTT hearing referee incorrectly believed that jurisdiction over the dispute vested in the MTT. Ashley's attorney was the first to question the propriety of MTT jurisdiction. Those doubts arose only after he received specialized training to serve as an MTT hearing referee. The MTT did not readily accept Ashley's position and initially denied its motion to transfer the petition. In this Court, the township continues to assert

that jurisdiction is proper only before the MTT. Until today, no court had determined that such an action must be brought before the circuit court.

These circumstances would support a claim that the period of limitations was equitably tolled, even under the narrow parameters permitted in this state. "[A] pinpoint application of equity" is warranted when any errors are the result of "the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate." *Id.* at 590 n 65. Given the existing law, the MTT was the only court of competent jurisdiction known to the parties at the time the petition was filed. Equity would therefore support Ashley's position.

VI. THE MTT PROPERLY TRANSFERRED ASHLEY'S PETITION TO THE CIRCUIT COURT

In the alternative, and contrary to the township's assertion, the MTT could transfer Ashley's petition to the circuit court once it discovered its lack of jurisdiction. Practices and procedures in the MTT are governed by administrative rules. If there is no rule on point, the MTT must look to either the court rules or MCL 24.271 to MCL 24.287, a section of the Administrative Procedures Act, to guide its conduct. Mich Admin Code R 205.1111(4). There is no administrative rule governing the MTT's conduct when it discovers that it lacks jurisdiction over a pending matter. There is no relevant statute either. MCR 2.227(A)(1), however, provides in pertinent part that:

> [w]hen the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper.

The MTT, before which Ashley's petition was pending, determined that it lacked jurisdiction and that the circuit court was the proper forum for Ashley's claims. Accordingly, the MTT could order the action transferred to the circuit court. The fact that the MTT is a "quasi-judicial agency," rather than a "court," is of no import. As the executive has directed the MTT to follow the court rules, it steps into the role of a "court" when it applies those rules.

In this regard, we find *Detroit v Nat'l Exposition Co*, 142 Mich App 539; 370 NW2d 397 (1985), instructive. In that case, the City filed a condemnation action against the defendant corporation to take its property for the infamous Poletown Project. *Id.* at 542. The circuit court ruled in the City's favor and calculated the price the City had to pay to take the land. *Id.* The City then stated its intent to withhold from the just compensation owed to the defendant the sum of various unpaid property taxes. *Id.* The defendant corporation filed a postjudgment motion to challenge the validity of the tax assessment. *Id.* at 542, 545. The circuit court transferred the defendant's motion to the MTT. *Id.* at 542. This Court upheld the transfer as the MTT had exclusive jurisdiction over the property taxation issue. *Id.* at 545. This Court found no ground for complaint simply because a "court" transferred the case to a "quasi-judicial agency," rather than to another "court."

Once Ashley's petition was transferred to the circuit court, moreover, the case proceeded "as if it had been originally filed there." MCR 2.227(B)(1). The circuit court was bound to treat the transferred matter as if it had been filed on April 22, 2009, 29 days after the township board confirmed the assessment roll. In this regard, the circuit court should have treated the transferred petition akin to the original circuit court com-

plaint, both being timely because the period of limitations tolled on April 22, 2009.

As noted in *Wikman*, 413 Mich at 654, in which a circuit court transferred an action to the MTT:

> The timely filing in the circuit court was not sufficient to invoke the jurisdiction of the [MTT]. However, through this action, the circuit court acquired jurisdiction over defendants. MCL 600.5856 . . . provides that the statute of limitations is tolled whenever jurisdiction over the defendant was otherwise acquired.

The *Wikman* Court concluded that the MTT was not divested of jurisdiction despite the action being transferred after the limitations period had otherwise expired. The timely filing of the action in the incorrect forum in that case meant that jurisdiction was obtained over the defendant and the limitation period was tolled. *Id.* Thereafter the circuit court could transfer the action and the MTT was bound to consider the matter as if it had been originally filed before that tribunal.

The circuit court misapplied the law by determining that it lacked jurisdiction and dismissing the transferred action. Consistent with the court rule, statute and precedent, we now vacate that order and reinstate Ashley's cause of action based on the transferred MTT petition.

VII. WE WILL NOT CONSIDER THE MERITS

Ashley asks this Court to review its claims and determine that it is entitled to judgment as a matter of law. We decline that invitation. The circuit court has yet to reach the merits and consider whether the township correctly included Ashley's property within the special assessment district. That court should consider this issue in the first instance.

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

BECKERING, J., concurred with GLEICHER, P.J.

SAAD, J. (*dissenting*). I respectfully dissent. Because binding Michigan Supreme Court precedent clearly and unequivocally provides that, as here, a township's tax assessment against a local property owner falls within the exclusive and original jurisdiction of the Tax Tribunal, our Court, as an inferior or subordinate, intermediate appellate court, has no authority to overrule that precedent. The doctrine of vertical stare decisis compels our Court to simply reaffirm this longstanding principle of law and hold that the circuit court had no jurisdiction to hear this landowner's challenge to the special property tax assessment made by the township under the township public improvement act. MCL 41.721 *et seq*.

The majority holds that the 1992 amendment to the Tax Tribunal Act, 1992 PA 172, § 1; MCL 205.703(f), changed the law regarding jurisdiction to hear local property owners' challenges to township assessments, so that the circuit court, not the Tax Tribunal, now has exclusive jurisdiction over those claims. Were it true that this is the effect of the 1992 amendment—an assertion which I believe misapprehends the reason and meaning of the amendment—it would be within the province of the Supreme Court to so hold and overrule its own precedent. Our Court is constrained to follow Supreme Court precedent and we are not at liberty to exceed our power and overrule it, even if we were to correctly guess how the Supreme Court would rule under these facts in light of the 1992 amendment. And, here, in my view, the majority's guess is incorrect.

In my view, the 1992 amendment simply codified and clarified the holdings in *Wikman v Novi*, 413 Mich 617; 322 NW2d 103 (1982), *Eyde v Lansing Twp*, 420 Mich 287; 363 NW2d 277 (1984), and *Charter Twp of Windsor v Eaton Co Drain Comm'r*, 181 Mich App 481; 449 NW2d 689 (1989), to prevent suits by local property owners against drain boards in the Tax Tribunal. In *Eyde*, 420 Mich at 292, our Supreme Court held that all challenges to special assessments on personal property are within the exclusive and original jurisdiction of the Tax Tribunal. Thus, it determined that a challenge to a special assessment that was imposed by a township on private property in order to pay for the township's financial obligations to the drainage board arose under the property tax laws of the state, and that the Tax Tribunal had exclusive and original jurisdiction over such a dispute. *Id.* Consequently, under *Eyde* the Tax Tribunal, not the circuit court, has jurisdiction over plaintiff's claims. *Id.* In contrast, if a special assessment is against a township as a "public body in general, rather than . . . upon property owned by the township," it does not fall under the property tax laws under MCL 205.731, because the assessment is against a public corporation. *Windsor*, 181 Mich App at 482, 485. In other words, first-level disputes over intragovernmental special assessments are not real property assessments contemplated by the property tax laws, and are handled in circuit court for myriad reasons, including the need for finality and prompt appellate review, particularly in cases addressing drain projects, which often involve jurisdictional questions, bond issues, and pressing public health concerns. *Id.* at 484-487, citing *Eyde v Lansing Twp*, 109 Mich App 641, 644-649; 311 NW2d 438 (1981).

It does not render the township's assessment as one arising under the Drain Code, MCL 280.1 *et seq*., merely

because the township assessed property taxes against a local property owner to defray the cost of a drain board's charge against the township for a drain project. On the contrary, while the charge by the drain board against the township does arise out of and is authorized by the Drain Code, the township's power and ability to pass this cost on to local property owners is derived from and arises out of the authority granted to it by the public improvements act. MCL 41.721 *et seq*. Indeed, in *Wikman*, 413 Mich at 631-634, our Supreme Court held that MCL 205.731(a) clearly expressed the Legislature's intent that the Tax Tribunal's exclusive and original jurisdiction extend to special assessments challenges that were levied by a public corporation, such as a township, for public improvement projects like the one here. In my view, the Drain Code unambiguously states that if the township decides to impose a special assessment on private property owners, it must do so pursuant to authority that is outside the Drain Code. See MCL 280.490(2). In any event, the Legislature's 1992 amendment to the Tax Tribunal Act does not provide that claims contesting tax bills by local property owners—imposed through the public improvements act or otherwise—should be heard in circuit court instead of the Tax Tribunal, where they have historically been adjudicated.

Again, the majority comes to the opposite conclusion, but even if my interpretation of the 1992 amendment is incorrect, this simply reinforces that it is for our Supreme Court to make the judgment about the effect of the amendment. As an intermediate appellate Court, we have the dual obligation, under the rule of law, to faithfully interpret legislative enactments and to also respect vertical stare decisis. And when, as here, these two roles possibly conflict and there is legitimate disagreement about a legislative change, we must be

careful to do justice to both roles and not give short shrift to either. Our case law instructs that because *Eyde* addressed the same issue, it constitutes binding precedent that we are bound to follow. This Court may not overrule or modify decisions of the Michigan Supreme Court, even when a statute has been amended in a way that may change the holding of a decision or otherwise render the decision obsolete. *Paige v Sterling Heights*, 476 Mich 495, 523-524; 720 NW2d 219 (2006), citing *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), in turn overruled on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28 (2007), in turn overruled on other grounds *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455 (2010). See also *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 354 n 17; 785 NW2d 45 (2010); *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987) ("An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of this Court is binding upon lower courts."). In *Paige*, 476 Mich at 524, our Supreme Court held that this Court could not overrule a decision of the Michigan Supreme Court, and that

> [t]he obvious reason for this is the fundamental principle that only this Court has the authority to overrule one of its prior decisions. Until this Court does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete.

Moreover, in *Boyd*, 443 Mich at 523, the Michigan Supreme Court stated that "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." The Court explained in *Mitchell*, 428 Mich

at 370, that if this Court finds that a Michigan Supreme Court decision is no longer viable, it may state its disagreement with the case, but it is bound to follow it nonetheless. Thus, because the Michigan Supreme Court's decision in *Eyde* has not been overruled subsequent to the amendment of MCL 205.703, this Court is bound by the decision. *Id.* See also *Paige*, 476 Mich at 524.

The majority cites cases for the ostensible proposition that this Court may ignore Supreme Court precedent when the Legislature amends a statute, but the cases are simply inapposite. In *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 606-607; 822 NW2d 159 (2012), our Supreme Court ruled that its *own prior opinion* was superseded by statute on the basis of new "clear guidance" by the Legislature. In *Bush v Shabahang*, 484 Mich 156, 165-166; 772 NW2d 272 (2009), the Supreme Court reconsidered its *own prior decisions*, both of which "relied on language of a statute that is no longer in existence . . . ." In *In re Nestorovski Estate*, 283 Mich App 177, 196 n 6; 769 NW2d 720 (2009), the majority denied that it was overruling Supreme Court precedent but, as here, rebuffed the doctrine of stare decisis on the basis of *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002), and *People v Pfaffle*, 246 Mich App 282, 303-304; 632 NW2d 162 (2001). However, as with the majority's other citations, *Lamp* relied on cases in which the Supreme Court declared that it could modify or overrule *its own decisions*, and not that this Court could modify or overrule decisions of the Michigan Supreme Court. See *Lamp*, 249 Mich App at 604, citing *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 367-368; 550 NW2d 215 (1996), in turn overruled *Rowland v Washtenaw County Rd Comm*, 477 Mich 197 (2007). And the Court in *Pfaffle*, 246 Mich

App at 303-304, declined to overrule or ignore a prior Supreme Court decision, observing that the issues addressed in the Supreme Court opinion were wholly different from those at issue in *Pfaffle* and addressed a statute that "no longer exists in even a roughly similar form."

For these reasons, the majority's reliance on those decisions is misplaced. More importantly, however, because the holding in *Paige* has not been overruled, this Court is bound by the rule set forth therein and may not overrule a decision of the Michigan Supreme Court even if it concludes that a subsequent amendment to a statute renders the Michigan Supreme Court decision obsolete. *Pellegrino*, 486 Mich at 353-354.

Notwithstanding our Supreme Court's mandate that lower courts must abide by its decisions in situations precisely like this one, the majority declines and, instead attempts to characterize the 1992 amendment as though a statute has been repealed, replaced, or completely nullified when the reality is obviously far more complicated. Disregarding the application of Supreme Court precedent speaks not only to a disregard of the rules of vertical stare decisis, but to an indifference to the true complexity of the jurisdictional issue presented, as evidenced by the record itself. Plaintiff originally filed this action in the Tax Tribunal and, while it was pending, filed a challenge to the tax assessment in circuit court. On the basis of plaintiff counsel's training to become a Tax Tribunal hearing referee, he believed the case should be transferred out of the Tax Tribunal entirely and heard in the circuit court. The Tax Tribunal initially denied plaintiff's transfer petition, at first believing that it had jurisdiction over the challenge to the tax assessment, and then, on reconsideration, granted the transfer to circuit court. Thereafter, with

two separate cases pending before two different judges—plaintiff's original complaint and the transferred case—the circuit court ruled that, indeed, it lacked jurisdiction to consider any of plaintiff's challenges to the tax assessment by defendant and that the case should have been heard in the Tax Tribunal. Thus, while the majority simply dismisses *Eyde* as superseded and without effect, the legal significance and application of the 1992 amendment confounded not only the litigants and their counsel, but also the circuit court and the Tax Tribunal.

Moreover, contrary to the majority's position, the amendment does not exist in isolation, but intersects with many other statutory sections that remain and impact how tax assessments may be imposed and challenged. The Drain Code, the property tax laws, and the public improvements act are comprised of hundreds of statutory sections with myriad requirements, procedures and levels of hearings and challenges by both governmental entities and individual property owners. How the 1992 amendment fits within them and existing precedent, is, at best, a complex question of jurisdiction and procedure which I believe should be addressed by our Supreme Court. And again, the very fact that there is serious disagreement here about the impact of the amendment underscores the importance of deferring to the Supreme Court as the doctrine of stare decisis says we must.

Accordingly, I dissent and would hold that the circuit court lacked subject-matter jurisdiction over plaintiff's claims and that the trial court correctly granted summary disposition to Pittsfield Township.

MAKOWSKI v GOVERNOR

Docket No. 307402. Submitted December 4, 2012, at Lansing. Decided December 27, 2012, at 9:10 a.m. Leave to appeal granted, 494 Mich 876.

Matthew Makowski filed an action in the Court of Claims against the Governor and the Secretary of State, seeking a declaratory judgment and injunctive relief to reverse then Governor Jennifer Granholm's decision to revoke her order of commutation of plaintiff's nonparolable life sentence that had been imposed for his first-degree murder and armed robbery convictions. Plaintiff filed an application for commutation of his sentence in January 2010, requesting that his sentence be commuted to parolable life. The parole board initially recommended to the Governor that the application had no merit, but on further review after a public hearing, recommended that the Governor grant plaintiff's application for commutation. Thereafter the Governor signed a commutation certificate. The certificate was delivered to the Office of the Great Seal on December 22, 2010, the Great Seal was affixed, and the document was signed by the Secretary of State. The document was then forwarded to the Department of Corrections, but it was not processed. On December 27, 2010, after the victim's family raised objections, the governor directed that she intended to revoke the commutation proceedings. The signed and sealed commutation certificate was retrieved from the Secretary of State's office and destroyed. The court, Richard D. Ball, J., granted defendants' motion for summary disposition, concluding that it lacked jurisdiction to review the governor's exercise of discretion over commutation decisions. Plaintiff appealed.

The Court of Appeals *held*:

1. Courts do not have jurisdiction to review any action performed by the Governor under powers conferred by the Constitution or legislative enactment. A case is nonjusticiable because it involves a political question when (1) the issue to be resolved involves a question that is reserved in the Constitution to a coordinate branch of government, (2) the court must move beyond its areas of judicial expertise to resolve the issue, and (3) there are prudential considerations for maintaining respect between the three branches that counsels against judicial intervention. The Governor has the author-

ity under Const 1963, art 5, § 14, to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, subject to the procedures and regulations prescribed by law. A political question is nonjusticiable when it implicates the separation of powers. The three branches of government are coequal and no branch may invade the province of another or control, direct, or restrain the action of another. The judiciary may not use its powers to usurp the power of a coordinate branch of government or inappropriately interfere with its business.

2. The trial court did not err by granting summary disposition in favor of defendants because review of the former Governor's commutation power presented a nonjusticiable political question. The Constitution expressly grants to the governor the exclusive power to grant commutations. MCL 791.243 and MCL 791.244, which are the procedures and regulations prescribed by law, detail the procedures for filing and reviewing commutation applications; they do not limit the governor's absolute discretion with regard to commutation decisions.

3. The judicial power does not include the power to legislate how and when a commutation decision becomes final and irrevocable. Nor may the judiciary dictate to the Governor which actions are proper and necessary in the exercise of the commutation power. There was no legal support for plaintiff's claim that the text of the original commutation certificate, along with the Governor's signature, being filed with the Secretary of State and the affixation of the Great Seal, made the commutation effective immediately and irrevocable. The former Governor expressed her clear intention to not commute plaintiff's sentence and judicial action to the contrary would be the functional equivalent of this Court granting plaintiff a commutation, which is constitutionally prohibited. The Governor's initial commutation decision did not confer on plaintiff a protected liberty interest because his status as a nonparolable life prisoner never changed.

4. Prudential considerations counseled against reviewing the commutation order. Judicial action would imply a lack of respect for the executive branch of government and would invade the exclusive province of the Governor to coerce an outcome that would be contrary to the former Governor's clear intention on a matter that was exclusively within her constitutional power.

Affirmed.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — POLITICAL QUESTIONS — JUSTICIABILITY — COMMUTATION DECISIONS — REVIEW BY COURTS.

A case is nonjusticiable because it involves a political question when (1) the issue to be resolved involves a question that is reserved in

the Constitution to a coordinate branch of government, (2) the court must move beyond its areas of judicial expertise to resolve the issue, and (3) there are prudential considerations for maintaining respect between the three branches that counsel against judicial intervention; the Governor's decision to grant or deny a prisoner's application for commutation is not reviewable by the judiciary because it presents a nonjusticiable political question; the Governor has exclusive authority under Const 1963, art 5, § 14, to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, subject to the procedures and regulations prescribed by law; the judiciary does not traditionally review commutation applications and any judicial action would violate the separation of powers by invading the clear province of the Governor.

Paul D. Reingold and *Charles L. Levin* for Matthew Makowski.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *A. Peter Govorchin*, Assistant Attorney General, for the Governor and the Secretary of State.

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

CAVANAGH, J. Plaintiff appeals by right the summary dismissal of his request for declaratory judgment and injunctive relief on his claim that former Governor Jennifer Granholm[1] exceeded her constitutional authority when she revoked or rescinded her purported commutation of his nonparolable life sentence. We affirm.

On February 2, 1989, plaintiff was sentenced by the Wayne Circuit Court to mandatory life in prison with-

[1] Governor Granholm was the incumbent governor during the relevant time periods in this case. This opinion's references to the "Governor" will therefore refer only to former Governor Granholm unless otherwise specified.

out the possibility of parole after being convicted of first-degree murder and armed robbery. In January 2010, plaintiff filed an application for commutation of his sentence, requesting that his sentence be commuted to parolable life. In May 2010, the application was reviewed by the parole board and resulted in a "no merit" recommendation to the Governor. The Governor then referred the matter to the Executive Clemency Advisory Council for further review and recommendation. Apparently after a favorable recommendation, the parole board again reviewed plaintiff's application and recommended that the matter continue to public hearing. Following the scheduled hearing, the parole board recommended to the Governor that plaintiff's application for commutation be granted and that his sentence be commuted to a parolable life sentence.

Subsequently, the Governor signed a commutation certificate. On December 22, 2010, the commutation certificate was delivered to the Office of the Great Seal where the Great Seal was affixed, and the document signed by the Secretary of State. It was then forwarded to the Michigan Department of Corrections (MDOC), but not processed. Thereafter, the victim's family contacted the Governor's office with objections. It appears that several e-mails were then transmitted between the Governor's office, a parole board member, and the MDOC regarding the purported commutation. Referenced in the e-mails were the facts that the commutation certificate was not processed by the MDOC and would be returned to the Governor's office.

On December 27, 2010, the former Governor issued a written directive to the Parole and Commutation Board to "halt all commutation proceedings," "prohibit [t]he release of [plaintiff]," and "rescind any and all certificates relating to the commutation." The directive fur-

ther provided that "it is my intention, as previously communicated, to revoke the commutation of [plaintiff's] sentence before fully effectuated." On December 29, 2010, the signed and sealed commutation certificate was retrieved from the Secretary of State's office by the Governor's office and it was subsequently destroyed.[2]

On May 19, 2011, plaintiff filed this lawsuit seeking a declaratory judgment and injunctive relief, alleging that the former Governor had officially commuted his sentence, that she lacked the power to revoke the commutation, and that the manner of revocation violated his due process rights. After the completion of discovery, defendants moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that plaintiff's claim was unenforceable as a matter of law because the former Governor's actions were consistent with her constitutional powers and the commutation never became effective. Plaintiff responded to the motion, arguing that the signed and sealed commutation certificate was final and irrevocable. Further, plaintiff argued, once his request for commutation was granted, he acquired a liberty interest and was entitled to due process.

On November 15, 2011, the trial court issued a written opinion and order holding "that [the trial court] has no authority, *i.e.* no jurisdiction, to examine and/or approve the exercise by the governor of her constitutional authority to commute a prison sentence." That is, "because the federal and Michigan constitutions grant to the executive branch the authority to grant sentencing pardons, reprieves, and commutations, that [sic] the courts have no jurisdiction or authority to question the manner in which reprieves or commutations are granted or, for that matter,

[2] The parole board thereafter voted against recommending commutation of plaintiff's sentence and the newly elected Governor Snyder denied plaintiff's commutation application.

rescinded or revoked." Accordingly, the trial court concluded that plaintiff failed to state a cause of action and that dismissal was proper under both MCR 2.116(C)(4) and (C)(8). This appeal followed. Plaintiff challenges the trial court's holding that it lacked jurisdiction to decide the matter and further argues that the former Governor commuted his sentence through a final and irrevocable official act.

I. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Questions of law in declaratory judgment actions are also reviewed de novo, *Green Oak Twp v Munzel*, 255 Mich App 235, 238; 661 NW2d 243 (2003), as are jurisdictional questions, *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001), and constitutional issues, including whether the separation of powers doctrine applies. *Harbor Tel 2103, LLC v Oakland Co Bd of Comm'rs*, 253 Mich App 40, 50; 654 NW2d 633 (2002).

II. JUSTICIABILITY

The first issue we must consider is whether the trial court properly concluded that it lacked jurisdiction to consider this matter. It appears the trial court concluded that plaintiff's claim challenging the former Governor's commutation power was nonjusticiable because it involved a political question implicating the separation of powers doctrine. We agree.

The separation of powers doctrine is explicitly established in Michigan's Constitution, Const 1963, art 3,

§ 2, which provides, "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

The three branches of our government are separate and coequal, a design that preserves the independence of the three branches of government. *Straus v Governor*, 459 Mich 526, 536; 592 NW2d 53 (1999). In *Kyser v Kasson Twp*, 486 Mich 514, 535; 786 NW2d 543 (2010), our Supreme Court explained:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. [*Id*., quoting *Massachusetts v Mellon*, 262 US 447, 488; 43 S Ct 597; 67 L Ed 1078 (1923).]

That is, "[b]y separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 352; 792 NW2d 686 (2010).

In Michigan, the executive power is vested in the Governor. Const 1963, art 5, § 1. At issue in this case is the Governor's commutation power. A decision to commute a prisoner's sentence is within the scope of the Governor's authority as set forth in Michigan's Constitution. Const 1963, art 5, § 14 provides:

> The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons therefor.

As the trial court noted in this case, a challenge to the Governor's commutation power naturally merits consideration of justiciability limitations. "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion . . . recognize its lack of jurisdiction and act accordingly . . . ." *In re Fraser Estate*, 288 Mich 392, 394; 285 NW 1 (1939). "Judicial power" cannot be used to usurp the power of a coordinate branch of government or to inappropriately interfere with its business. Const 1963, art 3, § 2; *United States v Munoz-Flores*, 495 US 385, 394; 110 S Ct 1964; 109 L Ed 2d 384 (1990). Accordingly, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v Carr*, 369 US 186, 210; 82 S Ct 691; 7 L Ed 2d 663 (1962). As the United States Supreme Court held in *Baker*, "[i]n determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Id*. (quotation marks and citation omitted; alteration in *Baker*).

In Michigan, whether a case is nonjusticiable because it involves a political question is determined through a three-part inquiry:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the ques-

> tion demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations [for maintaining respect between the three branches] counsel against judicial intervention? [*Wilkins v Gagliardi*, 219 Mich App 260, 265-266; 556 NW2d 171 (1996), quoting *House Speaker v Governor*, 443 Mich 560, 574; 506 NW2d 190 (1993), in turn quoting *Goldwater v Carter*, 444 US 996, 998; 100 S Ct 533; 62 L Ed 2d 428 (1979) (Powell, J., concurring), which cited *Baker*, 369 US at 217; quotation marks omitted.]

Our first inquiry, then, is whether and to what extent the issue of commutation is textually committed to the Governor as the holder of the executive power. See *Nixon v United States*, 506 US 224, 228; 113 S Ct 732; 122 L Ed 2d 1 (1993). In that regard, we examine art 5, § 14 to determine the scope of commutation authority conferred on the Governor. When interpreting constitutional language, we are mindful that our primary duty is to ascertain the purpose and intent of the provision. *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010). The intent is that of the people who adopted the constitutional provision; thus, we apply the rule of common understanding that reasonable minds would give. *People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004).

The plain language of the Constitution expressly grants, the power of commutation to the Governor. The Governor's power under art 5, § 14 to "grant reprieves, commutations and pardons after convictions for all offenses" is mandatory and subject only to "procedures and regulations prescribed by law." See *Co Rd Ass'n of Mich v Governor*, 260 Mich App 299, 306; 677 NW2d 340 (2004) (noting that use of the word "shall" indicates a mandatory action). The "procedures and regulations prescribed by law" are set forth in MCL 791.243 and 791.244. In relevant part, MCL 791.243 provides that applications for commutations "shall be filed with the

parole board upon forms provided therefor by the parole board . . . .” MCL 791.244 then prescribes the procedures for processing and investigating such applications by the parole board, “[s]ubject to the constitutional authority of the governor to grant reprieves, commutations, and pardons . . . .” MCL 791.244(1).

These statutory provisions in no way limit the Governor’s absolute discretion with regard to commutation decisions. See, e.g., *Rich v Chamberlain*, 104 Mich 436, 441, 444; 62 NW 584 (1895); *Berry v Dep’t of Corrections*, 117 Mich App 494, 497-499; 324 NW2d 65 (1982). That is, although the parole board renders a recommendation for or against commutation, MCL 791.244(h) and (i), the Governor need not abide the recommendation, as evidenced by the facts of this case; plaintiff’s application for commutation initially resulted in a “no merit” recommendation to the Governor. And unlike a parole board’s decision whether to grant or deny parole, there are no such statutory guidelines limiting the Governor’s discretion. See, e.g., MCL 791.233(1)(a); *In re Parole of Johnson*, 219 Mich App 595, 598-599; 556 NW2d 899 (1996). Consistent with this constitutional grant of absolute power to the Governor, it is well-established that the Legislature may not “pass a law that will infringe upon the exclusive power of the governor to commute a sentence,” *People v Freleigh*, 334 Mich 306, 310; 54 NW2d 599 (1952), and “judicial actions that are the functional equivalent of a pardon or commutation are prohibited . . . .” *People v Erwin*, 212 Mich App 55, 63-64; 536 NW2d 818 (1995). Thus, we conclude that commutation decisions are wholly committed by the text of Michigan’s Constitution to be exclusively within the Governor’s power.

Plaintiff contends, however, that the former Governor granted his application for commutation and, by

changing her decision, she exceeded her constitutional power. We conclude that a resolution of the issue by the trial court, or this Court, would constitute mere guess and speculation, not the application of judicial expertise. There are no judicially discoverable and manageable standards of review regarding the matters of how and precisely when a commutation application is considered "granted," including the procedural formalities required for a commutation decision to become final and irrevocable. See *Nixon*, 506 US at 228. There is no identifiable textual limit on the power committed to the Governor by Michigan's Constitution and there are no statutory provisions that govern the commutation decision process. That is, the "procedures and regulations prescribed by law" do not set forth rules or describe any particular manner by which the Governor must exercise the power of commutation. See Const 1963, art 5, § 14. A judicial determination that imports definite procedural requirements and restrictions into the commutation process would constitute actions outside the purview of judicial function. See *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959). The judicial power does not include the power to legislate how and when a commutation decision becomes final and irrevocable. See *Kyser*, 486 Mich at 535 (noting that the Legislature has the duty to make laws); *Roosevelt Oil Co v Secretary of State*, 339 Mich 679, 694; 64 NW2d 582 (1954) ("[I]t is not the function of the court to legislate."). Nor can the judiciary dictate to the Governor which actions are proper and necessary in the exercise of the commutation power. See *Kyser*, 486 Mich at 535, quoting *Mellon*, 262 US at 488 (recognizing that the three branches of government cannot control, direct, or restrain the actions of, or invade the province of, another).

Plaintiff argues that the text of a commutation certificate makes it "effective immediately." However, plaintiff has set forth no authority to support his claim that the language of a commutation certificate, especially without concomitant action, has the force of law. Plaintiff also argues that his purported commutation became a final and irrevocable "official act of state upon being signed, filed with the Secretary of State, affixed with the Great Seal,[3] and delivered to the MDOC." However, plaintiff has cited no apposite legal authority in support of his position and we could find no such authority. Instead, plaintiff relies on the case of *Smith v Thompson*, 584 SW2d 253 (Tenn Crim App, 1979), which stands for the proposition that actions or inactions of the commuting Governor's subordinate officials or of a new Governor could not negate issued commutations "contrary to [the commuting governor's] obvious wishes." *Id*. at 257. With regard to the "validity of an intended act of pardon," that court focused on the commuting Governor's intention, holding that "the Governor who issued the commutation must intend that it become and be immediately effective and that the Governor never does or says anything inconsistent with that intention." *Id*. at 256. Unlike *Smith*, in the case before us the former Governor expressed her clear intention not to commute plaintiff's sentence; thus, any judicial action in defiance of that clear intention would be the functional equivalent of this Court granting plaintiff a commutation, which is constitutionally prohibited. See *Erwin*, 212 Mich App at 63-64.

To the extent that plaintiff argues that he acquired a constitutionally protected liberty interest as a conse-

[3] Although plaintiff argues that MCL 2.44(d) requires placement of the Great Seal on commutations of sentences, he cites no authority for the claim that such placement causes a commutation to be irrevocable.

quence of the former Governor's initial decision regarding his application for commutation, we disagree. A commutation results in a reduction of sentence. It is undisputed that plaintiff's status as a nonparolable life prisoner never changed and, consequently, he never came within the jurisdiction of the parole board. See MCL 791.234(6) and 791.234(7). Thus, plaintiff was never conferred any liberty interest and did not actually receive any benefit associated with the former Governor's initial commutation decision. Accordingly, his "unilateral hope" was never transformed into an "entitlement," as characterized by the United States Supreme Court in *Connecticut Bd of Pardons v Dumschat*, 452 US 458, 465; 101 S Ct 2460; 69 L Ed 2d 158 (1981), which further recognized that "[u]nlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Id*. at 464.

Finally, we hold that prudential considerations counsel against judicial intervention in this matter. This conclusion is based on our recognition of the Governor's clear and exclusive constitutional power in the matters of commutation; the lack of procedures and standards governing the commutation decision process; the respect that must be accorded the separation of powers as delineated in Michigan's Constitution; and the fact that one consideration that has traditionally defined "judicial power" is "the avoidance of political questions or other non-justiciable controversies," *Nat'l Wildlife Federation*, 471 Mich at 614. It is well-established in this state that "the courts have no jurisdiction to review any action performed by a governor under the power conferred upon him either by the Constitution or legislative enactment." *Born v Dillman*, 264 Mich 440, 444; 250 NW 282 (1933). Michigan's Constitution empowers

the Governor, solely, to exercise judgment in commutation matters. A judicial decision on plaintiff's challenge to the former Governor's decision on his commutation application would, at minimum, imply lack of respect for the executive branch of government. More importantly, the exercise of judicial power in this matter would have the effect of invading the exclusive province of the Governor to coerce an outcome that is contrary to the former Governor's clear intention on a matter that was exclusively within her constitutional power. Michigan's Constitution forbids this intrusion. See *Kyser*, 486 Mich at 535.

In summary, plaintiff's challenge to the former Governor's commutation power presents a nonjusticiable political question. Accordingly, the trial court properly dismissed plaintiff's request for a declaratory judgment and injunctive relief for lack of jurisdiction over this matter. See *Allstate Ins Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993).

Affirmed.

O'CONNELL, P.J., and DONOFRIO, J., concurred with CAVANAGH, J.

PEOPLE v SITERLET

Docket No. 308080. Submitted December 11, 2012, at Lansing. Decided December 27, 2012, at 9:15 a.m. Leave to appeal sought.

Kris E. Siterlet pleaded guilty on the first day of trial in the Clare Circuit Court, Roy G. Mienk, J., of operating a vehicle with a suspended or revoked license, second offense. The jury then convicted defendant of operating a vehicle while visibly impaired, third offense. He was sentenced to one year in prison for the former conviction and, as a fourth-offense habitual offender, to 46 months to 25 years in prison for the latter conviction. Defendant appealed with regard to the sentence imposed for the conviction of operating a vehicle while visibly impaired. He alleged that he should have been sentenced as a third-offense habitual offender because he was originally charged as a fourth-offense habitual offender, the prosecution amended the felony information during plea negotiations to charge defendant as a third-offense habitual offender, and, after defendant rejected the plea offer, the prosecution did not file another amendment to increase the habitual-offender level back to fourth-offense status until four days after the trial.

The Court of Appeals *held*:

1. The issue regarding sentencing defendant as a fourth-offense habitual offender was not raised by him in the trial court and is, therefore, reviewed for plain error. To avoid forfeiture under the plain-error rule, a defendant must prove (1) that there was error, (2) that the error was plain, i.e., clear or obvious, and (3) that the plain error affected substantial rights, i.e., the outcome of the lower-court proceedings. Once the defendant establishes the three requirements, the Court of Appeals must exercise its discretion in deciding whether to reverse. However, reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent person. Plain error that affects substantial rights does not necessarily result in the conviction of an actually innocent person or seriously affect the fairness, integrity, or public reputation of judicial proceedings.

2. MCL 769.13(1) provides that the prosecution may seek to enhance the sentence of an habitual offender if it files a written notice within 21 days after arraignment or, if the defendant waives arraignment, within 21 days after the filing of the information charging the underlying offense. The purpose of the 21-day-notice rule is to give the defendant notice of the potential consequences should a conviction arise. The 21-day-notice rule is a bright-line test that must be strictly applied.

3. MCL 767.76 provides that an information may be amended any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the defendant is not prejudiced by the amendment and the amendment does not charge a new crime. MCR 6.112(H) provides that a court may permit the prosecution before, during, or after trial to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. Under these two provisions, the prosecution may not amend an information after the 21-day period provided in MCL 769.13(1) to include additional prior convictions and, therefore, increase potential sentence consequences.

4. The prosecution filed the second amended felony information in order to increase defendant's habitual-offender level well after the expiration of the 21-day period. There was no error or defect in the first amended information, which decreased defendant's habitual-offense level in an effort to secure a plea agreement. The second amended information sought to impose more severe consequences on defendant by increasing his habitual-offender level and, therefore, his potential sentence. The increase in the habitual-offender level had the effect of increasing the sentence imposed. Defendant, therefore, showed that an error occurred that affected the outcome of the lower-court proceedings. Nevertheless, defendant was not entitled to relief because the error in this case was not plain error. It was not clear or obvious, given the existing legal precedent and the facts of this case, that the prosecution was prohibited from amending the information to increase defendant's habitual-offender level. No binding precedent clearly established that the amendment could not be made. Even if the error was plain, given defendant's qualification as a fourth-offense habitual offender and his knowledge that the prosecution was pursuing the fourth-offense enhancement following the failure to reach a plea agreement, defendant's sentence as a fourth-offense habitual offender did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Affirmed.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, *Michelle Ambrozaitis*, Prosecuting Attorney, and *Laura A. Cook*, Assistant Attorney General, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM. Defendant, Kris Edward Siterlet, appeals as of right his conviction following a jury trial of operating a vehicle while visibly impaired, third offense, MCL 257.625(3) and (11)(c).[1] At issue is whether the trial court could sentence defendant as a fourth-offense habitual offender, MCL 769.12, after the prosecution twice amended the felony information to change defendant's habitual-offender level. The prosecution originally charged defendant as a fourth-offense habitual offender. However, the prosecution amended the felony information during plea negotiations to charge defendant as a third-offense habitual offender, MCL 769.11. After defendant rejected the prosecution's plea offers, the prosecution pursued the case as if defendant was charged as a fourth-offense habitual offender, to which defendant did not object. Defendant was tried and convicted of operating a vehicle while visually impaired, third offense. Four days after trial, the prosecution filed a second amended felony information to increase defendant's habitual-offender level back to fourth-offense

[1] Defendant also pleaded guilty of operating a vehicle with a suspended or revoked license, second offense, MCL 257.904(1) and (3)(b), and the trial court imposed a one-year sentence for that conviction. However, this plea-based conviction is not at issue in this appeal.

status. Defendant did not object to this amendment. The trial court sentenced him as a fourth-offense habitual offender to 46 months to 25 years in prison.

Defendant argues on appeal that the trial court erred by sentencing him as a fourth-offense habitual offender because the information in place during the plea negotiations and at trial alleged that he was a third-offense habitual offender. We hold that the trial court erred by sentencing defendant as a fourth-offense habitual offender because the prosecution improperly amended the felony information to increase defendant's habitual-offender level after the 21-day period provided for in MCL 769.13(1). However, we also hold that defendant is not entitled to relief with regard to this unpreserved argument because the trial court's error was not plain and did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Therefore, we affirm.

I. PERTINENT FACTS

On October 15, 2010, the police arrested defendant for driving while impaired; Breathalyzer tests indicated that defendant's blood alcohol level was 0.11. In a felony information filed on November 19, 2010, the prosecution charged defendant as a fourth-offense habitual offender with operating a vehicle while visibly impaired, third offense, and operating a vehicle with a suspended or revoked license, second offense. On June 15, 2011, the prosecution amended the felony information to charge defendant as a third-offense habitual offender. The amendment occurred during plea negotiations, in which the prosecution first offered to charge defendant as a third-offense habitual offender and later offered to charge defendant as a second-offense habitual offender. However, defendant rejected these plea offers.

On August 18, 2011, the prosecution filed three motions in the trial court referring to how defendant was then charged as an habitual offender. In a motion in limine, the prosecution alleged that defendant was charged at that time as a third-offense habitual offender. However, in both a motion to suppress evidence and a motion to suppress nonexpert testimony, the prosecution alleged that defendant was charged at that time as a fourth-offense habitual offender. In response to the prosecution's motion to suppress nonexpert testimony, defendant admitted the prosecution's allegation that he was charged at that time as a fourth-offense habitual offender.

The amended information charging defendant as a third-offense habitual offender remained unchanged during defendant's trial. On the first day of trial, defendant pleaded guilty of operating a vehicle while his license was suspended or revoked, second offense. A jury then convicted him of operating a vehicle while visibly impaired, third offense. On September 27, 2011 (four days after trial), the prosecution filed a second amended felony information to increase defendant's habitual-offender level back to fourth-offense status. Defendant did not object to this amendment, and on December 5, 2011, the trial court sentenced him as a fourth-offense habitual offender.

II. ANALYSIS

Defendant's only argument on appeal is that the trial court erred by sentencing him as a fourth-offense habitual offender. Defendant did not raise this issue before the trial court; therefore, our review is for plain error. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid issue forfeiture under the plain-error rule, defendant must prove the following: (1) there was an error, (2)

the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights, i.e., the outcome of the lower-court proceedings. *Id*. at 763. Once defendant has established these three requirements, this Court "must exercise its discretion in deciding whether to reverse." *Id*. Reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent person. *Id*. A plain error that affects substantial rights does not necessarily result in the conviction of an actually innocent person or seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *People v Vaughn*, 491 Mich 642, 666-667; 821 NW2d 288 (2012) (holding that the closure of a courtroom during jury selection, a structural error, did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings); see also *Johnson v United States*, 520 US 461, 469-470; 117 S Ct 1544; 137 L Ed 2d 718 (1997) (holding that a plain error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings even though the error was assumed to have affected substantial rights).

MCL 769.13 governs the procedure for seeking sentence enhancement as an habitual offender. MCL 769.13(1) states the following:

> In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under [MCL 769.10, MCL 769.11, or MCL 769.12], by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

The purpose of the 21-day-notice rule is to give the defendant notice of the potential consequences should a

conviction arise. See *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982). The 21-day-notice rule is a bright-line test that must be strictly applied. *People v Morales*, 240 Mich App 571, 575-576; 618 NW2d 10 (2000).

Under MCL 767.76,

> [a]n information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime. [*People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001), citing MCL 767.76.]

Similarly, MCR 6.112(H) provides that "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant."

This Court has harmonized MCL 769.13 and MCL 767.76 to determine that the prosecution may not amend an information after the 21-day period provided in MCL 769.13(1) to include additional prior convictions and, therefore, increase potential sentence consequences. See *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997); *People v Hornsby*, 251 Mich App 462, 472-473; 650 NW2d 700 (2002). In *Ellis*, the prosecutor promptly filed a supplemental information charging the defendant as a second-offense habitual offender. *Ellis*, 224 Mich App at 755. About six weeks later, however, the prosecutor amended the information to charge the defendant as a fourth-offense habitual offender by alleging two additional prior convictions. *Id.* This Court held that the trial court erred by allowing the amended information. *Id.* at 755, 757. We explained

that a "supplemental information may be amended outside the [21-day] statutory period only to the extent that the proposed amendment does not . . . relate to additional prior convictions not included in the timely filed supplemental information." *Id.* at 757. We emphasized that "[t]o hold otherwise would be to permit prosecutors to avoid making the necessary 'prompt' decision regarding the level of supplementation, if any, they wish to pursue and would materially alter the 'potential consequences' to the accused of conviction or plea." *Id.*, quoting *Shelton*, 412 Mich at 569.

Significantly, the *Ellis* Court distinguished its case from *People v Manning*, 163 Mich App 641; 415 NW2d 1 (1987), "where the Court upheld an amendment of a supplemental information outside the [applicable notice period]." Ellis, 224 Mich App at 757 n 2. The *Ellis* Court explained that "[i]n *Manning*, the amended supplemental information corrected an error in the specific convictions that formed the basis of the habitual offender, fourth offense charge. However, the amendment did not elevate the level of the supplemental charge." *Id.*

Several years after *Ellis*, this Court reaffirmed the rule that "the prosecutor may not amend a notice to seek enhancement to include additional prior convictions after the twenty-one-day period," and we again expressly distinguished the circumstances in *Ellis* from cases in which the effect of an amendment is only "to correct an error in the initial notice that did not otherwise affect the level of [a] defendant's potential sentence enhancement." *Hornsby*, 251 Mich App at 470-471. In *Hornsby*, the prosecution initially filed a notice that it intended to enhance the defendant's sentence under MCL 769.11 (third-offense habitual offender) and listed two prior convictions. *Id.* at 469. One month later, the prosecution amended the notice

by replacing one of the listed prior convictions with a different conviction. *Id.* at 470. The defendant challenged the amendment during his sentencing hearing, but the trial court permitted the amendment. *Id.* This Court affirmed, explaining that "a recognized difference exists between an amendment of a notice to seek sentence enhancement that attempts to impose more severe adverse consequences to a defendant and one that does not." *Id.* at 472. We further explained that "*Ellis* does not preclude the amendment of a timely sentence enhancement information to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *Id.* We therefore held that the trial court had properly sentenced the defendant as a third-offense habitual offender because "the amended information did not increase defendant's potential sentence because the amendment did not change defendant's habitual offender level." *Id.* at 472-473.

Consistently with these decisions, we conclude that the trial court erred by sentencing defendant as a fourth-offense habitual offender. Well after the expiration of the 21-day period provided in MCL 769.13(1), the prosecution filed a second amended felony information to increase defendant's habitual-offender level. This case does not involve an error or defect in the June 15, 2011, felony information. As the prosecution explained on appeal, it intentionally decreased defendant's habitual-offender level in the June 15, 2011, felony information in an attempt to obtain a plea. Furthermore, the posttrial, presentencing amendment of the June 15, 2011, felony information sought to "impose more severe adverse consequences" on defendant by increasing his habitual-offender level and, therefore, his potential sentence. *Hornsby*, 251 Mich App at 472. Specifically, the increase in the habitual-

offender level raised defendant's potential minimum sentence by 12 months, i.e., from 34 months as a third-offense habitual offender to 46 months as a fourth-offense habitual offender. See MCL 777.66. In addition, defendant's potential maximum sentence increased from 10 years as a third-offense habitual offender to life imprisonment as a fourth-offense habitual offender. See MCL 769.11(1)(a); MCL 769.12(1)(b); MCL 257.625(11)(c)(*i*). As previously discussed, the trial court sentenced defendant to a term of 46 months' to 25 years' imprisonment. Defendant, therefore, has demonstrated the first and third plain-error requirements: an error that affected the outcome of the lower-court proceedings. See *Carines*, 460 Mich at 763; see also, generally, *Higuera*, 244 Mich App at 444 (stating that an amendment of an information is allowed as long as it does not prejudice the defendant); MCR 6.112(H) (permitting the prosecution to amend the information as long as the amendment does not prejudice the defendant).

The prosecution argues that neither error nor prejudice occurred in this case because defendant knew both that he qualified as a fourth-offense habitual offender and that the prosecution would change his habitual-offender level back to fourth-offense status if he rejected the prosecution's plea offer. We reject this argument. While the first felony information notified defendant that he qualified as a fourth-offense habitual offender, the first felony information was amended, i.e., replaced, to actually charge defendant as a third-offense habitual offender. Moreover, the prosecution's claim assumes that it could amend the June 15, 2011, felony information to increase defendant's habitual-offender level to fourth-offense status. As previously discussed, the prosecution could not do so. Although the prosecution was certainly free to make and withdraw plea

offers to defendant that addressed his habitual-offender level, it could not amend the information after the 21-day period to increase defendant's habitual-offender level.

Despite defendant's demonstration of an error affecting the outcome of the lower-court proceedings, we conclude that defendant is not entitled to relief for two reasons. First, the error in this case was not plain. See *Carines*, 460 Mich at 763-764. Given the existing legal precedent and the facts of this case, it was not clear or obvious that the prosecution was prohibited from amending the June 15, 2011, felony information to increase defendant's habitual-offender level. No binding precedent existed that clearly established that, after the expiration of the 21-day period provided in MCL 769.13(1), an amended felony information that decreased the habitual-offender level charged in an original felony information could not be amended to increase a defendant's habitual-offender level back to the level charged in the original felony information. See, generally, *id.* at 770 (evaluating whether the rule of law serving as the basis for an error was clearly established by Michigan caselaw in order to determine whether the error was plain).

Second, even if the error was plain, we would decline to exercise our discretion in this case to order resentencing. See *id.* at 763-764. Defendant is not arguing that he is innocent. Moreover, sentencing defendant as a fourth-offense habitual offender did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. See *id.*; see also *Vaughn*, 491 Mich at 666-667. The factual basis supporting defendant's status as a fourth-offense habitual offender was beyond dispute. Indeed, defendant has an extensive criminal history illustrating that he is an habitual drunk driver.

The original felony information notified defendant that he qualified as a fourth-offense habitual offender. It also informed him that the prosecution would initially pursue the fourth-offense enhancement. Significantly, the record illustrates that defendant knew that the prosecution would pursue a fourth-offense enhancement after he rejected the prosecution's plea offer. The prosecution alleged in two motions filed on August 18, 2011, that defendant was charged at that time as a fourth-offense habitual offender. Although this was not true in light of the June 15, 2011, felony information, defendant not only failed to challenge the prosecution's allegation in the lower court but admitted this allegation in his answer to the prosecution's motion to suppress nonexpert testimony. Defendant cannot make this admission in the trial court and now argue on appeal that the prosecution abandoned its intent to charge him as a fourth-offense habitual offender. See *Flint City Council v Michigan*, 253 Mich App 378, 395; 655 NW2d 604 (2002) ("[A] party may not seek redress on appeal on the basis of a position contrary to that it took in the proceedings under review."); *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) ("A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.") (quotation marks and citations omitted). In addition, all references to defendant made by the prosecutor after the jury announced its verdict, in the presentence investigation report, and by the trial court at sentencing were to defendant as a fourth-offense habitual offender, yet defendant remained silent regarding this habitual-offender designation. Given defendant's qualification as a fourth-offense habitual offender and his knowledge that the prosecution was pursuing the fourth-offense enhancement, we

cannot conclude that defendant's sentence as a fourth-offense habitual offender seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Accordingly, we hold that defendant has failed to establish that he is entitled to relief under a plain-error framework.

Affirmed.

WHITBECK, P.J., and FITZGERALD and BECKERING, JJ., concurred.

CHICO-POLO v DEPARTMENT OF CORRECTIONS

Docket No. 307804. Submitted December 12, 2012, at Grand Rapids. Decided January 8, 2013, at 9:00 a.m. Leave to appeal sought.

Daulys Chico-Polo, who was not an American citizen but was serving a sentence of life imprisonment, brought an action for mandamus or declaratory relief in the Ingham Circuit Court, alleging that the Department of Corrections was required to parole and release him to the custody and control of United States Immigration and Customs Enforcement for deportation pursuant to MCL 791.234b, which requires that these actions be taken if a prisoner has been ordered to be deported, was not convicted of certain crimes or sentenced as an habitual offender, and has served at least half of the minimum sentence imposed by the court. The court, Clinton Canady III, J., denied the motion, ruling that although MCL 791.234b would apply to plaintiff once he had become eligible for parole after serving his statutory mandatory minimum sentence under MCL 791.234, that would not occur until 2017. Plaintiff appealed.

The Court of Appeals *held*:

MCL 791.234b does not apply to prisoners serving life sentences. MCL 791.234b requires the parole board to place a prisoner on parole and release that prisoner to the custody and control of the United States Immigration and Customs Enforcement for the sole purpose of deportation if a final order of deportation has been issued against the prisoner, the prisoner has served at least half of the minimum sentence imposed by the court, the prisoner is not serving a sentence for criminal sexual conduct or first- or second-degree homicide, and the prisoner was not sentenced as an habitual offender. By specifying that the minimum sentence must have been imposed by the court, the Legislature excluded prisoners who were eligible for parole but serving a life sentence because the date on which a prisoner becomes eligible for parole was fixed by the Legislature, not imposed by a court.

Affirmed.

BOONSTRA, J., concurring in the result, wrote separately to note that, in the absence of a clear indication of the Legislature's intent with regard to the factual situation at issue, the only two

choices available to the Court of Appeals in applying MCL 791.234b in this case arguably violated a rule of statutory construction. He concluded that the trial court had not abused its discretion by denying the extraordinary relief of mandamus because plaintiff had not satisfied the burden of establishing the existence of a clear legal right to performance by defendant of a clear legal duty.

PRISONS AND PRISONERS — STATUTES — PAROLE — DEPORTATION — LIFE SENTENCES.

MCL 791.234b requires the Parole Board to place a prisoner on parole and release that prisoner to the custody and control of the United States Immigration and Customs Enforcement for the sole purpose of deportation if a final order of deportation has been issued against the prisoner, the prisoner has served at least half of the minimum sentence imposed by the court, the prisoner is not serving a sentence for criminal sexual conduct or first- or second-degree homicide, and the prisoner was not sentenced as an habitual offender pursuant to MCL 769.10, 769.11, or 769.12; MCL 791.234b does not apply to prisoners serving life sentences.

Daulys Chico-Polo *in propria persona*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Scott R. Rothermel*, Assistant Attorney General, for the Department of Corrections.

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM. In this action for mandamus, plaintiff Daulys Chico-Polo appeals as of right the trial court's order denying his request for mandamus or declaratory relief compelling defendant, the Department of Corrections, to parole and release him to the custody and control of the United States Immigration and Customs Enforcement (ICE) for the purpose of deportation pursuant to MCL 791.234b. Because we conclude that MCL 791.234b does not apply to prisoners serving life sentences, we affirm.

Chico-Polo sought review of his file regarding his eligibility for deportation under MCL 791.234b.[1] A memorandum addressed to Chico-Polo and dated March 16, 2011, from a Department of Corrections departmental analyst indicated that review of Chico-Polo's file showed he was not "within the guidelines" of MCL 791.234b because he was serving a life sentence, and he would accordingly "not be eligible to be deported under the provisions" of the statute. In response, Chico-Polo filed a Step I grievance with the Department of Corrections. The department denied his grievance on April 18, 2011. Chico-Polo thereafter filed a Step II grievance, which the department denied on June 1, 2011. Finally, Chico-Polo filed a Step III grievance, which the department denied on July 7, 2011. Thereafter, Chico-Polo filed two separate requests with the Department of Corrections for declaratory rulings. The department did not respond to either request. Under the department's administrative rules, unanswered requests are deemed denied.[2]

Having exhausted his administrative remedies, Chico-Polo filed a pro se complaint for mandamus or declaratory relief in the trial court on September 19, 2011. In his complaint he alleged that defendant was required to parole and release him to the custody and control of ICE for the purpose of deportation pursuant to MCL 791.234b because he had already served more than half of his statutory minimum of 20 years. His complaint alleged that 20 years was his statutory mini-

[1] Chico-Polo is not an American citizen, and an order of deportation against him was issued in 2003.

[2] Specifically, Mich Admin Code, R 791.1115(3) provides: "The director or his or her designee may, but is not required to, issue a declaratory ruling when properly requested. Lack of response within 30 days of receipt of the request shall be deemed a denial of the request for a declaratory ruling."

mum because after 20 years he would be eligible for parole despite the fact that he was serving a life sentence.

On October 31, 2011, defendant filed a brief in response to Chico-Polo's mandamus complaint, arguing that MCL 791.234b was not applicable to prisoners who were serving life sentences. Chico-Polo filed a pro se brief in response to defendant's brief on November 10, 2011, wherein he argued that the Legislature clearly intended to impose a minimum sentence of 20 years for violation of MCL 333.7401(2)(a)(i). The trial court denied Chico-Polo's requests for relief in a written opinion, stating:

> This Court finds there is nothing in the plain language of [MCL 791.234b] that precludes its application to the present case. Under MCL 791.234(7)(b), a prisoner sentenced to life imprisonment under [MCL 333.7401(2)(a)(*i*)] is subject to parole board jurisdiction and may be placed on parole after having served . . . 20 calendar years. Since this is a statutory minimum, Plaintiff must serve the entire 20 years before being considered for parole and deportation under [MCL 791.234b]. Plaintiff will be parole eligible on July 16, 2017 and would be subject to consideration for deportation under [MCL 791.234b] at that time.

On this basis, the trial court denied Chico-Polo's request for mandamus. Chico-Polo now appeals the trial court's order and opinion as of right.

Chico-Polo was convicted of delivering or manufacturing a controlled substance greater than 650 grams, MCL 333.7401(2)(a)(*i*), and was sentenced to life imprisonment on August 5, 1998.[3] His life sentence does

[3] At the time Chico-Polo was sentenced, MCL 333.7401 required a sentence of life imprisonment for violation of MCL 333.7401(2)(a)(*i*). Effective March 1, 2003, the statute was amended to change the amounts of controlled substances in each subsection. Subsection (2)(a)(*i*) now

not, by its terms, provide a minimum sentence from which to calculate his eligibility for parole. But a provision of the Corrections Code, MCL 791.201 *et seq*., states that prisoners sentenced for violations of MCL 333.7401(2)(a)(*i*) who have served 20 years of their sentence are "subject to the jurisdiction of the parole board and may be placed on parole" in accordance with several specific conditions. MCL 791.234(7). Below, and now on appeal, Chico-Polo argues that the 20-year minimum for parole eligibility for individuals given life sentences should be held to be the "minimum sentence" required by MCL 791.234b(2)(b). Defendant responds by arguing that a life sentence, as such, does not have a "minimum sentence" from which to calculate eligibility under MCL 791.234b(2)(b) and, therefore, the trial court properly denied Chico-Polo's application for a writ of mandamus. The parties have not supported their arguments beyond merely announcing their respective positions, but nevertheless, as presented, the issue before us is one of statutory interpretation. Specifically, we must determine whether MCL 791.234b applies to prisoners who are serving life sentences but are nonetheless eligible for parole.[4]

Issues of statutory interpretation are questions of law that we review de novo. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Id.* at

proscribes the delivery or manufacture of 1,000 grams or more of a controlled substance. See 2002 PA 710.

[4] In its brief on appeal defendant also argued that mandamus was not appropriate under the circumstances of this case; however, at oral argument defendant conceded that MCL 791.234b is not discretionary and that if Chico-Polo satisfied the requirements of MCL 791.234b and defendant refused to parole and deport him, mandamus would be appropriate.

246-247. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247. " 'Courts may not speculate regarding legislative intent beyond the words expressed in a statute.' " *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011) (citation omitted). The plain meaning of a statute's words provide the most reliable evidence of the Legislature's intent. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). "Unless defined in the statute, every word or phrase should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Tuggle v Dep't of State Police*, 269 Mich App 657, 663; 712 NW2d 750 (2006) (citations and quotation marks omitted).

MCL 791.234b provides in pertinent part:

> (1) [T]he parole board shall place a prisoner described in subsection (2) on parole and release that prisoner to the custody and control of the United States immigration and customs enforcement for the sole purpose of deportation.
>
> (2) Only prisoners who meet all of the following conditions are eligible for parole under this section:
>
> (a) A final order of deportation has been issued against the prisoner by the United States immigration and naturalization service.[5]
>
> (b) The prisoner has served at least 1/2 of the minimum sentence imposed by the court.
>
> (c) The prisoner is not serving a sentence for any of the following crimes:

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[5] The functions formerly performed by the Immigration and Naturalization Service, which has been abolished, were transferred to the Department of Homeland Security under Title IV of the Homeland Security Act, PL 107-296, 116 Stat 2135.

(*i*) A violation of section 316 or 317 of the Michigan penal code, 1931 PA 328, MCL 750.316 and 750.317 (first or second degree homicide).

(*ii*) A violation of section 520b, 520c, or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d (criminal sexual conduct).

(d) The prisoner was not sentenced pursuant to section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

Particularly important to resolution of the issue before us is the language included in MCL 791.234b(2)(b) which provides that in order to be paroled and released to ICE, the prisoner must have "served at least 1/2 of the minimum sentence *imposed by the court*." (Emphasis added.) By requiring that the minimum sentence be imposed by the court, the Legislature essentially excluded prisoners, such as Chico-Polo, who are eligible for parole but serving a life term because at best, the date on which a prisoner would become eligible for parole is fixed by the Legislature pursuant to MCL 791.234 and not imposed by the court. To hold otherwise would render nugatory the plainly stated requirement that the minimum sentence be "imposed by the court." See *Robertson v Daimler-Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002) (stating that "it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory"). Prisoners serving life sentences do not and never will have a minimum sentence *imposed by the court*. Consequently, even if we were to accept Chico-Polo's implicit argument that the term of years after which he is eligible for parole is equivalent to a minimum sentence, the Legislature imposed this "minimum sentence," not the trial court as required by MCL 791.234b(2)(b). Therefore, the plain language of MCL 791.234b(2)(b) excludes prisoners serving life sentences

from eligibility for parole and deportation under MCL 791.234b. Any contrary interpretation ignores, treats as surplusage, or renders nugatory the words "imposed by the court" in MCL 791.234b.

Further, the conclusion that the Legislature specifically added the requirement that minimum sentences be "imposed by the court" to exclude prisoners who are eligible for parole but serving life sentences is bolstered by the presumption that the Legislature is aware of the existence of all the laws in effect when it enacts new laws. *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 713; 664 NW2d 193 (2003). MCL 791.234b was enacted after MCL 791.234. Accordingly, we must assume that the Legislature was aware of the effect of MCL 791.234 on MCL 791.234b.[6] Thus, presuming the Legislature was aware that MCL 791.234 effectively imposed a minimum sentence for all prisoners serving life sentences for violations of MCL 333.7401(2)(a)(*i*) by giving those prisoners parole eligibility after 20 years, the inclusion of the phrase "imposed by the court" in MCL 791.234b must be interpreted as a conscious decision to exclude those prisoners serving life sentences but eligible for parole.

Therefore, we conclude that the plain language of MCL 791.234b excludes prisoners serving life sentences. Accordingly, because he is serving a life sentence, Chico-Polo is not eligible for parole and deportation pursuant to MCL 791.234b.

Affirmed.

HOEKSTRA, P.J., and BORRELLO, J., concurred.

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[6] We note that MCL 791.234 and MCL 333.7401 were enacted and effective before MCL 791.234b, which did not take effect until April 1, 2011. See 2010 PA 223.

BOONSTRA, J. (*concurring*). I concur in the result. I write separately to address two factors that counsel me toward that decision.

First, I suspect that the issue raised in this appeal is one that the Legislature never considered, and hence it is difficult to discern from the statutory scheme any legislative intent to answer the question before us. That is not a criticism of the Legislature, but merely an observation that legislatures cannot always anticipate factual situations that later may give rise to issues that were not contemplated at the time of the passage of the legislation in question.

As a consequence, we are here faced with two choices, neither of which is optimal, given that both arguably violate a rule of statutory construction. Under the first choice, as the majority notes, a failure to affirm the trial court would render nugatory the plainly stated requirement that the minimum sentence be "imposed by the court." See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002) ("[I]t is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory."). Simply put, the trial court imposed no minimum sentence, but instead imposed an indeterminate life sentence with no minimum term. Any deviation that might result from that sentence by way of an earlier release date is purely a creation of the Legislature, and was not "imposed by the court."[1]

[1] To hold otherwise would require an exercise of mental gymnastics that the majority is not, nor am I, prepared to employ, i.e., that although the trial court imposed no minimum sentence (but rather only an indeterminate life sentence), it was aware at the time of sentencing that the Legislature had adopted truth-in-sentencing laws, making the trial court's imposition of an indeterminate life sentence, with no mention of any minimum term, the equivalent of the trial court's "imposing" a minimum sentence of 20 years. By the same token, I am not prepared, as

The second choice that is available to us, for which the majority opts in affirming the trial court, arguably fares no better in terms of its adherence to the rules of statutory construction. Specifically, MCL 791.234b contains a number of explicit exceptions, one of which is for the offense of first-degree murder in violation of MCL 750.316. MCL 791.234b(2)(c)(*i*). The penalty for that offense is "imprisonment for life[.]" MCL 750.316(1). Consequently, by concluding (as the majority does in affirming the trial court) that the plain language of MCL 791.234b implicitly excludes prisoners serving life sentences, we effectively render nugatory the existing explicit exception for first-degree murder (since there would be no need for it, as it would be subsumed within the implicit exception for prisoners serving life sentences). As noted, "it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory." *Robertson*, 465 Mich at 748.

In endeavoring to interpret the language of MCL 791.234b, we are thus left with two imperfect choices. Ultimately, the best choice would be a third one, i.e., for the Legislature to address this issue by way of statutory amendment, and to make plain its legislative intent as applied to the factual situation before us. But such a legislative solution is not currently available to us.

This leads me to the second factor that guides my decision. This matter comes before us on appeal from the denial of a writ of mandamus. The issuance of a writ of mandamus "is an extraordinary remedy." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008). "The plaintiff bears the burden of demonstrating entitlement

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is the majority, to interpret the inclusion of the phrase "imposed by the court" in MCL 791.234b as a "conscious decision to exclude those prisoners serving life sentences but eligible for parole."

to the extraordinary remedy of a writ of mandamus." *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004). We review a trial court's denial of a writ of mandamus for an abuse of discretion. *In re MCI Telecom Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999). A trial court abuses its discretion when its ruling falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

To show entitlement to the extraordinary mandamus remedy, a plaintiff must demonstrate that (1) the plaintiff has a clear legal right to performance of the specific duty sought, (2) the defendant has a 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. *Tuggle v Dep't of State Police*, 269 Mich App 657, 668; 712 NW2d 750 (2006).

I conclude that plaintiff has not satisfied this burden. At a minimum, and for the reasons noted, I cannot find in the statute a *clear* legal duty on the part of defendant, or that plaintiff has a *clear* legal right to the performance of the alleged duty. If anything is clear, it is that the statute is *unclear* with regard to its application to defendant. Consequently, I am unable to conclude that the trial court abused its discretion by denying plaintiff the requested extraordinary relief of mandamus.[2]

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[2] Plaintiff's alternative request for declaratory relief fails for similar reasons. The grant or denial of declaratory relief is within the sound discretion of the trial court, and we grant the trial court substantial deference when reviewing its decision. MCR 2.605; *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 129; 715 NW2d 398 (2006) ("Under the deferential standard of review outlined in MCR 2.605, a reviewing court must affirm the trial court's decision even if a reasonable person might differ with the trial court in its decision to

I therefore concur in the result reached by the majority.

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withhold relief."). For the reasons noted, a reasonable person would find support in the canons of statutory interpretation for either plaintiff's or defendant's position, and the correctness of plaintiff's preferred interpretation is therefore far from clear. Therefore, this Court should not, and properly does not here, upset the trial court's sound exercise of discretion in denying plaintiff declaratory relief.

PEOPLE v ALLAN

Docket No. 305283. Submitted December 11, 2012, at Lansing. Decided January 10, 2013, at 9:00 a.m. Leave to appeal denied, 494 Mich 863.

David Lee Allan was convicted by a jury in the Jackson Circuit Court of conspiracy to commit extortion, MCL 750.157a; MCL 750.213. Before jury selection, the clerk of the court administered an oath in which the prospective jurors swore to honestly answer all questions about their respective qualifications to be a juror. After the jury was selected, the case proceeded through trial without the jury taking another oath. Defendant was found guilty, and the jury was polled and confirmed the verdict. Defendant appealed, and moved for peremptory reversal and to remand to file a motion in the trial court for an evidentiary hearing and a new trial. He argued that trial counsel had been ineffective and he had been denied due process, in part for failing to object to the trial court's failure to swear in the jury. The Court of Appeals denied defendant's motion for peremptory reversal, but granted defendant's motion to remand in part for an evidentiary hearing and a determination whether the jury was sworn before trial commenced in an unpublished order of the Court of Appeals, entered April 12, 2012 (Docket No. 305283). On remand, the court, John G. McBain, heard testimony and determined that the jury had not been sworn after selection and before trial commenced.

The Court of Appeals *held*:

1. MCR 6.412(F) and MCL 768.14 require that after the jury is selected and before the trial begins, the court must have the jurors sworn. The jury must be sworn in accordance with the oath set forth in MCR 2.511(H)(1). The oath, which must be administered at the beginning of trial in accordance with statute and court rule, protects the fundamental right to a trial by a fair and impartial jury.

2. Unpreserved constitutional claims of error are reviewed for plain error. To avoid forfeiture of an unpreserved claim, the defendant must prove (1) that there was an error, (2) that the error was clear or obvious, and (3) that the plain error affected the outcome of the lower-court proceedings. Reversal is warranted only if the error seriously affected the fairness, integrity, or public

reputation of the judicial proceedings or resulted in the conviction of an actually innocent person. In this case, the trial court plainly erred by failing to swear in the jury as required by Michigan statutes and court rules. The trial court's failure to administer the oath to the jury seriously affected the fairness, integrity, and public reputation of the judicial proceedings because it resulted in an invalid verdict under Michigan law.

3. The failure to swear a jury in a criminal prosecution is a fatal defect. The jury oath is not a mere formality. Rather, the oath required at the beginning of a jury trial is a solemn promise to fulfill the duty to act in accordance with the law at all stages of a trial and a mechanism to ensure that jurors decide the case honestly in accordance with the law and on the basis of the evidence presented. The oath is designed to protect the fundamental right of trial by an impartial jury.

4. Constitutional error is either structural or nonstructural. Nonstructural error typically occurs during the presentation of the case to the jury and may be quantitatively assessed in the context of the other evidence presented. In contrast, structural error is a defect that affects the framework of the trial, infects the truth-gathering process and deprives the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. An error is structural only when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. A structural error is intrinsically harmful without regard to whether an error affected the outcome of a defendant's trial. In this case, the trial court's failure to swear in defendant's jury before trial was a structural error. Because administration of the oath is necessary to ensure the fundamental right to trial by an impartial jury, the failure to administer the oath necessarily renders the criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. It is a defect that affects the framework within which the trial proceeds. That the failure to swear in the jury was a structural error is also supported by the fact that because the jury was never sworn, jeopardy never attached in this case, and defendant can be retried for the same offenses. The plain structural error satisfied the third prong of unpreserved constitutional review without regard to the error's effect on the outcome of defendant's trial. When a defendant is convicted by an unsworn jury, the proper remedy is reversal of the defendant's conviction and remand for a retrial.

Conviction reversed and case remanded for a new trial.

CONSTITUTIONAL LAW — JURY — OATH — FAILURE TO ADMINISTER.

The failure to swear in a jury in a criminal prosecution by administering the oath required by MCL 768.14, MCR 2.511(H)(1), and MCR 6.412(F) before trial begins is a fatal defect that requires automatic reversal of the defendant's convictions and remand for a new trial.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry C. Zavislak* Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Randy E. Davidson*) for defendant.

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM. An unsworn jury convicted defendant, David Lee Allan, of conspiracy to commit extortion, MCL 750.157a; MCL 750.213. Defendant appeals as of right, arguing, among other things, that the trial court committed plain error that requires reversal by failing to swear in the jury. We conclude that the trial court plainly erred by failing to swear in the jury, which both court rule and statute require to protect the constitutional right to a trial by a fair and impartial jury. We also conclude that the trial court's error was structural because the absence of a sworn jury rendered defendant's trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence. Finally, defendant's trial by an unsworn jury seriously affected the fairness, integrity, and public reputation of the judicial proceedings because it rendered the jury's verdict invalid under Michigan law. We, therefore, hold that defendant is entitled to relief under the plain-error

framework for being tried by an unsworn jury. Accordingly, we reverse and remand for a new trial.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The prosecution in this case charged defendant with extortion and conspiracy to commit extortion.[1] It was alleged that the victim met defendant's daughter, Jennifer Allan, at a strip club in summer 2010 and that the two engaged in consensual, unprotected sexual intercourse at a motel several months later. It was further alleged that after the sexual encounter, defendant and Jennifer threatened to accuse the victim of raping Jennifer unless he met their continual demands for money.

Before jury selection in this case, the clerk of the court administered the following oath to the prospective jurors: "You do solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case, so help you God." The prospective jurors affirmed. After the jury was selected, the case proceeded through trial without the jury taking another oath. The jury found defendant guilty of conspiracy to commit extortion but not guilty of extortion. After the jury returned its verdict, defendant requested that the trial court poll the jury. The clerk of the court then administered the following oath to the jury: "Do you jury foreperson and do each of you other jurors state on your oath that the verdict read by the judge is the verdict of this jury, so say you members of the jury." The jury affirmed. Polling confirmed the jury's verdict. The trial court later sentenced defendant to a term of 10 to 20 years' imprisonment.

Defendant appealed as of right and filed two motions in this Court. Defendant first moved this Court to

[1] The prosecution dismissed a charge of prostitution, MCL 750.448.

remand so that he could file a motion in the trial court for a new trial and an evidentiary hearing, arguing that (1) his trial counsel was ineffective for failing to challenge a biased juror for cause, (2) the trial court violated his due-process rights by failing to swear in the jury, and (3) his trial counsel was ineffective for not objecting to the court's failure to swear in the jury. In his second motion, defendant moved this Court to peremptorily reverse his conviction on the basis of the trial court's failure to swear in the jury. We denied defendant's motion for peremptory reversal but granted defendant's motion to remand in part "for an evidentiary hearing and determination whether the jury was sworn before trial commenced."[2] We denied defendant's motion to remand in all other respects and retained jurisdiction.[3]

On remand, the trial court held an evidentiary hearing and received testimony from defendant and defendant's trial counsel. Trial counsel testified that he had no recollection of either the jury being sworn or not being sworn. The trial court then issued an order stating its factual finding that "the jury was not sworn after selection and before trial commenced."

II. ANALYSIS

A. FAILURE TO ADMINISTER JURY OATH

Defendant argues that the trial court committed error that requires reversal by failing to give the jury its oath after jury selection.[4] We agree.

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[2] *People v Allan*, unpublished order of the Court of Appeals, entered April 12, 2012 (Docket No. 305283).

[3] The circuit court register of actions indicated that the jury was sworn, but the trial transcripts contained no record that the jury was sworn

[4] We note that this is a case in which the jury was never sworn, not a case in which the jury was belatedly sworn, e.g., during the presentation

Defendant did not raise this issue before the trial court; therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture of a constitutional right under the plain-error rule, defendant must prove the following: (1) there was an error, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights, i.e., the outcome of the lower-court proceedings. *Id*. at 763. Once defendant has established these three requirements, this Court "must exercise its discretion in deciding whether to reverse." *Id*. Reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent person. *Id*. A plain error that affects substantial rights does not necessarily result in the conviction of an actually innocent person or seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *People v Vaughn*, 491 Mich 642, 666-667; 821 NW2d 288 (2012) (holding that the closure of a courtroom during jury selection, a structural error, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings); see also *Johnson v United States*, 520 US 461, 469-470; 117 S Ct 1544; 137 L Ed 2d 718 (1997) (holding that a plain error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings even when the error was assumed to have affected substantial rights).

MCL 768.14 provides that the following oath must be administered to jurors in criminal cases: "You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the

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of the evidence to the jury. The latter case would present a different legal issue, which we do not consider today.

laws of this state; so help you God." MCL 768.15 permits substitution of the words "[t]his you do under the pains and penalties of perjury" for "so help you God."

Similarly, MCR 6.412(F) provides that "[a]fter the jury is selected and before trial begins, the court must have the jurors sworn." Under MCR 6.412(A), MCR 2.511 governs the procedure for impaneling the jury. MCR 2.511(H)(1) states the following:

> The jury must be sworn by the clerk substantially as follows:
>
> "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."

We have opined that the oath that must be administered at the beginning of trial pursuant to statute and court rule protects the fundamental right to a trial by a fair and impartial jury. *People v Pribble*, 72 Mich App 219, 224-225; 249 NW2d 363 (1976); see also, generally, US Const, Am XIV; *Groppi v Wisconsin*, 400 US 505, 509; 91 S Ct 490; 27 L Ed 2d 571 (1971).

In this case, the trial court did not administer the oath to the jury as provided for by statute and court rule. The trial court's obligation to do so was clearly established by law. Thus, the trial court's failure to swear in the jury was plain error. See *Carines*, 460 Mich at 763.

With respect to whether the trial court's error affected defendant's substantial rights, defendant argues that the trial court's failure to swear in the jury satisfies the third prong of the plain-error test without regard to its effect on the outcome of his trial because the error was structural. Constitutional error is classified as

either structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). Nonstructural errors are typically trial errors "occur[ing] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented . . . ." *Arizona v Fulminante*, 499 US 279, 307-308; 111 S Ct 1246; 113 L Ed 2d 302 (1991). In contrast, "[s]tructural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003). The United States Supreme Court has found error to be structural "only in a very limited class of cases," *Johnson*, 520 US at 468, including in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), for a total deprivation of the right to counsel; in *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927), for the lack of an impartial trial judge; in *Vasquez v Hillery*, 474 US 254; 106 S Ct 617; 88 L Ed 2d 598 (1986), for the unlawful exclusion of grand jurors of the defendant's race; in *McKaskle v Wiggins*, 465 US 168; 104 S Ct 944; 79 L Ed 2d 122 (1984), for the deprivation of the right to self-representation at trial; in *Waller v Georgia*, 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984), for the deprivation of the right to a public trial; and in *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993), for an erroneous reasonable-doubt instruction to the jury.

The Court has typically characterized errors as structural "only when the error necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Rivera v Illinois*, 556 US 148, 160; 129 S Ct 1446; 173 L Ed 2d

320 (2009) (quotation marks and citation omitted; alteration in the original). The United States Supreme Court "has specifically reserved judgment on whether an unpreserved structural error automatically affects a defendant's substantial rights . . . ." *Vaughn*, 491 Mich at 666. However, our Supreme Court has opined that a structural error is intrinsically harmful without regard to whether the error affected the outcome of a defendant's trial. *Duncan*, 462 Mich at 51. Accordingly, in *Vaughn*, 491 Mich at 666, the Court recognized that Michigan caselaw "suggests that a plain structural error satisfies the third *Carines* prong."

In *Pribble*, this Court opined that "the failure in a criminal prosecution to swear the jury is regarded as a fatal defect." *Pribble*, 72 Mich App at 225 (quotation marks and citation omitted). The trial court in *Pribble* sua sponte granted the defendant a mistrial after it discovered during the presentation of the prosecution's case-in-chief "that the jury had not been given its oath prior to commencement of the proceedings." *Id*. at 221. The defendant was then given a second trial, and he was convicted. *Id*. at 222. The defendant appealed his conviction, arguing that it was prohibited by the Double Jeopardy Clauses of the United States and Michigan Constitutions, US Const, Am V; Const 1963, art 1, § 15. *Id*. We rejected the defendant's argument and affirmed his conviction, holding that the trial court's failure to swear the jurors in before the beginning of the defendant's first trial was a "fatal defect" that would have rendered invalid a resulting conviction in the first trial. *Id*. at 225-226. In so holding, we recognized that the right to be tried by an impartial jury was a constitutional guarantee and further opined as follows:

> The required oath is not a mere "formality" which is required only by tradition. The oath represents a solemn

> promise on the part of each juror to do his duty according to the dictates of the law to see that justice is done. This duty is not just a final duty to render a verdict in accordance with the law, but the duty to act in accordance with the law at all stages of trial. The oath is administered to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as befits one holding such an important position. The oath is designed to protect the fundamental right of trial by an impartial jury. [*Id*. at 224.]

Accordingly, we explained that any conviction resulting from an unsworn jury was subject to being overturned on appeal. *Id*. at 225.

In *People v Clemons*, 177 Mich App 523, 528-530; 442 NW2d 717 (1989), we reaffirmed the legal principles discussed in *Pribble*. The defendant's first trial in *Clemons* properly began with the trial court administering the oath to the jurors. *Id*. at 529. The trial court subsequently granted the defendant a mistrial on unrelated grounds and began a second trial with 10 of the defendant's original jurors and 2 new jurors. *Id*. However, at the start of the second trial, the trial court only administered the oath to the 2 new jurors and failed to administer the oath to the original 10 jurors. *Id*. We held that the original 10 jurors should have been given the oath at the start of the second trial because the declaration of a mistrial rendered all prior trial proceedings invalid. *Id*. Because the defendant's second trial was conducted with 10 unsworn jurors, we reversed the defendant's conviction and remanded the case for a new trial. *Id*. at 530. In so holding, we reaffirmed *Pribble*, emphasizing that "[t]he required oath is necessary to protect the defendant's fundamental right of trial by an impartial jury." *Id*. at 529-530, citing *Pribble*, 72 Mich App at 224.

Our decisions in both *Pribble* and *Clemons* recognized that the oath required at the beginning of a jury trial is both a solemn promise to fulfill the duty to act in accordance with the law at all stages of a trial and also a mechanism to ensure that jurors decide the case honestly in accordance with the law and on the basis of the evidence presented. *Clemons*, 177 Mich App at 528-529; *Pribble*, 72 Mich App at 224. While these opinions are not binding decisions of this Court,[5] we conclude that they were correctly decided.

Administering the oath to the jury is not a mere formality. *Pribble*, 72 Mich App at 224; *Clemons*, 177 Mich App at 528. It is a "long-standing common law requirement." *Harris v State*, 406 Md 115, 124; 956 A2d 204 (2008); see also *Owens v State*, 399 Md 388, 408-409; 924 A2d 1072 (2007) (explaining that when a criminal jury began to assume a form recognizable to us under the reign of King Henry II, it was a sworn jury); *State v Ballen*, 333 SC 378, 380; 510 SE2d 226 (SC App, 1998) ("The requirement for and form of the jury oath in South Carolina apparently originated in the common law."); *State v Duff*, 253 Mo 415; 161 SW 683 (1913) (noting that the jury-oath requirement originated in part from the common law); *State v Johnson*, 37 La Ann 421, 422 (1885) (referring to a common-law oath to be taken by jurors); *Minich v People*, 8 Colo 440, 450; 9 P 4 (1885) (referring to a common-law jury oath); *Fitzhugh v State*, 81 Tenn 258, 265 (1884) (referring to a common-law oath to be taken by jurors); *State v Davis*, 52 Vt 376, 381 (1880) (noting that, at common law, a jury is not empaneled until an oath is administered); *Beale v Commonwealth*, 25 Pa 11, 17 (1855) (articulating the common-law form of a juror's oath in criminal cases). The Vermont Supreme Court opined as follows:

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[5] See MCR 7.215(J)(1).

> This [criminal jury] oath is not only a summary of the duties of the jurors, but is also the only security which the State and the respondent have for a faithful, fearless discharge of those duties. It has been so regarded for many centuries. By the common law, in a criminal case the jury is not regarded as impanelled until the oath is administered. The general, if not universal, current of the decisions hold that a trial by an unsworn jury is a mistrial. It is not a legal trial, a right which every respondent is entitled to have accorded him. [*Davis*, 52 Vt at 381.]

More than a century later, the Maryland Court of Special Appeals emphasized that the administration of the jury oath remains an essential ingredient to a legally constituted jury and explained that "[i]n those states where the matter has been considered, the courts have, almost unanimously, held that the concepts of waiver and harmless error have no application when the jury was *never* sworn." *Harris*, 406 Md at 127, 129. Since then, this Court and other jurisdictions have held that a trial by an unsworn jury results in an invalid conviction. See, e.g., *Pribble*, 72 Mich App at 224-225; *Clemons*, 177 Mich App at 528-530; *Duff*, 161 SW at 685 (explaining that courts have uniformly held that the failure to have the jury sworn requires that a verdict be set aside); *Brown v State*, 220 SW3d 552, 554 (Tex App, 2007) ("There is little doubt that a complete failure to administer the jury oath renders the jury's verdict a nullity and is reversible error."); *Spencer v State*, 281 Ga 533, 534; 640 SE2d 267 (2007) (explaining that a conviction by an unsworn jury is a nullity); *Ex Parte Benford*, 935 So 2d 421, 429 (Ala, 2006) (stating that failure to administer the oath to the jury renders the jury's verdict a nullity); *People v Pelton*, 116 Cal App Supp 789, 790-791; 7 P2d 205 (1931) (stating that a conviction by an unsworn jury is a nullity).

Moreover, we have emphasized that administering the oath to jurors is "*necessary* to protect the . . . fundamental right of trial by an impartial jury." *Clemons*, 177 Mich App at 529-530, citing *Pribble*, 72 Mich App at 224 (emphasis added). Because administration of the oath is *necessary* to ensure the fundamental right to trial by an impartial jury, it necessarily follows that the failure to administer the oath "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Rivera*, 556 US at 160 (quotation marks and citation omitted, alteration in original, and emphasis added); see also *Neder v United States*, 527 US 1, 8-9; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Failure to administer the oath to the jury is not an error "occur[ing] during the presentation of the case to the jury" that may "be quantitatively assessed in the context of other evidence presented . . . ." *Fulminante*, 499 US at 307-308. Rather, it is a defect that affects the framework within which the trial proceeds. See *Watkins*, 247 Mich App at 26; see also *Neder*, 527 US at 8-9. Failing to administer the oath "deprive[s] the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Watkins*, 247 Mich App at 26.

Significantly, there is another reason to support the conclusion that failure to swear in a jury is structural error. Under the Double Jeopardy Clauses of the United States and Michigan Constitutions, "an accused may not be put in jeopardy twice for the same offense." *People v Grace*, 258 Mich App 274, 278; 671 NW2d 554 (2003). It is well established that jeopardy attaches when the jury is selected and sworn. *Id.* at 279; *Crist v Bretz*, 437 US 28, 36, 38; 98 S Ct 2156; 57 L Ed 2d 24 (1978). In the event that an unsworn jury returns a verdict, a defendant may be tried again for the same

offense because jeopardy never attached. See *Spencer*, 281 Ga at 533-535 (holding that a not guilty verdict by an unsworn jury did not bar retrial on the same charge because the jury was without authority to render a verdict and jeopardy never attached). That jeopardy has not even attached in this case further supports our conclusion that the error is structural in nature.

Accordingly, we hold that the trial court's failure to swear in the jury was structural error. Furthermore, Michigan caselaw "suggests that a plain structural error satisfies the third *Carines* prong." *Vaughn*, 491 Mich at 666; see generally *Duncan*, 462 Mich at 51 (stating that structural errors are intrinsically harmful without regard to their effect on the outcome). Thus, we conclude that the plain structural error in this case satisfies the third *Carines* prong without regard to the error's effect on the outcome of defendant's trial.

Finally, we conclude that the trial court's failure to administer the oath to the jury seriously affected the fairness, integrity, and public reputation of the judicial proceedings. See *Carines*, 460 Mich at 763-764. Because the trial court did not administer the oath to the jury, the jury did not undertake the solemn promise to act in accordance with the law at all stages of defendant's trial. The trial court's failure to administer the oath to the jury in this case affected the integrity of the proceedings because it resulted in an invalid verdict under Michigan law. *Id.*; *Pribble*, 72 Mich App at 224-225; *Clemons*, 177 Mich App at 528-530. The absence of the oath deprived defendant of a means to ensure that the jury would decide the case honestly in accordance with the law and on the basis of the evidence. Administration of the oath was necessary to protect defendant's fundamental right to a trial by an impartial jury.

Accordingly, defendant's claim of error satisfies the requirements of the plain-error test, and we will exercise our discretion to afford defendant relief. See *id.* When a defendant is convicted by an unsworn jury, the proper remedy is reversal of the defendant's convictions and remand for a new trial. See *Clemons*, 177 Mich App at 530. Retrial in this case is permitted because the jury was not sworn and jeopardy, therefore, did not attach. See *Grace*, 258 Mich App at 279; see also *Crist*, 437 US at 36, 38.

B. REMAINING ISSUES

Defendant raises several other issues on appeal. However, our decision to reverse defendant's conviction and remand for a new trial on the basis of the trial court's failure to swear in the jury makes it impossible to grant any further relief to defendant. Accordingly, defendant's remaining arguments are moot. See *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009). However, we will briefly address two of defendant's remaining claims to guide the parties and the court on remand.[6]

With regard to defendant's contention that the trial court erroneously excluded Jamie Pickering's testimony about Jennifer's scheme to have her boyfriends impersonate defendant over a telephone to obtain money in a brain-surgery scheme, we conclude that the trial court did not abuse its discretion when it ruled that the testimony was inadmissible under MRE 404(b) and MRE 403. Evidence that Jennifer had her boyfriends call people, impersonate defendant, and request money for a brain surgery for Jennifer that she was not

[6] We do not address defendant's claim of ineffective assistance of counsel for failure to challenge a juror for cause.

getting is too dissimilar to the scheme in the present case to be logically relevant for purposes of MRE 404(b). See *People v Sabin (After Remand)*, 463 Mich 43, 63-68; 614 NW2d 888 (2000). Moreover, even if the testimony was logically relevant to illustrate a common plan or scheme, its probative value was substantially outweighed by the danger of unfair prejudice. See MRE 403. Admission of the testimony would have detracted from the material issues in this case and unnecessarily diverted attention to if and how a different scheme to extort money occurred. Finally, Pickering's testimony was not admissible under MRE 613(b) as extrinsic evidence of a prior inconsistent statement by Jennifer because Jennifer did not testify regarding her boyfriends impersonating defendant on occasions outside this case; she only testified that she never had her boyfriends impersonate defendant when attempting to obtain money from *the victim in this case*.

We conclude that the trial court's refusal to allow defendant to cross-examine Jennifer about the 20-year maximum penalty for her extortion charge that the prosecution dropped in exchange for her testimony at trial was likewise not an abuse of discretion. Permitting this cross-examination would have informed the jury of the maximum sentence that defendant faced for extortion; "[t]he general rule is that the jury should not normally be informed of possible punishment if a defendant is convicted." *People v Mumford*, 183 Mich App 149, 151; 455 NW2d 51 (1990) (quotation marks and citation omitted). Although *Mumford* illustrates that this general rule must yield to a defendant's right to confrontation in certain circumstances, the present case is factually distinguishable from *Mumford* because the trial court in this case did not preclude defendant from cross-examining Jennifer on "*all of the details* of [her] plea bargain." *Id.* at 154 (emphasis added). In-

deed, the trial court permitted extensive cross-examination with regard to Jennifer's plea bargain to reveal bias.

III. CONCLUSION

We hold that defendant's conviction must be reversed and this case remanded for a new trial because the jury was never sworn. The trial court plainly erred by failing to administer the oath; the court's obligation to do so was clearly established by court rule and statute to protect the constitutional right to a fair and impartial jury. Furthermore, the error was structural and, therefore, intrinsically harmful without regard to its effect on the outcome of defendant's trial. The oath is not a mere formality; rather, it is a long-standing common-law requirement that is necessary to protect defendant's constitutional right to a trial by an impartial jury. The failure to administer the oath necessarily rendered defendant's trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence. Finally, the trial court's failure to administer the oath to the jury seriously affected the fairness, integrity, and public reputation of the judicial proceedings because it resulted in an invalid verdict under Michigan law. For this reason, defendant is entitled to relief under the plain-error framework.

We reverse and remand for a new trial with a properly sworn jury. We do not retain jurisdiction.

WHITBECK, P.J., and FITZGERALD and BECKERING, JJ., concurred.

USITALO v LANDON

Docket No. 308240. Submitted November 6, 2012, at Lansing. Decided December 11, 2012. Approved for publication January 10, 2013, at 9:05 a.m.

Julianna Ellen Usitalo brought an action in the Saginaw Circuit Court against Melissa Jo Landon, her former domestic partner and the biological mother of the minor child they adopted, seeking sole legal and physical custody of the child. Plaintiff also filed a motion for parenting time. In response, defendant moved to dismiss the complaint and the motion, arguing that the adoption order, which had been issued in 2005 by the family division of the Shiawassee Circuit Court, James R. Clatterbaugh, J., was void *ab initio* because, given that Michigan law only permits adoptions by a single person or a married couple and that Michigan does not recognize same-sex marriages, the court lacked subject-matter jurisdiction over the adoption proceeding. The Saginaw Circuit Court, William A. Crane, J., transferred the case to the Shiawassee Circuit Court, where it was assigned back to Judge Clatterbaugh. Defendant moved to dismiss the custody proceedings and for mandamus, asking the court to vacate the adoption order. After a hearing, the court denied defendant's motions, ruling that it had had subject-matter jurisdiction over the 2005 adoption under MCL 600.1021(1)(b) and noting that if the parties had disagreed with its interpretation of the adoption statute, they would have had to appeal within 21 days of its original ruling on the adoption in 2005. The court transferred the case back to the Saginaw Circuit Court for custody proceedings, where defendant again moved for dismissal. The court denied defendant's motion on res judicata grounds and entered an order granting plaintiff joint legal and physical custody as well as parenting time. Defendant appealed.

The Court of Appeals *held*:

The court had subject-matter jurisdiction over the adoption proceeding under MCL 600.1021(1)(b); therefore, no collateral attack on the adoption order was permissible and dismissal of plaintiff's custody complaint and motion for parenting time was not required. Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case of the kind or

character of the one pending, not the particular case before it. A party may attack subject-matter jurisdiction at any time, and a proven lack of subject-matter jurisdiction renders a judgment void; however, the existence of subject-matter jurisdiction does not depend on the correctness of the court's ultimate legal conclusions. While a lack of subject-matter jurisdiction may be collaterally attacked, a court's exercise of jurisdiction may only be challenged on direct appeal. It was undisputed that the court that granted the 2005 adoption generally had subject-matter jurisdiction over adoption proceedings under MCL 600.1021(1)(b). The fact that the court may have erred by granting the adoption did not allow a collateral attack on the adoption order or render it void because there was no defect in the court's subject-matter jurisdiction.

Affirmed.

SHAPIRO, J., concurring, wrote separately to note that the logical consequence of defendant's argument that the custody order was void *ab initio* would have been the elimination of defendant's own parental rights and the possibility that the child would be left without a legal parent, given that defendant had surrendered her parental rights as birth mother before the joint adoption and had made no jurisdictional challenge to the circuit court's order terminating those rights.

PARENT AND CHILD — ADOPTIONS — SUBJECT-MATTER JURISDICTION — COLLATERAL ATTACK.

Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case of the kind or character of the one pending, not the particular case before it; a party may attack subject-matter jurisdiction at any time, and a proven lack of subject-matter jurisdiction renders a judgment void; however, the existence of subject-matter jurisdiction does not depend on the correctness of the court's ultimate legal conclusions; while a lack of subject-matter jurisdiction may be collaterally attacked, a court's exercise of that jurisdiction may only be challenged on direct appeal; the family divisions of circuit courts have subject-matter jurisdiction over adoption proceedings under MCL 600.1021(1)(b); a legal error underlying an adoption order does not create a defect in subject-matter jurisdiction; an adoption order that was erroneously granted as a matter of law may not be collaterally attacked on jurisdictional grounds because of the legal error.

Mark Granzotto, *Sarah C. Zearfoss*, *Jay D. Kaplan*, *Michael J. Steinberg*, and *Kary L. Moss* for plaintiff.

Burkhart, Picard, Tiderington, & McLeod, P.L.L.C. (by *Thomas D. Burkhart*), for defendant.

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

PER CURIAM. Defendant, Melissa Jo Landon, appeals as of right the trial court's order granting plaintiff, Julianna Ellen Usitalo, joint legal and physical custody of their adopted daughter as well as parenting time. Defendant is the biological mother of the minor child, who was born on November 28, 2003. The parties, who were in a long-term, same-sex relationship, adopted the minor child on February 28, 2005. On appeal, defendant does not challenge the propriety of the custody and parenting-time award entered by the trial court. Instead, defendant argues that the Michigan Adoption Code, MCL 710.21 through MCL 710.70, only permits adoptions by a single person or a married couple, and that because Michigan does not recognize same-sex marriages, plaintiff's adoption of the minor child was void *ab initio*. Defendant acknowledges that a collateral attack on the validity of an adoption is not typically permissible; however, she argues that because Michigan law does not permit same-sex adoptions, the court that granted the adoption lacked subject-matter jurisdiction. Accordingly, defendant maintains that a collateral attack on the validity of the adoption is permissible. Because we conclude that the court had subject-matter jurisdiction over the adoption, defendant may not collaterally attack the validity of the 2005 adoption order. Therefore, we affirm the trial court's order granting plaintiff custody and parenting time.

After the 2005 adoption, the parties lived together and jointly raised the minor child. In July 2007, plaintiff and defendant separated, but continued to jointly par-

ent the minor child. In August 2008, the parties entered into a written agreement regarding custody and parenting time. However, the relationship between the parties further deteriorated, and in November 2009, the parties stopped cooperating in regard to the minor child's care and custody. On January 27, 2010, plaintiff filed a complaint against defendant in the Saginaw Circuit Court, seeking sole legal and physical custody of the minor child. Plaintiff filed a motion for parenting time on the same day. In response, defendant filed an answer and a motion to dismiss. Defendant argued that plaintiff's adoption of the minor child was void *ab initio* because Michigan does not permit same-sex adoptions. Thus, defendant argued that because the adoption was void, plaintiff was not a legal parent of the minor child, and dismissal of plaintiff's complaint for custody and motion for parenting time was accordingly required.

In response to the parties' filings, the Saginaw Circuit Court issued an order transferring the matter to the Shiawassee Circuit Court, which is where the adoption had been granted. In its order, the Saginaw Circuit Court found that the legal status of the adoption was a central issue in the case and stated, "This court sees no reason why it should hear a collateral attack upon an adoption granted in Shiawassee County and will accordingly transfer this matter to the Circuit Court for Shiawassee County for any further proceedings."

Once the case was transferred, defendant filed a motion to dismiss the custody proceedings and a motion for mandamus, asking the Shiawassee Circuit Court to vacate the 2005 order granting the adoption. Defendant argued that even though her appellate rights had expired, mandamus was available to compel the court to vacate the order and a collateral attack on the adoption was permitted because the court never had subject-matter jurisdic-

tion over the adoption proceeding. Defendant again argued that the court lacked subject-matter jurisdiction because Michigan's adoption code only permits adoptions by a single person or a married couple and Michigan does not recognize same-sex marriages. Thus, defendant maintained that the adoption was void and that plaintiff was merely an unrelated third party who lacked standing to bring a custody action.

Plaintiff countered that defendant wanted the adoption from the start and that the two of them had petitioned for it together. Plaintiff asserted that the court had subject-matter jurisdiction over the adoption because subject-matter jurisdiction is a court's right to exercise its power over a certain class of cases, and not just the particular case before it. Therefore, the adoption was valid and defendant was barred from bringing a collateral attack. Plaintiff maintained that defendant should have filed a direct appeal back in 2005 if she had wanted to challenge the court's interpretation of the Michigan Adoption Code.

A hearing was held in the family division of the Shiawassee Circuit Court on defendant's motion to dismiss the custody proceedings and motion for writ of mandamus to void the adoption. The court ordered that the case be reassigned to the judge who originally granted the adoption. The court noted that it believed the adoption was invalid, but ordered that the judge who granted the adoption "may enter any order . . . he deems appropriate with regards to the validity of the adoption order, after consideration of pleadings, briefings, and a transcript of the June 11, 2010 proceeding, as well as further briefings and arguments as he may direct."

The judge who had granted the adoption heard oral arguments regarding defendant's motion and issued an opinion from the bench, ruling that it had subject-

matter jurisdiction over the 2005 adoption because Michigan's adoption code does not contain language that includes or excludes adoption by an unmarried couple. The court stated that if the parties disagreed with its interpretation of the adoption statute, they would have had to appeal within 21 days of its original ruling on the adoption in 2005. Thus, the court denied defendant's motion to dismiss the custody proceedings and motion for mandamus and transferred the case back to the Saginaw Circuit Court for custody proceedings.

Defendant filed another motion to dismiss the custody proceedings in the Saginaw Circuit Court, which denied the motion on the basis of res judicata because the Shiawassee Circuit Court had already ruled on that issue. After custody and parenting time hearings, the Saginaw Circuit Court entered an order granting plaintiff joint legal and physical custody of the minor child, as well as parenting time. Defendant now appeals as of right.

On appeal, defendant reiterates her argument that the Shiawassee Circuit Court lacked subject-matter jurisdiction over the adoption proceeding; therefore, her collateral attack on the adoption is permissible. Thus, defendant maintains that this Court should review the validity of the 2005 adoption and conclude that the adoption was void and that plaintiff has no parental rights to the minor child. In support of her argument, defendant primarily relies on the reasoning and analysis set forth in the dissenting opinion in *Hansen v McClellan*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2006 (Docket No. 269618).[1] Plaintiff argues that the court had subject-

[1] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be

matter jurisdiction and that defendant accordingly cannot collaterally attack the validity of the 2005 adoption.

Whether a court has subject-matter jurisdiction is a question of law subject to review de novo. *Young v Punturo (On Reconsideration)*, 270 Mich App 553, 560; 718 NW2d 366 (2006).

Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 375; 689 NW2d 145 (2004). "[S]ubject-matter jurisdiction describes the types of cases and claims that a court has authority to address." *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001). This Court explained:

> "Jurisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial." [*Id.*, quoting *Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938) (quotation marks and citations omitted).]

A party may attack subject-matter jurisdiction at any time, and a proven lack of subject-matter jurisdiction renders a judgment void. *In re Hatcher*, 443 Mich 426, 438; 505 NW2d 834 (1993). The existence of subject-matter jurisdiction does not depend on the correctness of the trial court's ultimate legal conclusions. *Id.* at 438-439. The Michigan Supreme Court explained:

> "Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings,

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instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

> however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. Error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made." [*Id.*, quoting *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 545-546; 260 NW 908 (1935) (quotation marks and citation omitted).]

Thus, while the lack of subject-matter jurisdiction may be collaterally attacked, a court's exercise of jurisdiction can only be challenged on direct appeal. *In re Hatcher*, 443 Mich at 439.

In this case, defendant does not dispute that the court that granted the 2005 adoption—namely, the family division of the circuit court in Shiawassee County—generally has subject-matter jurisdiction over adoption proceedings. MCL 600.1021(1)(b) specifically provides that "the family division of circuit court has sole and exclusive jurisdiction over . . . [c]ases of adoption as provided in chapter X of the probate code . . . ." See MCL 710.21; see also *In re Adams*, 189 Mich App 540, 542-543; 473 NW2d 712 (1991) ("Jurisdiction over adoption proceedings is conferred upon the probate court in chapter X of the Probate Code . . . ."). There is also no dispute that the adoption in this case was granted pursuant to chapter X of the Probate Code. Rather, defendant argues that because the Michigan Adoption Code does not provide for same-sex adoption, the family division of the circuit court lacked subject-matter jurisdiction in this case, despite the fact that it has subject-matter jurisdiction over adoption proceedings generally. Thus, defendant is essentially arguing

that subject-matter jurisdiction is proper only for adoptions that comply with defendant's interpretation of the Michigan Adoption Code. We disagree with defendant's view of subject-matter-jurisdiction jurisprudence.

Defendant's argument conflates subject-matter jurisdiction with a court's *exercise* of its jurisdiction. Whether the court's interpretation of the Michigan Adoption Code was correct as a matter of law has no effect on whether the court had subject-matter jurisdiction over the adoption because subject-matter jurisdiction concerns the right of a court to exercise judicial power over a certain class of cases, not a particular case within a class. *In re AMB*, 248 Mich App at 166. Defendant's argument—that the court lacked subject-matter jurisdiction because same-sex adoptions are not permitted by Michigan's adoption code—makes subject-matter jurisdiction dependent on the facts of a particular case within the broader class of adoption cases. However, defendant's understanding of subject-matter jurisdiction is incorrect because subject-matter jurisdiction concerns only a court's authority to exercise judicial power over broad classes of cases and does not consider particular cases within the broad class. *Id.* Even assuming defendant's interpretation of the Michigan adoption code is correct and same-sex adoptions are not permitted under Michigan law,[2] the fact that the court that granted the adoption in 2005 made an error of law is not sufficient to render the adoption void, and collateral attack is not permitted. When subject-matter jurisdiction is proper " 'mere errors or irregularities in the proceedings, however grave, although they may

[2] We specifically decline to rule on the merits of defendant's argument regarding the proper interpretation of the Michigan adoption code, and we offer no opinion regarding whether the Michigan Adoption Code permits same-sex adoptions.

render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void,' " and such a judgment is " 'valid and binding for all purposes and cannot be collaterally attacked.' " *In re Hatcher*, 443 Mich at 438-439, quoting *Jackson City Bank*, 271 Mich at 545 (quotation marks and citation omitted).

Therefore, we conclude that defendant may not collaterally attack the validity of the 2005 adoption because there was no defect in the court's subject-matter jurisdiction. Thus, because the validity of the adoption may not now be questioned, we reject defendant's claim that plaintiff lacked standing to seek custody and parenting time of the minor child, and we affirm the trial court's custody and parenting-time order.

Affirmed.

CAVANAGH, P.J., and HOEKSTRA, J., concurred.

SHAPIRO, J. (*concurring*). I concur with the majority's conclusion and its analysis.

I write separately to note the internal contradiction in defendant's argument. Defendant's entire claim rests on her assertion that plaintiff lacked standing to contest defendant's custody motion, because the adoption that gave plaintiff parental rights was void *ab initio*. Were that to be true, however, it would result not only in the elimination of plaintiff's parental status, but in the elimination of defendant's parental status as well. Both plaintiff and defendant attained that status through a single order of adoption naming each of them as a parent. We cannot declare that order void *ab initio* with respect to one of the adopting parties and not the other. Either it is void as to both, or effective as to both. There is nothing in that joint adoption order or else-

where in the record that gives one of the two jointly adopting parents priority over the other.

Defendant seems to imply that her long-abandoned status as birth mother would still provide her with parental rights over the child if the joint adoption were voided. However, that implication has no basis in law. Defendant surrendered her parental rights as birth mother before the joint adoption, and she makes no jurisdictional challenge to the circuit court's order that those rights be terminated. Nor does she argue that after seven years, she still retains a right to appeal that termination on the merits, which of course she does not.

Defendant had a full opportunity to dispute the jurisdiction of the family court before the entry of that court's order of adoption. She declined to do so. She also could have raised such a challenge on appeal from that order, given that subject-matter jurisdiction may be challenged on direct appeal even if it was not challenged in the trial court. However, defendant chose not to raise that challenge and instead, seven years after the fact, seeks to now void the only document that provides this child with a legal parent. Were we to void the 2003 joint adoption, it is quite possible that this nine-year-old child would be without a legal parent. Defendant's willingness to risk this result is quite troubling, as is her unabashed repudiation of the jurisdiction that she herself invoked seven years ago.

HANLIN v SAUGATUCK TOWNSHIP

Docket No. 300415. Submitted November 15, 2012, at Grand Rapids. Decided January 15, 2013, at 9:00 a.m.

Walter L. Hanlin and John Latini filed an action in the Allegan Circuit Court against Saugatuck Township, the Saugatuck Township Board, and the Allegan County Board of Canvassers, seeking declaratory and injunctive relief, mandamus, and permission to proceed by quo warranto to challenge the results of a millage election. The township had sought the millage to raise funds for enforcing and implementing certain laws, ordinances and regulations, including associated planning expenses and other expenses for attorneys, trial and administrative hearings. The county board of canvassers certified the election results, and plaintiffs petitioned for a recount. Plaintiffs alleged that the township clerk had cut the security seal on the ballot container after the election but before a recount could be performed. In addition, it was alleged that the seal on the transfer case for the ballots did not match the seal recorded in the poll book and the original seal that had been cut could not be located. Because the seal number recorded in the poll book did not match the seal number on the certificate to the bags containing the ballots and the original seal had not been found in the bag in which the township clerk placed it, the board elected to not proceed with the recount. The parties filed cross-motions for summary disposition and the court, Kevin W. Cronin, J., denied plaintiffs' motion and granted defendants' motion. Plaintiffs appealed.

The Court of Appeals *held*:

1. Quo warranto is a common-law writ that is used to inquire into the authority by which a public office is held or a franchise is claimed. Under MCL 168.861, the remedy of quo warranto remains in full force, together with any other remedies now existing, for fraudulent or illegal voting or tampering with the ballots or ballot boxes before a recount by the board of county canvassers. MCL 168.861 is a saving clause that preserves the remedy of quo warranto in certain situations; the act of illegal or fraudulent voting or of tampering with the ballots or ballot boxes does not extinguish an already existing claim for quo warranto under

MCL 600.4505 or MCL 600.4545(1). The trial court did not err by granting summary disposition to the township and the township board on the quo warranto claim brought under MCL 168.861. Because MCL 168.861 is a saving clause, it does not provide a basis for an independent cause of action for quo warranto.

2. An action for quo warranto is brought under MCL 600.4545(1) to challenge the validity of the election itself when material fraud or error is alleged to have occurred in any state, county, township, or municipal election involving any constitutional amendment, question, or proposition. The phrase "material fraud or error" means fraud or error that might have affected the outcome of the election. The plaintiff's proofs must be sufficient to support a finding that enough votes were tainted by the alleged fraud to affect the outcome. If the relevant board of canvassers determines under MCL 168.871(1)(a), that ballots from a precinct are not eligible for a recount because of a broken or inconsistent seal, under MCL 168.871(3)(b) the original return of the votes is deemed correct. The need to guard against alteration of the vote between the original count and a recount outweighs the risk that the original count was erroneous and that a recount would be circumvented by election workers. The trial court did not err by dismissing plaintiffs' claim premised on a violation of MCL 600.4545(1). While the township clerk violated the security provision of the election law by erroneously cutting the seal on the ballot container, resulting in the ballots being ineligible for recount, MCL 600.4545(1) does not provide a remedy for that error.

3. MCL 168.674 requires that election inspectors be appointed by the city and township board of election inspectors. Under MCL 168.77(3), a person shall not be appointed as an election inspector if the person or any member of the person's immediate family is a candidate for nomination or election or has been convicted of a felony or an election crime. In addition, a person shall not be permitted to act as an election inspector if the person has not attended a school of instruction or passed an examination given by the election commission. In this case, the trial court did not err by granting summary disposition to the township and the township board to the extent that plaintiffs' quo warranto claim, brought under MCL 600.4545(1), was premised on those defendants' failing to follow critical election policies. While the township clerk improperly served as an election inspector for the election because she had never been appointed to the position by the township board of election inspectors, plaintiffs failed to present any evidence that but for the township clerk acting as an election inspector, the election result would have been different.

4. When a ballot proposal is misleading, the appropriate remedy is to void the election. In this case, quo warranto was not justified under MCL 600.4545 on the basis that the voters were being misled by the proposal language. While the township in part sought a millage increase to defend certain lawsuits, there was no evidence that the $30,000 donated by a third party to help with litigation costs actually covered all those fees.

5. Mandamus is appropriate when (1) the plaintiff has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other legal or equitable remedy exists that might achieve the same result. In this case, the trial court properly dismissed plaintiffs' claim for mandamus because the alternative remedy of quo warranto was available to them under MCL 600.4545(1) and (3). Plaintiffs failed to dispute the basis of the trial court's ruling and the Court of Appeals was not required to grant the relief plaintiffs sought. Even considering the issue, defendants inappropriately relied on the Manual for Boards of County Canvassers, issued by the Department of State, Bureau of Elections in June 2008 to assert that the Board of Canvassers violated a clear legal duty; evidence was not presented that the manual was a properly promulgated rule and accordingly it did not have the force of law.

QUO WARRANTO — REMEDIES — INDEPENDENT CAUSE OF ACTION — ILLEGAL OR FRAUDULENT VOTING OR TAMPERING.

Quo warranto is a common-law writ that is used to inquire into the authority by which a public office is held or a franchise is claimed; under MCL 168.861, the remedy of quo warranto remains in full force, together with any other remedies now existing, for fraudulent or illegal voting or tampering with the ballots or ballot boxes before a recount by the Board of County Canvassers; MCL 168.861 is a saving clause that preserves the remedy of quo warranto in certain situations; the act of illegal or fraudulent voting or of tampering with the ballots or ballot boxes, as prohibited by MCL 168.861, does not extinguish an already existing claim for quo warranto under MCL 600.4505 and MCL 600.4545(1), but does not provide a basis for an independent cause of action for quo warranto.

Honigman, Miller Schwartz & Cohn LLP (by *John D. Pirich* and *Andrea L. Hansen*), for Walter L. Hanlin and John Latini.

Scholten Fant (by *Bradford W. Springer*) for Saugatuck Township and the Saugatuck Township Board.

Miller Johnson (by *Gregory P. Ripple*) for the Allegan County Board of Canvassers.

Amici Curiae:

Robert S. LaBrant for the Michigan Chamber of Commerce.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John K. Lohrstorfer*), for the Michigan Townships Association.

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM. Plaintiffs appeal as of right the trial court order granting summary disposition in favor of defendants, Saugatuck Township, the Saugatuck Township Board (hereafter referred to as "the township defendants"), and the Allegan County Board of Canvassers (the board), and denying summary disposition in plaintiffs' favor, in this action premised upon election irregularities. We affirm.

Plaintiffs initiated this action for declaratory and injunctive relief, mandamus and/or for permission to proceed by quo warranto in relation to a proposed millage that was approved in the May 4, 2010 Saugatuck Township special election by a margin of only two votes. According to plaintiffs, the county board certified the election results on May 6, 2010, and plaintiff Hanlin petitioned for a recount of the election results on May 11, 2010. Plaintiffs alleged that irregularities in the election procedure occurred, essentially surrounding the township clerk's mishandling of the ballot container and its seals. Specifically, plaintiffs asserted that the

township clerk cut the security seal on the township ballot container after the election but before a recount could be performed. The ballots were then handled and transferred to unapproved canvas bags. Additionally, the seal on the transfer case for the ballots did not match the seal recorded in the poll book and the original seal that had been cut could not be located. According to plaintiffs, the board elected not to proceed with the recount because the seal number recorded in the poll book did not match the seal number on the certificate to the bags containing the ballots and the original seal was not found in either of the ballot bags, contrary to the township clerk's assertion that she had placed said seal in one of the bags. Plaintiffs thus sued the township defendants and the board, seeking to void the election results.

The parties filed cross-motions for summary disposition, with plaintiffs arguing that those irregularities, as well as others, supported an action for quo warranto on the basis of "fraud or gross error" pursuant to MCL 600.4545 and on the basis of "fraudulent or illegal voting, or tampering with ballots or ballot boxes before a recount" pursuant to MCL 168.861. Plaintiffs also argued that quo warranto was justified because voters were misled regarding the millage proposal, and that the township defendants violated the Election Law in other critical aspects, including the fact that the township clerk, despite not being authorized to act as an election inspector, ran the election and signed the poll book as an election inspector. Plaintiffs further argued that mandamus was the appropriate remedy against the board because it failed to verify that the poll book was signed by two election inspectors and that the seal numbers were recorded in the statement of votes, thereby failing to comply with its ministerial duties.

Defendants moved for summary disposition on their own respective behalves. The township defendants sought summary disposition on the basis of their assertion that plaintiffs' complaint failed to contain a single factual allegation that any fraud or error occurred at the election itself. The township defendants further asserted that MCL 168.861 is a saving clause and does not serve as the basis for an independent claim for quo warranto. The board moved for summary disposition on plaintiffs' claim for mandamus because plaintiffs, in the complaint, failed to identify any ministerial duty of the board that plaintiffs had a legal right to see performed. The trial court ultimately denied plaintiffs' motion for summary disposition and granted summary disposition to the board under MCR 2.116(C)(8), and to the township defendants under MCR 2.116(C)(8) and (C)(10). This appeal followed.

To proceed with a claim for quo warranto, a citizen must obtain leave of the trial court. MCR 3.306(B)(2). A trial court's decision whether to grant a citizen's application for leave to proceed by quo warranto is reviewed for an abuse of discretion. *Barrow v Detroit Mayor*, 290 Mich App 530, 539; 802 NW2d 658 (2010). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id*. A trial court properly denies an application to proceed by quo warranto when the application fails to disclose sufficient facts and grounds and sufficient apparent merit to justify further inquiry. *Id.* at 546.

In this case, rather than determining whether plaintiffs should be granted leave to proceed by quo warranto, the trial court decided plaintiffs' claim for quo warranto under summary disposition standards. While the court did not did not specify under which subrule it was granting summary disposition to the township defen-

dants, it does not appear that the trial court limited its analysis to the pleadings alone. This Court will thus construe the motion as having been granted pursuant to MCR 2.116(C)(10). See, e.g., *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." A motion under 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). All well-pleaded allegations must be accepted as true and construed in the light most favorable to the nonmoving party. *Cummins v Robinson Twp*, 283 Mich App 677, 689; 770 NW2d 421 (2009). Only when no factual development could possibly justify recovery, should the motion be granted. *Feyz*, 475 Mich at 672.

Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." A motion under MCR 2.116(C)(10) tests the factual support of a complaint. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Id.* "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 issues presented involve questions of statutory interpretation. This Court reviews de novo issues of statutory interpretation. *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 79; 782 NW2d 514 (2010).

On appeal, plaintiffs first contend that the trial court erred by granting summary disposition to the township defendants on plaintiffs' claim of quo warranto because there was, at a minimum, a question of fact as to whether the township clerk tampered with the ballots, because the township clerk committed gross error sufficient to warrant quo warranto relief, and because the voters were misled by the township defendants with respect to the need for the millage funds. We disagree.

Quo warranto is a " 'common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.' " *Davis v Chatman*, 292 Mich App 603, 612; 808 NW2d 555 (2011), quoting Black's Law Dictionary (9th ed). As previously indicated, MCR 3.306(B)(2) allows a citizen to proceed with an action for quo warranto only by special leave of the court. Generally such actions are brought pursuant to MCL 600.4505—which echoes the procedure of MCR 3.306(B)(2)—and are pursued against a person in public office by one who seeks to challenge that person's right to hold office, but no assertions are made of fraud or error. *Barrow*, 290 Mich App at 541. MCL 600.4545(1), on the other hand, provides for an action in the nature of quo warranto "whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof." This type of action is brought to challenge the validity of the election itself. *Barrow*, 290 Mich App at 543. Thus, to pursue an action for quo

warranto to challenge the validity of the election, plaintiffs must establish that a material fraud or error was committed at the election.

Plaintiff, however, asserts that MCL 168.861 expressly provides a remedy by quo warranto, and thus a voiding of the election results, for tampering with the ballots or ballot boxes before a recount. MCL 168.861 directs that "[f]or fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing."

Whether MCL 168.861 provides an independent ground for bringing a claim for quo warranto has never been addressed by a Michigan appellate court. Indeed, MCL 168.861 has never been interpreted by a Michigan appellate court in any fashion. We undertake this task, keeping in mind that the goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). If the language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). The fair and natural import of the words used in the statute governs. *Hughes*, 277 Mich App at 274. Undefined words are to be accorded their plain and ordinary meaning, and a dictionary may be consulted to define a common word that lacks a unique legal meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).

The key words found in MCL 168.861 are "remain" and "in . . . force." The word "remain" is defined as "[t]o continue in the same state or condition" and "[t]o

endure or persist." *The American Heritage Dictionary of the English Language* (4th ed). The phrase "in force" is defined as "[i]n effect; operative." *Id*. When these definitions are placed in MCL 168.861, the statute then reads, "[f]or fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall [continue in the same state or condition][in full effect], together with any other remedies now existing." In other words, MCL 168.861 provides that the acts of illegal or fraudulent voting or of tampering with the ballots or ballot boxes before a recount do not extinguish an already existing claim for quo warranto. Accordingly, MCL 168.861 is a saving clause: it preserves the remedy of quo warranto in certain situations.

Notably, in MCL 600.4545(1), the Legislature expressly provided that "[a]n action may be brought in the circuit court . . . whenever it appears that material fraud or error has been committed at any election . . . . MCL 600.4545(3) further provides that such action shall be brought in the nature of one for quo warranto. The Legislature, had it intended to provide for an action of quo warranto whenever there was illegal or fraudulent voting or tampering with the ballots or ballot boxes before a recount, could have used language similar to that used in MCL 600.4545. That it did not lends further support to the conclusion that MCL 168.861 was intended as a saving clause rather than an independent cause of action. Thus, the trial court did not err by granting summary disposition to the township defendants to the extent that plaintiffs' claim for quo warranto was brought pursuant to MCL 168.861.

We next consider whether the trial court properly granted summary disposition to the township defendants for plaintiffs' quo warranto claim that was

brought pursuant to MCL 600.4545. As previously indicated, MCL 600.4545(1) provides for an action in the nature of quo warranto "whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof." The phrase "material fraud or error" in MCL 600.4545(1) "means fraud or error that 'might have affected the outcome of the election.' " *Barrow*, 290 Mich App at 542, quoting *St Joseph Twp v City of St Joseph*, 373 Mich 1, 6; 127 NW2d 858 (1964). While a "but for" showing is not necessary, the plaintiff's "proofs must be sufficient to support a fact finding that enough votes were tainted by the alleged fraud to affect the outcome." *Barrow*, 290 Mich App at 542. See also *Rosenbrock v Sch Dist No. 3, Fractional*, 344 Mich 335, 339; 74 NW2d 32 (1955) ("It has been repeatedly held by this Court that irregularities in the conducting of an election will not invalidate the action taken unless it appears that the result was, or may have been, affected thereby.").

In this case, plaintiffs claim that two acts by the township clerk involved material fraud or error: (1) the township clerk cut the seal on the ballot container on May 11, 2010, and transferred the ballots to an unapproved ballot bag and (2) the township clerk acted as an election inspector for the May 4, 2010, election. While the actions of the township clerk in cutting the seal was certainly, as the State Bureau of Elections found during their investigation, a violation "of the security provisions of Michigan election law" and constituted "improper conduct," the end result was that the board determined that the election results were not recountable. And the Legislature has provided that if a board of canvassers has determined that ballots from a precinct

are not eligible for a recount (because of a broken or inconsistent seal among other reasons, MCL 168.871[1][a]), the original return of the votes for the precinct shall be taken as correct. MCL 168.871(3)(b). Even though we are fully aware of and dismayed by the fact that the township clerk's actions *caused* the Allegan County Board of Canvassers to not recount the election results, the law simply provides no remedy under these circumstances. The Supreme Court has stated, "The Legislature has evidently decided, however, that the need to guard against alteration of the vote between the original count and a recount outweighs the risk that the original count was erroneous and a recount will be circumvented by election workers." *Ryan v Wayne Co Bd of Canvassers*, 396 Mich 213, 218; 240 NW2d 236 (1976). Thus, under this specific allegation of error, the remedy chosen by the Legislature is not a quo warranto action to void the election, but is instead to uphold the original vote count, which is what the board did. *Id*.

This conclusion does not render the language within MCL 168.861 surplusage. *Robinson v Lansing*, 486 Mich 1, 20-21; 782 NW2d 171 (2010) (restating the rule of statutory construction cautioning courts against construing a statute in a manner "that would render part of the statute surplusage or nugatory") (quotation marks and citation omitted). MCL 168.861 preserves the remedy of quo warranto for cases involving "tampering with the ballots or ballot boxes before a recount." When utilizing either a legal definition or a general one, "tampering" under MCL 168.861 can include many different forms of alteration of ballots or ballot boxes. Assuming, without deciding, that the township clerk's cutting of the ballot container seal before a recount fits the definition of "tampering," said tampering fits within the very narrow circumstances

set forth in MCL 168.871(1) that, when found, would result in the original election count being upheld. For all other possible forms of "tampering with the ballots or ballot boxes before a recount" there lies a potential quo warranto action. Consequently, the foregoing analysis does not render any part of MCL 168.861 surplusage.

With respect to the township clerk acting as an election inspector at the May 4, 2010, election, we note that MCL 168.672 requires a board of at least three inspectors of election at every election, for every precinct. These election inspectors are to be appointed by the city and township board of election commissioners. MCL 168.674. To be appointed an election inspector, a person shall file an application with a city, township, or village clerk in the county where the person wishes to serve as an election inspector. MCL 168.677(1). In addition, the person shall be a qualified voter, be of good reputation, and have sufficient education and clerical ability to perform the duties of the office. *Id*. A person shall not be appointed as an election inspector if the person or any member of the person's immediate family is a candidate for nomination or election or has been convicted of a felony or an election crime. MCL 168.677(3). Further, a person shall not be permitted to act as an election inspector if the person has not attended a school of instruction or passed an examination given by the election commission. *Id*.

There is no dispute that the township clerk acted as an election inspector at the May 4, 2010 election or that she had not been appointed an election inspector for the Saugatuck Township Election Commission. While the township defendants contend that the township clerk nevertheless had the authority to act as an election inspector because, as the township clerk, she was the

election official in charge of the election, such assertion is without merit. MCL 168.778, cited by the township defendants, does state that "[t]he clerk and his or her authorized assistants are . . . officers of election and may be paid for the time spent in the discharge of their duties . . . . However, the Legislature has provided the precise manner in which persons may serve as election inspectors. When the Legislature has provided in MCL 168.677 the method by which a person may serve as an election inspector, a person may not ignore those requirements and serve as an election inspector without first being appointed by the board of election commissioners. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005) (noting that provisions not included by the Legislature should not be included by the courts). Consequently, because the township clerk was not appointed as an election inspector for the May 4, 2010, election, she improperly served as one at the same.

Nonetheless, relief is available under MCL 600.4545(1) only if there was fraud or error at an election that might have affected the election's outcome. *Barrow*, 290 Mich App at 542. In other words, to obtain relief under MCL 600.4545(1), plaintiffs must present proofs sufficient to support a finding that, but for the error of the township clerk acting as an election inspector at the May 4, 2010, election, the election outcome would have been different. *St Joseph Twp*, 373 Mich at 6. Plaintiffs make no argument, much less do they bring to this Court's attention any facts to support an argument, that but for the township clerk acting as an election inspector, the results of the May 4, 2010, election would have been different, i.e., the proposed millage increase would not have passed. There are no facts in the lower court record that would support a finding that the result of the election would

have been different had she not acted as an election inspector. Accordingly, the trial court did not err by granting summary disposition to the township defendants to the extent that plaintiffs' claim for quo warranto relies on its argument that the township defendants failed to follow critical election policies.

In the alternative, plaintiffs claim that quo warranto is warranted under MCL 600.4545 because the voters of Saugatuck Township were misled about the ballot proposal. According to plaintiffs, the voters were misled because they were informed that the millage increase was necessary to defend certain lawsuits, but not told that the legal fees of Saugatuck Township were being substantially funded by donations from a third party. When a ballot proposal is misleading, the remedy is to void the election. *West Shore Community College v Manistee Co Bd of Comm'rs*, 389 Mich 287, 297; 205 NW2d 441 (1973).

The township defendants do not deny that $30,000 was donated by a third party to help with litigation costs. However, there is nothing in the record to suggest that this donation covered the township defendants' legal fees. Evidence presented by plaintiffs, in fact, shows that as of December 2, 2009, Saugatuck Township had incurred more than $41,000 in one litigation, but there is no evidence regarding the amount of legal fees incurred in that litigation after December 2009, or of the amount of legal fees incurred in a separate litigation. Thus, plaintiffs' assertion that the township defendants' legal fees were "substantially funded" by a third party, thus rendering the millage language misleading, is unfounded. Moreover, the millage language merely states that the funds would be "used only for enforcing and implementing applicable laws, ordinances and regulations, including associated planning

expenses and other expenses for attorneys, trials and administrative hearings . . . ." There is no indication that that was not the intended use of the funds. Quo warranto was not justified on the basis of misleading voters.

Finally, plaintiffs argue on appeal that the trial court erred by granting summary disposition to the Board of Canvassers on their claim for mandamus. We disagree.

"[M]andamus is appropriate when (1) the plaintiff has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other legal or equitable remedy exists that might achieve the same result." *Bay City v Bay Co Treasurer*, 292 Mich App 156, 164-165; 807 NW2d 892 (2011). A ministerial act is one for which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of judgment or discretion. *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544 (1993). If the act requested by the plaintiff involves judgment or an exercise of discretion, a writ of mandamus is inappropriate. *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001).

The trial court in the instant action granted summary disposition to the Board of Canvassers on plaintiffs' claim for mandamus because plaintiffs had another remedy available to them—a claim in the nature of quo warranto. See MCL 600.4545(1) and (3), which grant plaintiffs the right to bring an action in Allegan Circuit Court for any material fraud or error that was committed in the May 4, 2010, election. Plaintiffs do not argue that the trial court erred by holding that because an action in the nature of quo warranto was available to them, they could not maintain a claim for mandamus

against the Board of Canvassers. When an appellant fails to dispute the basis of the trial court's ruling, the Court need not consider granting the appellant the relief it seeks. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

Regardless, we will briefly address plaintiffs' argument. Plaintiffs claim that the Board violated clear legal duties when it certified the May 4, 2010, election absent an investigation into the township clerk and her deputy clerk acting as election inspectors and absent investigation into the two missing ballot container seals. These two missing seals are seals that were placed on the ballot container on the night of the election. One was placed incorrectly, so it was cut and replaced by a new seal. Also, there was a third seal that was not used but its number was recorded in the poll book.

A county board of canvassers is required to meet after an election, MCL 168.821, and to canvass the returns of votes cast, MCL 168.822(1). Upon completion of its canvass, a county board of canvassers shall certify a statement of the number of votes cast and the manner in which the votes were cast. See MCL 168.824; MCL 168.825; MCL 168.826. Notably, plaintiffs do not rely on any statute, including the above, to claim that the Board of Canvassers violated a clear legal duty. Rather, they rely on the Manual for Boards of County Canvassers, which was issued by the Department of State, Bureau of Elections in June 2008. "In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory." *Danse Corp v Madison Hts*, 466 Mich 175, 181; 644 NW2d 721 (2002). Plaintiffs have presented this Court with no argument or evidence to conclude

that the Manual for Boards of County Canvassers has, in fact, been promulgated as an administrative rule under the Administrative Procedures Act, MCL 24.201 *et seq*. Plaintiffs may not rely on an agency's manual which has not been given the force of law to establish clear legal rights and duties for a mandamus claim. Accordingly, the trial court did not err by granting summary disposition in favor of the board on plaintiffs' mandamus claim.

Affirmed.

SERVITTO, P.J., and MARKEY and MURRAY, JJ., concurred.

PEOPLE v NEEDHAM

Docket No. 309491. Submitted January 8, 2013, at Grand Rapids. Decided January 15, 2013, at 9:05 a.m.

Robbie C. Needham pleaded no contest in the Kent Circuit Court, James R. Redford, J., to a charge of possessing child sexually abusive material, MCL 750.145c(4). At sentencing, the court assessed 10 points under offense variable (OV) 10, MCL 777.40, for defendant's having exploited a victim's youth and sentenced defendant to one to four years' imprisonment. Defendant appealed his sentence.

The Court of Appeals *held*:

Evidence that defendant possessed child sexually abusive material supported a score of 10 points for OV 10 despite the fact that he had no contact with the children depicted in the images. Under MCL 777.40(1)(b), 10 points are to be assessed if the offender exploited a victim's physical disability, mental disability, or youth or agedness or a domestic relationship or if the offender abused his or her authority status. MCL 777(3)(b) defines "exploit" as to manipulate a victim for selfish or unethical purposes. A person who possesses child sexually abusive material has personally engaged in the systematic exploitation of the vulnerable victim depicted in that material by acting on a selfish and unethical desire to possess material that a child had to be manipulated to appear in for the material to be produced. Direct or physical contact between the offender and the victim is not required.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 10 — EXPLOITATION OF VULNERABLE VICTIMS — POSSESSION OF CHILD SEXUALLY ABUSIVE MATERIAL.

Ten points may be assessed under offense variable 10 of the sentencing guidelines if the offender exploited a victim's physical disability, mental disability, or youth or agedness or a domestic relationship or if the offender abused his or her authority status; evidence of possession of child sexually abusive material supports a scoring of 10 points for offense variable 10 even if the offender had no direct or physical contact with the children depicted in the images (MCL 777.40[1][b]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *T. Lynn Hopkins*, Assistant Prosecuting Attorney, for the people.

Kevin A. Landau for defendant.

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

GLEICHER, P.J. Defendant, Robbie Christopher Needham, pleaded no contest to possession of child sexually abusive material in violation of MCL 750.145c(4). Defendant challenges his one-to-four-year prison sentence, claiming that the circuit court should have assessed zero points for offense variable (OV) 10 (exploitation of a vulnerable victim) because he had no contact with the children depicted in the pornographic images. When a person possesses child sexually abusive material, he or she personally engages in the systematic exploitation of the vulnerable victim depicted in that material. Evidence of possession therefore can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim's vulnerability due to the victim's youth. We affirm.

MCL 777.40 provides for the scoring of OV 10 as follows:

> (1) [OV] 10 is exploitation of a vulnerable victim. Score [OV] 10 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:
>
> (a) Predatory conduct was involved ..... 15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status ..... 10 points

> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious ..... 5 points
>
> (d) The offender did not exploit a victim's vulnerability ..... 0 points
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.
>
> (3) As used in this section:
>
> * * *
>
> (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
>
> (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

Defendant preserved his challenge to the scoring of OV 10 by objecting at sentencing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). Defendant argued that scoring the variable was improper because he never had contact with the victims of his crime and therefore he could not have exploited them. The prosecutor challenged that "young, real people" were depicted in the photographs and those individuals were exploited due to their vulnerability. The circuit court agreed with the prosecutor, stating:

> First, the offense to which the defendant has been convicted of through the plea process is the possession of child pornographic materials. We then have to drill down, in the Court's estimation, to determine what is this thing that he has been convicted of possessing? Child pornography is, of its very nature, the exploitation of children, because of their status as a child and the objectification of the child as a sexual object by those who, for whatever

> reason, gain sexual pleasure through the viewing or possession of these sexually explicit images.
>
> The question then becomes is this, then, the victimization of the victim by the possession of this physical manifestation of their person in a sexually explicit position? The Court concludes that it is a continuing victimization of the person, and it is an exploitation of the victim's vulnerability, and were it not for the vulnerability, that is, the age of the child who is being exposed sexually and whose body is being exploited, the image of the body being exploited, there would be no offense, period. Because if it were, in fact, an adult engaged in some type of pornographic activity, while reprehensible or not understandable by some or most people, it is not necessarily criminally proscribed. What is criminally proscribed is that of a child.
>
> In this case, the defendant has pled guilty to possession of the child sexually explicit material. The Court is satisfied that each time this possession takes place by each new possessor of this pornographic and exploitive material, those who possess it are, in fact, exploiting the vulnerability of the person whose image was first taken, and for that reason the Court is satisfied, when we look to factor 4 [sic: 3] of the analysis undertaken by [*People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008)], whether the victim was particularly young or old, this speaks to the Court of the appropriateness of scoring this position.

We review the circuit court's scoring decision for an abuse of discretion and to determine " 'whether the record evidence adequately supports a particular score.' " *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010) (citation omitted). The circuit court's decision must be supported by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). We must uphold a scoring decision " 'for which there is *any* evidence in support . . . .' " *Phelps*, 288 Mich App at 135 (emphasis added; citation omitted). However, "[t]he proper interpretation and application of the legislative sentencing guidelines are

questions of law, which this Court reviews de novo." *Cannon*, 481 Mich at 156. The primary goal of statutory interpretation is " 'to ascertain and give effect to the intent of the Legislature.' " *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (citation omitted). Where the statutory language is plain and unambiguous, we must apply it as written and may not engage in judicial construction. *Id.*

The text of OV 10 permits a score of 10 points when "[t]he offender exploited a victim's . . . youth or agedness[.]" MCL 777.40(1)(b). MCL 777.40(1)(c) defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation," and MCL 777.40(3)(b) defines "exploit" as "to manipulate a victim for selfish or unethical purposes." Accordingly, to merit a score of 10 points for OV 10, a defendant must have manipulated a young victim for a selfish or unethical purpose and the victim's vulnerability must have been readily apparent.

There was clearly a victim in this case. A "victim" is "a 'person harmed by a crime, tort, or other wrong' . . . or . . . a person who 'is acted on and usually adversely affected by a force or agent . . . .' " *People v Althoff*, 280 Mich App 524, 536-537; 760 NW2d 764 (2008) (citations omitted). The victim of crimes involving child sexually abusive activity, including the possession of child sexually abusive material is the child victim portrayed in the material. *Id.* at 537-539. No one challenges that the vulnerability of the young children appearing in the materials possessed by defendant was readily apparent.

Contrary to defendant's arguments, however, *he did exploit and manipulate* the young, vulnerable victims depicted in the materials he possessed. Nothing in the plain language of MCL 777.40 suggests that an offender must have direct or physical contact with the victim to

exploit or manipulate him or her. The very purpose of MCL 750.145c is to "protect[] children from sexual *exploitation* . . . ." *People v Ward*, 206 Mich App 38, 42; 520 NW2d 363 (1994) (emphasis added). As did the defendant in *United States v Norris*, 159 F3d 926, 929 (CA 5, 1998), the current defendant "takes an unrealistically narrow view of the scope of harms experienced by the child victims of the child pornography industry." "Unfortunately, the 'victimization' of the children involved does not end when the pornographer's camera is put away. The consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions . . . ." *Id.*

Norris describes three ways in which the possessor of child sexually abusive material victimizes the child depicted. First, "the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials," and a person who takes possession of an image "directly contributes to this continuing victimization." *Id.* at 929-930. "[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *New York v Ferber*, 458 US 747, 758; 102 S Ct 3348; 73 L Ed 2d 1113 (1982). "[T]he materials produced by child pornographers permanently record the victim's abuse," and the "continued existence" of these images "causes the child victims continuing harm by haunting the children in years to come." *Osborne v Ohio*, 495 US 103, 111; 110 S Ct 1691; 109 L Ed 2d 98 (1990), citing *Ferber*, 458 US at 759.

Second, "the mere existence of child pornography represents an invasion of the privacy of the child depicted," and the recipient of the sexually abusive image "perpetuates the existence of the images re-

ceived, and therefore the recipient may be considered to be invading the privacy of the children depicted, directly victimizing these children." *Norris*, 159 F3d at 930. The child victim will forever "suffer profound emotional repercussions from a fear of exposure . . . ." *United States v Shutic*, 274 F3d 1123, 1126 (CA 7, 2001) (quotation marks and citation omitted).

Third, "the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials." *Norris*, 159 F3d at 930. As noted in *Norris*:

> "[T]he existence of and traffic in child pornographic images . . .
>
> ". . . inflames the desires of child molesters, pedophiles, and child pornographers, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials[.]"
>
> . . . The consumers of child pornography therefore victimize the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects. [*Id.* (citation omitted).]

Ultimately, "the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography." *Id.*

Defendant acted on his "selfish" and "unethical" desire to possess child sexually abusive material for his own sexual gratification. MCL 777.40(3)(b). To achieve that purpose, a child had to be manipulated to pose for the sexually abusive photographs. As noted by extensive federal caselaw on the topic of child pornography, child

sexually abusive material would not exist but for the selfish and unethical purposes of defendant and other end users.[1] And every time the image is viewed, the child victim is exploited anew.[2] Therefore, the circuit court correctly assigned points for OV 10 despite that defendant did not have contact with his young victims.

Defendant incorrectly interprets Michigan caselaw analyzing and applying OV 10 as requiring direct or physical contact between the offender and the victim. Contrary to defendant's assertion, nothing in *Cannon* requires the offender to have first-hand contact to exploit a victim. Rather, *Cannon* provides that every subdivision of MCL 777.40(1) requires that the offender have somehow exploited a vulnerable victim, including the assignment of points for "predatory conduct" in subdivision (a). *Cannon*, 481 Mich at 157-159.

In *People v Russell (On Remand)*, 281 Mich App 610, 615; 760 NW2d 841 (2008), this Court concluded that the circuit court could not score OV 10 when the offender has no "victim." In *Russell*, the defendant had communicated on the Internet with an undercover police officer posing as a 14-year-old girl. *Id.* at 612. This Court held that the defendant's subjective intent is irrelevant under OV 10 "if no vulnerable victim was in fact placed in jeopardy or exploited by an offender's actions . . . ." *Id.* at 615. There were several real victims in this case, however: the multiple young children depicted in the child sexually abusive material in defendant's possession.

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[1] See *United States v Sherman*, 268 F3d 539, 543-544 (CA 7, 2001); *United States v Tillmon*, 195 F3d 640, 644 (CA 11, 1999); *Norris*, 159 F3d at 930; *United States v Boos*, 127 F3d 1207, 1210 (CA 9, 1997); *United States v Ketcham*, 80 F3d 789, 793 (CA 3, 1996).

[2] See *Osborne*, 495 US at 111; *Ferber*, 458 US at 759; *Shutic*, 274 F3d at 1126; *Sherman*, 268 F3d at 544; *Norris*, 159 F3d at 929-930.

People v Huston, 489 Mich 451, 459; 802 NW2d 261 (2011), interpreted the predatory-conduct provision of MCL 777.40(1)(a) as requiring "a" victim rather than "the" "one particular or specific victim . . . ." MCL 777.40(1)(b) refers to "a" victim rather than "the" victim as well. However, *Huston* is not dispositive of the issue in this case. The defendant in *Huston* naturally had contact with his victim; he had lain in wait to rob her. *Huston*, 489 Mich at 455. Yet *Huston* in no way dictates that a defendant must have contact with a victim to exploit him or her. Similarly, the defendant in *Phelps*, 288 Mich App at 136, had physical contact with his victim because he had sexually assaulted her. Again, nothing in *Phelps* demands direct contact to "exploit" a victim for purposes of the sentencing guidelines.

Rather, this case is more akin to *Althoff*, 280 Mich App at 529-530, in which this Court considered whether the possession of child sexually abusive material could be considered a crime "that by its nature constitutes a sexual offense against" a minor for purposes of the catchall provision of the Sex Offenders Registration Act (SORA), MCL 28.722(s)(*vi*).[3] The defendant in *Althoff* also had no contact with the children depicted in the sexually explicit material he possessed. *Althoff*, 280 Mich App at 526-527. Despite the lack of contact between the offender and the victim, *Althoff* noted that the Legislature recognized that the possession of child pornography is a sexual offense worthy of requiring a defendant's registration as a sexual offender upon conviction. *Althoff*, 280 Mich App at 537, citing MCL 28.722(e)(*i*) (now MCL 28.722[s][*i*]). On this basis, *Althoff* held that the defendant had committed a sexual offense against the minors portrayed in the porno-

[3] At the time *Althoff* was decided, the relevant provision of SORA was located at MCL 28.722(e)(*xi*).

graphic images, thereby mandating his registration as a sexual offender under the statute's catchall provision. Specifically, this Court held that to commit a sexual offense against an individual is synonymous with the offender's making the individual a victim. *Althoff*, 280 Mich App at 537-540. Citing the same plethora of federal cases relied on in this opinion, *Althoff* concluded that the defendant, through his possession of child sexually abusive materials, made the children depicted the victims of his sexual offense. *Id.* at 538-540.

The same is true in this case. By possessing sexually abusive images of children, defendant made those children the victims of his sexual offense and exploited them for his sexual gratification. Just as this conduct requires registration as a sexual offender under SORA, it mandates the scoring of OV 10 for the exploitation of the vulnerable young victims.

Affirmed.

O'CONNELL and MURRAY, JJ., concurred with GLEICHER, P.J.

HANNAY v DEPARTMENT OF TRANSPORTATION

Docket No. 307616. Submitted January 10, 2013, at Detroit. Decided January 17, 2013, at 9:00 a.m. Leave to appeal sought.

Heather L. Hannay brought an action in the Court of Claims against the Department of Transportation, seeking damages for injuries she suffered when a salt truck driven by one of defendant's employees ran a stop sign and struck her car. After a bench trial, the court, Rosemarie E. Aquilina, J., awarded plaintiff $474,904 in noneconomic damages, $767,076 for work-loss benefits, and $153,872 in expenses for ordinary and necessary services. Defendant appealed, and plaintiff cross-appealed.

The Court of Appeals *held*:

1. The trial court did not err by awarding plaintiff economic damages for work loss and allowable expenses. Plaintiff brought the action pursuant to the motor vehicle exception to governmental immunity from tort liability, MCL 691.1405, which provides that governmental agencies may be held liable for bodily injury and property damage resulting from the negligent operation of a motor vehicle that the agency owns. Although the scope of recoverable damages in negligence actions involving an agency-owned motor vehicle are also governed by the no-fault act, MCL 500.3101 *et seq*., which generally abolished tort liability arising from the ownership, maintenance, or use of a motor vehicle in Michigan, MCL 500.3135(3)(c) specifically allows the recovery of damages for allowable expenses, work loss, and survivor's loss exceeding the daily, monthly, and three-year limitations contained in MCL 500.3107 to MCL 500.3110. These damages are not independent causes of action but are types of damages that arise from, and may be recovered because of, the bodily injury plaintiff sustained. The bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another. There was no dispute that plaintiff suffered a bodily injury. Accordingly, benefits for work loss and for ordinary and necessary services that exceeded the statutory personal protection insurance benefit maximum pursuant to MCL 500.3135(3) were awardable against defendant.

2. The trial court did not clearly err by basing its calculation of work-loss damages on what plaintiff might have earned as a dental hygienist instead of on what plaintiff was actually earning as a dental assistant when she was injured. Although speculative damages based on conjecture are not recoverable, damages need not be determined with mathematical certainty and may be awarded if a reasonable basis for computation exists. The court found that, but for the accident, plaintiff would have been accepted into the dental-hygienist program at the community college where she was enrolled, would have graduated, and would have been employed at least 60 percent of the time by the specific dental office where she was already working, at a rate of $28 an hour. These findings were supported by the testimony of plaintiff, the dentist who employed her, a dental hygienist employed at the same office, and an expert on financial modeling, as well as evidence regarding plaintiff's qualifications and the admission standards for the dental-hygienist program at the community college. Under these circumstances, the court's damages award was not purely speculative.

3. The trial court's factual findings in support of its decision to calculate plaintiff's work-loss award on the basis of part-time employment only were not clearly erroneous. The trial court specifically explained its decision to award damages based only on part-time employment given the evidence that plaintiff would be hired to replace a specific dental hygienist who worked only three days a week and that all the dental hygienists in the office worked part-time. The trial court's determination that this evidence was more credible than plaintiff's testimony that she had been offered full-time employment was entitled to deference.

Affirmed.

INSURANCE — NO-FAULT — GOVERNMENTAL IMMUNITY — MOTOR VEHICLE EXCEPTION — DAMAGES — WORK-LOSS DAMAGES — DAMAGES FOR ALLOWABLE EXPENSES.

MCL 691.1405 provides that governmental agencies may be held liable for bodily injury and property damage resulting from the negligent operation of a motor vehicle that the agency owns; the scope of recoverable damages in negligence actions involving agency-owned motor vehicles is also governed by the no-fault act, MCL 500.3101 *et seq.*; MCL 500.3135(3)(c) specifically allows the recovery of damages for allowable expenses, work loss, and survivor's loss exceeding the daily, monthly, and three-year limitations contained in MCL 500.3107 to MCL 500.3110; these damages are not independent causes of action but are types of damages that arise from, and may be recovered because of, the bodily injury a

> plaintiff sustained; the bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Gursten, Koltonow, Gursten, Christensen & Raitt, P.C.* (by *David E. Christensen*), for plaintiff.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *John P. Mack*, Assistant Attorney General, for defendant.

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM. In this personal injury case, defendant, the Department of Transportation, appeals as of right and plaintiff, Heather Lynn Hannay, cross-appeals the Court of Claims' judgment following a bench trial. Defendant argues that the Court of Claims erred by awarding economic damages to plaintiff and, alternatively, that the Court of Claims' damage calculation was clearly erroneous. Plaintiff argues that the Court of Claims clearly erred by calculating her work-loss damages on the basis of part-time employment. Because we conclude that defendant was liable for the economic damages awarded to plaintiff by the Court of Claims, and because the calculation of plaintiff's damages by the Court of Claims was not clearly erroneous, we affirm.

On February 13, 2007, plaintiff was involved in a car accident with a salt truck owned by the state of Michigan and driven by Brian Silcox, an employee of defendant. Silcox failed to heed a stop sign and struck plaintiff's 1994 Oldsmobile. As a result of the accident,

plaintiff sustained injuries to her right shoulder and underwent four surgeries; a fifth surgery had been recommended at the time of the bench trial. Plaintiff suffers from chronic pain that causes fatigue, anxiety, and mood disorder, and she also requires assistance with normal daily activities. Plaintiff filed a complaint against both defendant and Silcox on October 1, 2009; however, plaintiff agreed to dismiss her complaint against Silcox before trial. In regard to defendant, plaintiff alleged that defendant owned the truck that failed to stop at a stop sign and struck her vehicle, resulting in a serious impairment of bodily function.

The case proceeded to a bench trial, and after plaintiff rested, defendant moved to dismiss pursuant to MCR 2.504(B)(2).[1] Defendant argued that the state was only liable for damages arising from bodily injury or property damage and that, accordingly, damages for work loss were not recoverable because those damages are barred by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. Defendant summed up its argument by stating "that the court should dismiss the damages portion of the claim which relates to the alleged loss of earning capacity, and the claims for non-pathological injuries."

The trial court took the motion to dismiss under advisement and asked the parties to proceed with

[1] MCR 2.504(B)(2) provides in pertinent part:

> In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence.

closing arguments. Plaintiff argued that the evidence demonstrated that she suffered a serious impairment of bodily function. Plaintiff reviewed the testimony of the numerous medical professionals who testified during the trial. Plaintiff also made arguments regarding the extent of damages, noting all the limitations that plaintiff faces as a result of the accident. In its closing, defendant did not contest its liability; however, it did not concede that plaintiff suffered a serious impairment of bodily function or the amount of damages.

On November 18, 2011, the trial court issued its opinion. First, the trial court concluded that the proofs demonstrated that plaintiff suffered a serious impairment of bodily function and that, accordingly, plaintiff was entitled to noneconomic damages. The trial court balanced plaintiff's age and vibrancy with the fact that she will likely always have limited use of her shoulder and arm and suffer from chronic pain to conclude that plaintiff was entitled to a total award of $474,904 in noneconomic damages.[2] The trial court also concluded that plaintiff was entitled to economic damages pursuant to MCL 500.3135(3)(c), a section of the no-fault act, MCL 500.3101 *et seq*., that specifically permits the award of damages for "allowable expenses, work loss, and survivor's loss . . . ." The trial court awarded plaintiff $767,076 in work-loss benefits and $153,872 in allowable expenses for ordinary and necessary services. Defendant now appeals as of right.

On appeal, defendant first argues that the trial court erred by awarding plaintiff economic damages for work loss and loss of services because only damages for

[2] On appeal, defendant does not challenge the trial court's conclusion that plaintiff suffered a serious impairment of bodily function, nor does defendant challenge the trial court's award of noneconomic damages.

"bodily injury" or "property damage" are recoverable under the motor vehicle exception to governmental immunity, MCL 691.1405.

The issues in this case require us to interpret the GTLA and the no-fault act. Issues of statutory interpretation are questions of law that we review de novo. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Id.* at 246-247. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247.

Plaintiff alleged that defendant acted negligently. The elements of a negligence claim are duty, breach of duty, causation, and damages. *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). However, the GTLA provides that governmental agencies are "immune from tort liability" when "engaged in the exercise or discharge of a governmental function" unless a specific exception to governmental immunity is applicable. MCL 691.1407(1); see also *Bennett v Detroit Police Chief*, 274 Mich App 307, 315; 732 NW2d 164 (2007). Thus, the general purpose of the act was to abolish tort liability for governmental entities, even if a plaintiff is able to establish the elements of a tort claim.

However, as noted, the GTLA provides for certain exceptions to the otherwise general grant of immunity to governmental entities. Plaintiff's action in this case was brought pursuant to the motor vehicle exception to governmental immunity. The motor vehicle exception provides that "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or em-

ployee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405. Under this exception, a defendant may be liable to a plaintiff for its negligent operation of a motor vehicle under the GTLA.

However, the fact that a tort action arising from a motor vehicle accident may be pursued against a governmental entity does not except the action from the application of the no-fault act. See *Hardy v Oakland Co*, 461 Mich 561; 607 NW2d 718 (2000). One of the areas regulated by the no-fault act is the scope of recoverable damages in a negligence action involving a motor vehicle. MCL 500.3135. The no-fault act addresses recoverable damages by specifically setting forth the circumstances under which tort liability arising out of the use of a motor vehicle is recognized. *Id.* The first two subsections of MCL 500.3135 cover noneconomic damages. The third subsection, MCL 500.3135(3), begins by stating: "Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle . . . is abolished except as to . . . ." Thereafter the provision lists the specific instances in which tort liability is not abolished. MCL 500.3135(3)(c) specifically provides that liability for damages for work-loss benefits exceeding the three-year limitation placed on personal protection insurance benefits and for benefits exceeding the three-year limitation and daily maximum rate for obtaining ordinary and necessary services for the benefit of the injured person are allowed.[3] Thus, the no-fault

[3] MCL 500.3135(3)(c) provides that tort liability was not abolished for the following:

> Damages for allowable expenses, work loss, and survivor's loss as defined in [MCL 500.3107 to MCL 500.3110] in excess of the daily, monthly, and 3-year limitations contained in those sections.

act clearly permits the economic damages awarded by the trial court in this case, and there is no reason that the clear expression of recoverable damages set forth in the no-fault act is inapplicable to the government.

In this case, defendant does not dispute that the no-fault act provides for the award of economic damages. Rather, now—more than 48 years since the GTLA was enacted,[4] during which time economic damages have presumably been routinely awarded—defendant argues that the language of the motor vehicle exception precludes awarding economic damages as provided pursuant to MCL 500.3135(3)(c) because the damages recoverable pursuant to the motor vehicle exception are for the treatment of the bodily injury itself but not the broader damages associated with the bodily injury.

The only precedential authority that defendant cites that would suggest such a momentous change in the law is the definition of "bodily injury" as a "physical or corporeal injury to the body" that was announced in *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 85; 746 NW2d 847 (2008). Applying this definition of bodily injury, defendant argues that the economic damages for work loss and loss of services are not recoverable because the GTLA's motor vehicle exception, MCL 691.1405, waives liability only in regard to bodily injury or property damage as defined in *Wesche*. We conclude that defendant's reliance on *Wesche* in support of its position is misplaced.

The issue in *Wesche* was whether loss of consortium is recoverable against a governmental entity under the

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The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

[4] The GTLA was enacted in 1964 and became effective on July 1, 1965.

motor vehicle exception. *Wesche*, 480 Mich at 79. Applying a definition of bodily injury as being "a physical or corporeal injury to the body," the Court held that a loss-of-consortium claim is not recoverable because a loss of consortium is not a physical injury to the body, nor is a loss of consortium an item of damages derivative from the underlying bodily injury because loss of consortium has long been recognized as a separate, independent cause of action. *Id*. at 85.

In this case, it is clear, and defendant does not argue otherwise, that damages for work loss and loss of services are not independent causes of action, but are merely types or items of damages that may be recovered because of the bodily injury plaintiff sustained. Further, there is no dispute that plaintiff in this case sustained a bodily injury. Consequently, the holdings in *Wesche* are inapplicable to the issue in this case.

Plaintiff relies on, and defendant seeks to distinguish, this Court's recent decision in *Jago v Dep't of State Police*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2011 (Docket No. 297880).[5] *Jago* was a wrongful-death action premised on an automobile accident caused by an employee of the defendant. *Id*. at 1. At issue was the plaintiff's recovery of survivor's loss damages. *Id*. Like defendant in this case, the defendant in *Jago* argued that, under the *Wesche* definition of bodily injury, survivor's loss benefits were not recoverable under the GTLA because the GTLA permits only recovery for bodily injury or property damage. *Id*. at 3. This Court disagreed and held that survivor's loss benefits are damages for the bodily injury suffered by the person who died

[5] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

in the motor vehicle accident. *Id.* at 8. Thus, this Court concluded that survivor's loss damages are an item of damages for the bodily injury suffered by the deceased injured person, and the waiver of immunity in the motor vehicle exception applies to claims for excess survivor's loss benefits. *Id.*

Similarly, in this case, work-loss and loss-of-services damages are items of damages that arise from the bodily injuries suffered by plaintiff. To hold otherwise would conflate the actual-bodily-injury requirement for maintaining a motor vehicle cause of action against a governmental entity with the types of damages recoverable as a result of the bodily injury. To the contrary, we hold that the bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another. Accordingly, work-loss benefits and benefits for ordinary and necessary services that exceed the statutory personal protection insurance benefit maximum pursuant to MCL 500.3135(3) are awardable against governmental entities, and the trial court did not err by awarding those economic damages to plaintiff in this case.

Alternatively, defendant argues that the trial court clearly erred by basing its calculation of work-loss damages on what plaintiff might have earned as a dental hygienist instead of on the evidence of what plaintiff was actually earning at the time of her injury because it was not definite that plaintiff would ever work as a dental hygienist. Also, with regard to work loss, on cross-appeal, plaintiff argues that the trial court erred by failing to calculate her lost earning capacity on the basis of full-time employment instead of part-time employment because plaintiff testified that she was offered a full-time position upon graduation.

We review a trial court's determination of damages after a bench trial for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). The trial court's findings of fact are also reviewed for clear error. *Id.* at 512. "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* "We will not set aside a nonjury award merely on the basis of a difference of opinion." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002) (quotation marks and citation omitted). Although speculative damages based on conjecture are not recoverable, damages need not be determined with "mathematical certainty"; it is "sufficient if a reasonable basis for computation exists." *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010).

At issue in this case are damages for lost wages in excess of the daily, monthly, and 3-year limitations contained in MCL 500.3107 to MCL 500.3110. These damages are governed by MCL 500.3135(3)(c), which provides that tort liability arising from the ownership, maintenance, or use of a motor vehicle remains in regard to "[d]amages for allowable expenses, work loss, and survivor's loss" as defined in §§ 3107 to 3110. Section 3107 explains that personal protection insurance benefits are payable for "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." MCL 500.3107(1)(b); see also *Copus v MEEMIC Ins Co*, 291 Mich App 593, 594-595; 805 NW2d 623 (2011).

The trial court specifically found that plaintiff was enrolled at Lansing Community College (LCC) and working toward her degree at the time of the accident.

The trial court further found that plaintiff was already employed at a dental office as a dental assistant. From the testimony regarding the admission standards for LCC's dental hygienist program and plaintiff's qualifications, the trial court concluded that plaintiff would have been admitted and would have successfully completed the dental hygienist program. From plaintiff's testimony and that of the dentist plaintiff worked for and a dental hygienist employed in the same dental office, the trial court concluded that plaintiff would have received a part-time job as a dental hygienist. Plaintiff and the dentist with whom she was employed both testified about the hourly wage plaintiff would have been paid as a dental hygienist.

In *Swartout v State Farm Mut Auto Ins Co*, 156 Mich App 350; 401 NW2d 364 (1986), this Court reversed the trial court's grant of summary disposition in favor of the defendant in regard to the issue of lost wages because the plaintiff, who was a nursing student, alleged facts demonstrating where she would have been employed, the date her employment would have begun, and the wages she would have received but for the accident. Similarly, in this case, plaintiff provided testimony to support a finding that, had she graduated from the dental hygienist program, she would have been employed by a specific dental office three days a week at the rate of $25 an hour. The dentist who employed plaintiff testified that he pays his dental hygienists $28 to $31 an hour. An expert on financial modeling testified that the national average for a dental hygienist is $28 an hour. The trial court found that, but for the accident, plaintiff would have been accepted into LCC's dental hygienist program, would have graduated, and would have been employed at least 60 percent of the time by a specific dental office at a rate of $28 an hour. The trial court's

findings were supported by the testimony of plaintiff, the dentist who owned the dental office, an expert on financial modeling, and a dental hygienist employed at the dental office, as well as evidence regarding plaintiff's qualifications and LCC's admission standards. Under these circumstances, we cannot conclude that the trial court's damages award was purely speculative. Thus, we conclude that the trial court's award for lost wages was not clearly erroneous.

In regard to plaintiff's cross-appeal, plaintiff argues that her testimony that she had been offered full-time employment was not contradicted and required the trial court to calculate her damages on the basis of full-time employment. However, the trial court specifically explained its decision to award damages based only on part-time employment. The trial court noted that plaintiff testified that she was going to be hired to replace a specific dental hygienist and that other testimony demonstrated that the dental hygienist she would replace worked only three days a week. Further, the trial court noted that the dentist who ran the office testified that all of his dental hygienists worked part-time. Thus, the trial court concluded that plaintiff had failed to meet the burden of demonstrating that she would have full-time employment.

We conclude that the trial court's factual findings in support of its decision to calculate plaintiff's work-loss award on the basis of part-time employment only were not clearly erroneous. Plaintiff's position relies on the determination that her testimony regarding the offer of full-time employment was more credible than the testimony supporting the conclusion that she would have only worked part-time. "[W]e defer to the trial court's superior position to observe and evaluate witness credibility." *Marshall Lasser*, 252 Mich App at 110. Thus,

we conclude that the trial court did not clearly err by calculating plaintiff's lost wages on the basis of part-time employment.

Affirmed. No costs pursuant to MCR 7.219, neither party having prevailed in full.

HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ., concurred.

KNIGHT ENTERPRISES, INC v RPF OIL COMPANY

Docket No. 306451. Submitted December 5, 2012, at Detroit. Decided January 17, 2013, at 9:05 a.m. Leave to appeal denied, 494 Mich 857.

Knight Enterprises, Inc. filed an action in the Wayne Circuit Court against RPF Oil Company and others, claiming that RPF tortiously interfered with plaintiff's fuel-supply contract with Amer Saleh. Saleh had purchased two gasoline stations from RPF in 2005 or 2006 and informed RPF that he had existing fuel-supply contracts in effect with another supplier for an additional two years. Saleh approached RPF and other companies in 2008, indicating that his contract with plaintiff had expired and that he was seeking new fuel-supply contracts. Saleh was dissatisfied with plaintiff because it had continuously underpriced Saleh at a nearby gas station, and overcharged Saleh for fuel delivery. In addition, Saleh was worried that his Citgo gas station business would be adversely affected by negative public sentiment towards Venezuela, the source of Citgo's fuel. Saleh filed an action in April 2008 against plaintiff, claiming breach of contract and seeking termination of the fuel-supply contract. Saleh subsequently signed a ten-year fuel-supply agreement with RPF, effective July 1, 2008, but operated his stations under the Citgo name until RPF converted them to Shell stations. Plaintiff presented testimony at trial that its fuel-supply contract with Saleh had not expired until at least 2010. RPF presented testimony that it had no knowledge of a continuing contract between Saleh and plaintiff, that Saleh had been informed that a station could not be rebranded if there were existing contracts in place, and that Saleh had specifically asserted that his Citgo contracts were no longer in effect. Following a bench trial, the court, Prentis Edwards, J., ruled in favor of plaintiff and awarded damages. RPF appealed.

The Court of Appeals *held*:

Tortious interference with a contract or contractual relation is distinct from the cause of action for tortious interference with a business relationship or expectancy. The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. The defendant must have unjustifiably

instigated or induced the party to breach its contract with the plaintiff to prevail on a claim for tortious interference with a contract. The trial court erred by entering judgment in favor of plaintiff. The trial court erroneously decided the case on the basis of the elements for tortious interference with a business relationship, which is distinct from the instant action which involved tortious interference with a contract. The evidence established that RPF did not instigate Saleh's breach of his agreement with plaintiff or intentionally induce Saleh to breach his contracts. Further, undisputed evidence established that Saleh had sued plaintiff in a prior action to avoid his contractual obligations before he even entered into a contract with RPF.

Affirmed.

CONTRACTS — FUEL-SUPPLY CONTRACTS — BREACH OF CONTRACTS — TORTIOUS INTERFERENCE WITH CONTRACTS.

Tortious interference with a contract or contractual relations is distinct from the cause of action for tortious interference with a business relationship or expectancy; the elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant; the defendant must have unjustifiably instigated or induced the party to breach its contract with the plaintiff to prevail on a claim for tortious interference with a contract.

Giarmarco, Mullins & Horton, P.C. (by *Ben M. Gonek* and *Andrew T. Baran*), for Knight Enterprises, Inc.

Zausmer, Kaufman, August, Caldwell & Tayler, P. C. (by *Michael L. Caldwell*), for RPF Oil Company.

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

SAAD, P.J. Defendant, RPF Oil Company, appeals the trial court's judgment in favor of plaintiff, Knight Enterprises, Inc. For the reasons set forth below, we reverse.

I. FACTS AND PROCEEDINGS

Knight filed a complaint against RPF and other defendants after Amer Saleh decided to rebrand his gas

stations from Citgo, for which Knight is the gasoline supplier, to Shell, for which RPF is the gasoline supplier. Knight specifically alleged that RPF intentionally interfered with the fuel supply agreements between Knight and Saleh, which caused Saleh and his companies "to breach their obligations to Knight Enterprises."

At trial RPF's executive chairman, John Fleckenstein, testified that in 2005 or 2006, Saleh bought two gas stations from RPF. At the time, Saleh told Fleckenstein that he had two other gas stations, one in Port Huron and one in Roseville, and that each had approximately two years left on their respective gasoline-supply contracts. In 2008, Saleh approached RPF and several other gasoline suppliers to enter into agreements to supply gasoline to his Port Huron and Roseville gas stations. According to Fleckenstein, Saleh told RPF that he was no longer under any contract with Knight. RPF employee Michelle Wright testified that when RPF entered into the supply agreements with Saleh, she asked Saleh directly whether he was under contract with any other gasoline supplier and he told her that he was not. Saleh confirmed this information at trial. Saleh testified that he was dissatisfied with Knight because Knight had continuously underpriced Saleh at a nearby gas station and had overcharged Saleh for fuel delivery. Saleh was also concerned that anti-American statements made by Venezuela's president, Hugo Chavez, had hurt his Citgo business because Venezuela supplied Citgo fuel. Saleh claims he had tried to negotiate a solution with Knight's president, Carroll Knight, but that Knight had not worked with Saleh to resolve his concerns.

In April 2008, Saleh sued Knight claiming breach of contract and seeking termination of their fuel-supply

contract. On May 20, 2008, Saleh signed a ten-year fuel-supply agreement with RPF, to begin on July 1, 2008. Saleh continued to buy gas from Knight during the transition and Wright testified that Saleh had explained that he would operate as Citgo until RPF converted the stations to the Shell brand. It was Wright's understanding that Saleh was simply winding up his contract with his former Citgo supplier. Knight agreed at trial that, despite Saleh's lawsuit against him, Saleh continued to pay for gas deliveries until, one day, Saleh called and said he had decided to switch to Shell and he did not intend to pay for his gas delivery. At the time Knight estimated that, among other amounts, Saleh owed him $200,000 for gasoline he had already delivered to Saleh's stations. Knight later sued Saleh for breaching his agreements and Saleh settled the claim by paying Knight $275,000.

Carroll Knight testified that in light of what had happened with Saleh's switch to RPF, he was very surprised when, sometime in July 2008, Fleckenstein asked to meet with Knight to talk about buying ethanol fuel from Knight. Knight surreptitiously taped the discussion until Fleckenstein noticed the tape recorder and ended the meeting. The trial court admitted a transcript of the recording at trial. At the meeting Fleckenstein had said he wanted to meet with Knight to talk about buying ethanol, and Knight took the opportunity to confront Fleckenstein with copies of Knight's contracts with Saleh, which were not set to expire until at least 2010. Fleckenstein repeatedly told Knight at the meeting that he had no idea that Saleh had any continuing contracts with Knight. Fleckenstein recalled that Saleh had showed him some contracts a couple years earlier and that they had "a couple of years left of them." Fleckenstein told Knight that he had only taken a cursory look at the contracts and had told Saleh he

could not rebrand any stations that were under other contracts. Fleckenstein further explained to Knight that when Saleh approached RPF to buy fuel, Saleh specifically said that his Citgo contracts were no longer in effect. As noted, and despite Fleckenstein's assertions during the meeting, Knight sued RPF for tortious interference with a contract. After hearing proofs, the trial court ruled in favor of Knight and awarded Knight $96,136.83 in damages.

II. DISCUSSION

RPF appeals the trial court's judgment in favor of Knight. "This Court reviews a trial court's findings of fact following a bench trial for clear error and reviews de novo the trial court's conclusions of law." *Redmond v Van Buren Co*, 293 Mich App 344, 352; 819 NW2d 912 (2011).

As a preliminary matter, we hold that the trial court incorrectly framed Knight's claim as one for tortious interference with a business relationship or expectancy, rather than tortious interference with a contract. Knight specifically alleged tortious interference with a contract in the complaint and Knight's counsel argued those elements at the close of proofs at trial. Nonetheless, the trial court cited and decided the case on the basis of the elements for tortious interference with a business relationship. As this Court explained in *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005):

> In Michigan, tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy. *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-367; 695 NW2d 521 (2005); *Feaheny v Caldwell*, 175 Mich App 291, 301-303; 437 NW2d 358 (1989); M Civ JI

> 125.01 and 126.01. The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. *Badiee, supra* at 366-367; *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989); see also M Civ JI 125.01 (adding the necessary damage element to the cause of action).

By definition, tortious interference with a contract is an intentional tort. Indeed, it is well-settled that " '[o]ne who alleges tortious interference with a contractual . . . relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.' " *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2004), quoting *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). As this Court explained in *Badiee*, 265 Mich App at 367:

> "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12–13; 483 NW2d 629 (1992). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *CMI Int'l*, [251 Mich App] at 131.

In other words, in order to prevail on a claim for tortious interference with a contract, Knight had to prove "either that [RPF] committed an act that was so wrongful that [RPF] had no justification whatsoever for committing that act, and did so with malice and the intent to induce [Saleh] to breach [his] contracts . . . , or that [RPF] committed a lawful act with malicious intent to instigate [Saleh] to breach [his] con-

tracts . . . ." *Badiee*, 265 Mich App at 367. Thus, it is an essential element of a claim of tortious interference with a contract that the defendant "unjustifiably instigated or induced" the party to breach its contract. *Derosia v Austin*, 115 Mich App 647, 654; 321 NW2d 760 (1982). In *Woody v Tamer*, 158 Mich App 764, 774-775; 405 NW2d 213 (1987), this Court cited with approval 4 Restatement Torts, § 766, Comment d, pp 54-55, in which the authors explained the requirement that the defendant instigate or induce the breach:

> The essential thing is the purpose to cause the result. If the actor does not have this purpose, his conduct does not subject him to liability under this rule even if it has the unintended effect of deterring the third person from dealing with the other. It is not necessary, however, that the purpose to cause the breach of contract or failure to deal be the actor's sole or paramount purpose. It is sufficient that he designs this result whether because he desires it as an end in itself or because he regards it as a necessary, even if regrettable, means to some other end . . . .

Knight's claim fails as a matter of law because a necessary element of the cause of action is absent: RPF did not instigate Saleh's breach of his agreements with Knight or intentionally induce Saleh to breach his contracts. Undisputed evidence established that Saleh sued Knight in an effort to avoid his contractual obligations before he entered into any contract with RPF. Saleh specifically testified that he stopped buying fuel from Knight because Knight consistently underpriced gas at a nearby station, Citgo was losing business because of its connection to Hugo Chavez, and he believed Knight was overcharging him for gas deliveries.

Saleh also contacted numerous fuel suppliers, including RPF, and told them inaccurately that his contracts with Knight were not in effect. Saleh himself solicited

the bids, not RPF, and Saleh explicitly testified that no matter who became his new fuel supplier, he did not intend to continue his contracts with Knight. Moreover, the evidence established that Saleh breached his contracts with Knight before anyone at RPF even knew Saleh was obligated under any agreements with Knight. Saleh, Fleckenstein, and Wright all testified that Saleh unequivocally told RPF that his prior fuel contract was no longer in effect. Thus, undisputed evidence showed that Saleh's breach was not in any way instigated or induced by RPF. Because this essential element of a claim of tortious interference with a contract is absent, the trial court should have ruled that Knight's claim failed as a matter of law.

Knight also failed to present any evidence that RPF acted intentionally, with maliciousness, or that it committed a "per se wrongful act." Even if Knight could show some "intentional inducement" for Saleh to breach its contract, for Knight to succeed on the claim, it had to show "improper conduct" as defined above. *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 376; 354 NW2d 341 (1984). It generally does not constitute improper interference with a contract if a defendant simply takes "the initiative to gain an advantage over the competition," but RPF's conduct did not even rise to this level. *Wood v Herndon & Herndon Investigations, Inc*, 186 Mich App 495, 503; 465 NW2d 5 (1990). Again, Saleh breached his contracts with Knight *before* RPF knew the contracts remained in effect, as established by unrebutted evidence that Saleh repeatedly told RPF that he had no continuing fuel supply contracts with Knight.

While the trial court believed RPF should have taken some action when Knight told Fleckenstein about the contracts at the July 2008 meeting, Knight himself

stated at the meeting that by that time Saleh had already breached the agreements and Knight had stopped all fuel supplies to Saleh's stations. Thus, RPF's conduct in contracting with Saleh, as one of several fuel suppliers from which Saleh solicited to rebrand his stations, occurred after Saleh's decision to voluntarily and independently breach the agreements, for reasons having nothing to do with any conduct initiated by RPF. In sum, Knight failed to present any evidence that RPF engaged in any misconduct, let alone malicious or wrongful conduct, to induce Saleh's breach. Accordingly, for this additional reason, Knight did not establish a claim for tortious interference with a contract as a matter of law and the trial court's judgment is reversed.[1]

Reversed.

K. F. KELLY and M. J. KELLY, JJ., concurred with SAAD, P.J.

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[1] Because Knight's claim fails for the reasons stated in this opinion, we need not address RPF's other arguments on appeal.

PEOPLE v JONES

Docket No. 307184. Submitted January 10, 2013, at Detroit. Decided January 24, 2013, at 9:00 a.m. Leave to appeal denied, 494 Mich ___.

Byron Deandre Jones was convicted by a jury in the Wayne Circuit Court of three counts of assault with intent to do great bodily harm less than murder and one count each of carrying a concealed weapon (CCW) and felony-firearm. The court, Vonda R. Evans, J., sentenced defendant to 4 to 10 years in prison for each of the assault convictions, 1 to 5 years in prison for the CCW conviction, and 2 years in prison for the felony-firearm conviction. Defendant and at least one other friend, identified at trial as "Taiwan," targeted another group of young men at the Eastland Mall. Defendant and Taiwan were both armed and drew their guns during the confrontation. Defendant was the only person who fired a gun and was the only person charged with an offense from this incident. Defendant appealed.

The Court of Appeals *held*:

Offense variable (OV) 14, MCL 777.44, considers the offender's role in the entire criminal transaction. A trial court should assess 10 points for OV 14 when the offender was a leader in a multiple-offender situation. A multiple-offender situation is one consisting of more than one person violating the law while part of a group. In this case, the trial court did not clearly err by assessing 10 points for OV 14. While no other person involved in the original confrontation was charged with an offense, evidence was presented that at least one other person, Taiwan, accompanied defendant into the mall to confront the other group of men and that the two groups had a bad history. Defendant and Taiwan escalated the confrontation by drawing guns, but only defendant fired his gun. A multiple-offender situation was established when both defendant and Taiwan violated the law while part of a group.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 14 — OFFENDER'S ROLE — MULTIPLE-OFFENDER SITUATION.

Under offense variable 14, which considers the offender's role in the entire criminal transaction, a trial court should assess 10 points

> when the offender was a leader in a multiple-offender situation; a multiple-offender situation is one consisting of more than one person violating the law while part of a group (MCL 777.44).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, and *Valerie M. Steer*, Assistant Prosecuting Attorney, for the people.

Gerald Ferry for defendant.

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM. A jury convicted defendant, Byron Deandre Jones, of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and one count each of carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 4 to 10 years' imprisonment for each of the assault convictions, 1 to 5 years for the CCW conviction, and 2 years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case stems from a shooting in the Eastland Mall in Harper Woods, Michigan. Defendant and at least one other friend, identified at trial as "Taiwan," targeted another group of young men at the mall. Both defendant and Taiwan were armed and drew guns during the confrontation with the other group. However, defendant was the only person who fired his gun.

Defendant's only claim on appeal is that the trial court erred by assessing 10 points for offense variable (OV) 14 (offender's role), MCL 777.44, on the basis of its conclusion that defendant was a leader in a "multiple

offender situation." Defendant argues that the criminal transaction in this case was not a multiple-offender situation. Defendant insists that "there must be more than one person actively participating in the charged offense(s)" for there to be a multiple-offender situation under OV 14 and that he was the only person who committed the assaults and the only person charged with the underlying offenses. We reject this argument.

We review de novo "[t]he interpretation and application of the legislative sentencing guidelines." *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). "We review the trial court's scoring of a sentencing guidelines variable for clear error." *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). "A scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision." *Id.* (quotation marks and citation omitted). "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). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* (quotation marks and citation omitted).

OV 14 addresses "the offender's role" in a criminal transaction, and 10 points should be assessed when "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). When scoring OV 14, the entire criminal transaction should be considered. MCL 777.44(2)(a); see also *McGraw*, 484 Mich at 125. Our task in interpreting the language of a statute is to determine and give effect to the Legislature's intent. *People v Lowe*, 484 Mich 718, 721; 773 NW2d 1 (2009). "The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within

which they are used in the statute." *Id.* at 721-722. MCL 777.44 does not define "multiple offender situation." Thus, we may consult dictionary definitions to ascertain its plain meaning. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). The word "multiple" is defined as "consisting of more than one." *New Illustrated Webster's Dictionary of the English Language* (1992); see also *Random House Webster's College Dictionary* (2001) (defining "multiple" as "consisting of, having, or involving several or many individuals, parts, elements, relations, etc."). An "offense" is defined as a "transgression of the law," and an "offender" indicates a person who violated the law. See *Random House Webster's College Dictionary* (1997). Moreover, the statute's use of the word "leader" is significant when considering the context of the statute's use of the phrase "multiple offender situation." The word "leader" is not defined in the statute; however, the dictionary defines a "leader" as one who is a "guiding or directing head" of a group. *Id.* Therefore, the plain meaning of "multiple offender situation" as used in OV 14 is a situation consisting of more than one person violating the law while part of a group.

In this case, no other defendants were placed on trial for the shooting at the mall; defendant was the only person charged in connection with the shooting. However, the trial court did hear testimony that at least one other man, identified at trial as "Taiwan," accompanied defendant in the mall to confront the other group of young men. Moreover, trial testimony illustrated that the groups had a bad history with one another. The testimony further illustrated that the confrontation between the groups initially started out as "trash-talk" and that the group opposing defendant and Taiwan believed that there would be a fistfight; however, defendant and Taiwan escalated the confrontation from

trash-talk when they both drew guns and defendant started firing. Several witnesses testified that they heard a loud disturbance, looked to see what was happening, and saw people panicking. Because there was evidence in this case of a multiple-offender situation, i.e., a situation consisting of both defendant and Taiwan violating the law while part of a group, we conclude that the trial court did not err by assessing 10 points for OV 14.[1] See *Hornsby*, 251 Mich App at 468; MCL 750.170 (prohibiting a disturbance of the peace in a store or business place); MCL 750.234e (prohibiting the brandishing of a firearm in public); MCL 767.39 (providing that a person who aids or abets in the commission of an offense may be tried, convicted, and punished as if he or she had directly committed that offense).

Affirmed.

HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ., concurred.

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[1] We do not address whether defendant was a "leader" under OV 14 because defendant does not challenge this aspect on appeal.

In re STILLWELL TRUST

Docket No. 307822. Submitted November 15, 2012, at Lansing. Decided November 29, 2012. Approved for publication January 24, 2013, at 9:05 a.m. Leave to appeal denied, 494 Mich 868.

Gwendoline L. Stillwell executed a revocable trust on July 16, 2001, and conveyed all her property, except joint accounts, to the trust. The trust provided that, upon Stillwell's death, her children and grandchildren (including future born or adopted grandchildren) were to be the beneficiaries. The trust contained specific provisions regarding the distribution of real property and stated that the distribution would be conducted pursuant to a written list that would be prepared and signed by Stillwell, the initial trustee of the trust. Before Stillwell died in May 2010, she instructed one of her grandsons to take an envelope to David N. McPhail, the husband of one of Stillwell's daughters, Mary McPhail, if something happened to Stillwell. The envelope stated that inside was a summary of Stillwell's estate and instructions. Following Stillwell's death, David N. McPhail, as the successor trustee of Stillwell's trust, petitioned the Clinton County Probate Court to construe the trust in light of the notes in the envelope from Stillwell. The notes, which were in Stillwell's handwriting and were dated but were unsigned, included lists and descriptions of personal property. The notes also contained several entries that were inconsistent with the terms of the trust, including that David N. McPhail was to share in the distribution of the personal property and that the college tuition of two of Stillwell's grandchildren, Jacob and Dessa McPhail, was to be paid from the estate before any of the estate was distributed to the beneficiaries. Petitioner David N. McPhail also sought a determination that Avery McPhail, the daughter of Dessa, was a grandchild-beneficiary of the trust because David N. McPhail and Mary McPhail had adopted Avery six days after Stillwell's death. The court, Lisa Sullivan, J., entered an opinion and order holding that Stillwell's handwritten notes constituted both a valid amendment of the trust and a list governing the disposition of Stillwell's personal property. The holdings included that David N. McPhail was to share in the distribution of the personal property and that the student loans

of Jacob and Dessa were to be paid before the remainder was paid to the beneficiaries. Finally, the court held that Avery was a "grandchild" beneficiary with regards to the trust. Respondents, Christine Ann Dudley-Marling (Stillwell's other daughter) and her two children, Ian Dudley-Marling and Anne Dudley-Marling, appealed.

The Court of Appeals *held*:

1. A settlor may amend a written revocable trust pursuant to MCL 700.7602(3)(a) by substantially complying with a method provided in the terms of the trust. The paragraph of the trust in this case governing amendment provided that the grantor could by written instrument delivered to the trustee modify or alter the agreement in any manner. This paragraph did not require the grantor to sign the instrument. Although the notes were unsigned and not entitled an "amendment," Stillwell clearly intended the notes to create a list governing the distribution of her personal property and intended to amend the trust. Stillwell clearly showed her intent that the contents of the notes be her final directive on the distribution of her entire estate. Stillwell modified how all her assets would be distributed by substantially complying with the terms of the trust that governed its amendment. She altered the disposition of the trust assets by providing that the tuition of Jacob and Dessa be paid before any other distributions, and she altered the disposition of the personal property by including David N. McPhail in the distribution. The probate court properly held that the notes constituted an amendment of the trust to the extent that the tuition of Jacob and Dessa should be paid first and David N. McPhail should participate in the distribution of the personal property. That part of the order of the probate court was affirmed.

2. The language of the trust showed that Stillwell created a class gift to her grandchildren and intended that her estate vest and the class of grandchildren-beneficiaries close at her death. Absent a clear indication to the contrary, membership in a class is generally to be ascertained at the death of the testator. Although the trust defined "grandchild" to include future born or adopted grandchildren, that definition did not change the fact that the class closed at Stillwell's death. The estate vested and the class of beneficiaries closed at Stillwell's death. Avery was not Stillwell's grandchild at the time of her death. The part of the order of the probate court identifying Avery as a grandchild entitled to a share of the estate was reversed.

Affirmed in part and reversed in part.

TRUSTS — AMENDMENTS OF TRUSTS — ESTATES AND PROTECTED INDIVIDUALS CODE.

The Estates and Protected Individuals Code, MCL 700.1101 *et seq*., governs the application of a trust in Michigan; section 7602(3)(a) of the code provides that a settlor may amend a written revocable trust agreement by substantially complying with a method provided in the terms of the trust (MCL 700.7602[3][a]).

Fortino Plaxton & Costanzo, P.C. (by *Charles M. Fortino*), for petitioner.

Schram, Behan & Behan (by *Michael R. Behan*) for respondents.

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

PER CURIAM. Respondents-appellants, Christine Ann Dudley-Marling, Ian Dudley-Marling, and Anne Dudley-Marling, appeal as of right a December 5, 2011, probate court order wherein the court held that certain handwritten notes constituted both a valid amendment of the Gwendoline Louise Stillwell Trust (the trust) and a list governing the disposition of the settlor's personal property and that Avery McPhail was a grandchild-beneficiary with regard to the trust. For the reasons set forth in this opinion, we affirm the probate court's order in part and reverse the order in part.

I. FACTS AND PROCEDURAL HISTORY

During her lifetime, the settlor, Gwendoline Stillwell, had two children, Mary McPhail and Christine Dudley-Marling. Mary married petitioner-appellee, David N. McPhail, who is the successor trustee of the trust. Together, Mary and petitioner had three children (David Maxwell McPhail, Jacob McPhail, and Dessa McPhail), and they have one grandchild, Avery McPhail

(the daughter of Dessa). Christine had two children, Ian Dudley-Marling and Anne Dudley-Marling.

On July 16, 2001, Stillwell executed the trust, a revocable trust, designating herself as the initial trustee. Stillwell conveyed all her property, excluding joint accounts, to the trust. The trust provided that, upon Stillwell's death, "my children and grandchildren (including future born or adopted grandchildren) are the beneficiaries of this Trust." The trust contained specific provisions regarding the distribution of real property, and it provided for the distribution of personal property pursuant to a written list that would be prepared and signed by Stillwell. The trust provided that any remaining property would be distributed in equal shares to the beneficiaries. Finally, the trust contained a clause that provided: "The Grantor may by instrument in writing delivered to the Trustee . . . modify or alter this Agreement in any manner . . . ."

Stillwell died in May 2010. Sometime before her death, Stillwell had instructed her grandson Jacob, who was age 27 at the time, that he was to take a large envelope to petitioner if anything ever happened to her. The envelope was addressed to petitioner and stated: "In the event of my death or if I happen to become incapacitated so that living alone is futile, open this envelop [sic]. There in [sic] lies a summary of my estate and instructions." The envelope contained several pages of handwritten notes in sequential order with the most recent document on top. The notes were unsigned, but were dated. Many of the writings included lists and descriptions of personal property; however, Stillwell had made several entries that were inconsistent with the terms of the trust. Specifically, Stillwell instructed that peti-

tioner was to share in the distribution of her personal property and that both Jacob's and Dessa's college tuition was to be paid from the estate before the estate was distributed to the beneficiaries.

On August 17, 2011, petitioner, as successor trustee, petitioned in the probate court to construe the trust in light of Stillwell's notes and determine the effect the notes had on the disposition of the assets in the trust. In addition, at a hearing, petitioner indicated that he and Mary had adopted Avery (the daughter of Dessa) six days after Stillwell's death. Petitioner argued that the adoption made Avery one of Stillwell's grandchildren, entitling her to a share of the estate. Respondents objected, arguing that the notes had no effect on the distribution of the estate because they were unsigned and did not refer to the trust or contain the word "amendment." Respondents also argued that Avery was not a beneficiary of the trust because she had not been a member of the grandchildren class of beneficiaries at the time of Stillwell's death.

Following an evidentiary hearing, the probate court entered an opinion and order on December 5, 2011, wherein it held that the handwritten notes constituted both a valid amendment of the trust and a list governing the disposition of Stillwell's personal property. The court concluded that, pursuant to the handwritten notes, petitioner was to share in the distribution of the personal property and that Jacob's and Dessa's student loans (approximately $76,244) were to be paid in full from the trust assets before the remainder was distributed to the beneficiaries. Finally, the probate court concluded that Avery was a beneficiary of the trust because the fourth paragraph of the trust provided that "grandchildren" beneficiaries included "future born or adopted grandchildren . . . ." This appeal ensued.

II. ANALYSIS

Respondents raise two issues on appeal. Respondents contend that the handwritten notes did not have any lawful effect on the distribution of the trust assets because they were unsigned and did not contain the word "amendment." Respondents also contend that the probate court erred by holding that Avery was a beneficiary of the trust.

We review de novo a probate court's construction and interpretation of the language used in a will or a trust. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). When construing a trust, "a court's sole 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). Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust. *Id*. A probate court's factual findings are reviewed for clear error. *In re Raymond Estate*, 483 Mich 48, 52-53; 764 NW2d 1 (2009).

With respect to the amendment of a trust, the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., governs the application of a trust in Michigan. *In re Temple Marital Trust*, 278 Mich App 122, 127-128; 748 NW2d 265 (2008). MCL 700.7602(3)(a) provides that a settlor may amend a written revocable trust agreement "[b]y substantially complying with a method provided in the terms of the trust."

In this case, the ninth paragraph of the trust governed amendment and provided that "[t]he Grantor may by instrument in writing delivered to the Trustee . . . modify or alter this Agreement *in any manner* . . . ." (Emphasis added.) The paragraph did not require the grantor to sign the instrument. There is no

dispute that Stillwell had the mental capacity to amend the trust, and there is no evidence of undue influence. Further, there is no dispute that the notes are in Stillwell's handwriting. Essentially, at issue is whether the lack of a signature and the absence of the word "amendment" are fatal to Stillwell's attempt to alter the disposition of her estate. A review of the contested notes shows that although the notes were unsigned and were not entitled an "amendment," Stillwell nevertheless clearly intended to create a list governing the distribution of her personal property and intended to amend the trust.

Stillwell placed the notes inside a large envelope that had specific directions to petitioner, the successor trustee, regarding her entire estate, indicating that she intended the documents to constitute more than just a list concerning the distribution of her personal property. In particular, Stillwell referred to the notes as "a summary of my estate and instructions," and she summarized her entire estate on the outside of the envelope, including real property, gold, bank accounts, and stocks. In the notes, Stillwell again referred not only to personal property, but also to all her assets. Stillwell clearly showed her intent that the contents of the notes constituted her final directive on the distribution of her entire estate. For example, Stillwell directed how her real property should be distributed in the event that any of her heirs had lived with her and provided care. She directed the successor trustee to divide all her assets. In one entry, she stated: "Given my age, however, all property must be up to date. Some stipulations are in order." On April 17, 2010, Stillwell stated, "My latest directions are as follows" and then dictated how she wanted her assets to be divided. In addition, on October 4, 2009, she stated, "This is my latest directive to the family."

Moreover, Stillwell modified how her assets were to be distributed. In the trust, apart from specific instructions with respect to her real property, Stillwell directed that her assets be divided evenly among the beneficiaries. In contrast, Stillwell clearly indicated in the notes that Jacob's and Dessa's college tuition was to be paid before any other distribution of her assets. Specifically, on November 3, 2010, Stillwell made two written entries that read as follows:

> When the assets are assembled and before dividing begins pay all college debts for Jacob McPhail and Dessa McPhail.
>
> * * *
>
> Dessa McPhail and [Jacob] McPhail's college loans must be paid ahead of any divisions of the estate.

These entries clearly show that Stillwell intended to alter the disposition of the trust assets by providing that both Jacob's and Dessa's tuition would be paid before any other distribution.

Furthermore, Stillwell modified the distribution of her personal property. In the trust, Stillwell provided that her personal items were to be distributed to the beneficiaries. In the notes, Stillwell indicated that she wanted petitioner to also share in the distribution of her personal property. Specifically, on November 3, 2010, Stillwell wrote, "[G]ive all heirs and include David N. McPhail the opportunity to choose personal items" and "David N. McPhail is to be included in the divisions of personal items . . . ." Near the last entry, Stillwell included an asterisk in the margin and wrote, "[C]hange from previous." On October 4, 2009, Stillwell referred to her personal possessions and wrote, "I wish all the heirs to choose as they wish," and in the margin

on the same page she drew an arrow to that sentence and wrote, "Also include David N. McPhail as he was a wonderful soninlaw [sic]."

In sum, Stillwell substantially complied with the terms of the trust that governed an amendment when she drafted the handwritten notes and ensured that they were delivered to the successor trustee upon her incapacitation. MCL 700.7602(3)(a). Accordingly, the probate court properly held that the notes constituted an amendment of the trust to the extent that Jacob's and Dessa's tuition should be paid from the assets of the trust and that petitioner should participate in the distribution of personal property.

In addition, we conclude that the notes govern the disposition of Stillwell's personal property. The trust provided that Stillwell had either prepared or would prepare a signed, written list designating that certain personal property be given to certain persons. Although the handwritten notes were unsigned, aside from an amendment discussed above, the crux of the notes was to direct how to dispose of Stillwell's personal belongings. In the notes, Stillwell clearly showed her intent to distribute her personal property in accordance with her directives therein. Moreover, the requirement that the list be signed was to ensure the validity of the document; here, no one questioned the validity of the notes. It is undisputed that the notes were in Stillwell's handwriting, that Stillwell included the notes in an envelope with instructions to the successor trustee, and that Stillwell had the notes delivered to the successor trustee upon her incapacitation. In taking these steps, Stillwell clearly showed her intent that the notes constitute a final list governing the distribution of her personal property. Furthermore, Stillwell arguably satisfied the signature requirement because the notes were

in Stillwell's own handwriting and contained statements by her about her health and well-being at the time the notes were written. In sum, the probate court did not err when it ordered petitioner to distribute the personal property in accordance with the directives in the handwritten notes.

Next, respondents contend that the probate court erred by concluding that Avery was a beneficiary of the trust. The fourth paragraph of the trust was entitled "Provisions Applicable Upon Death of Grantor," and it provided, in relevant part, as follows:

> A. Beneficiaries upon Death of Grantor.
>
> * * *
>
> 2. I have only two children: ***Mary Denise McPhail*** and ***Christine Ann Dudley-Marling***. I have five grandchildren: ***David Maxwell McPhail***, ***Jacob Preston McPhail***, ***Dessa Rose McPhail***, ***Ann Dudley-Marling***, and ***Ian Dudley-Marling***.
>
> 3. It is my intent . . . that my children and grandchildren (including future born or adopted grandchildren) are the beneficiaries of this Trust. After my death if the Trustee makes any distributions . . . they shall be in equal portions, per capita, to all of my grandchildren and children.

Petitioner contends that Avery is a beneficiary of the trust because she became Stillwell's "grandchild" when, six days after Stillwell's death, petitioner and Mary adopted Avery. Respondents counter that Avery was not a class member at the time of Stillwell's death.

The language of the trust shows that Stillwell created a class gift to her grandchildren. Absent a clear indication to the contrary, membership in a class is generally to be ascertained at the death of the testator. *In re Fitzpatrick Estate*, 159 Mich App 120, 128; 406 NW2d

483 (1987);[1] *Veeser v Stenglein*, 314 Mich 29, 35; 22 NW2d 59 (1946); *In re Churchill's Estate*, 230 Mich 148, 158-159; 203 NW 118 (1925); see also *In re Reisman Estate*, 266 Mich App at 527 (stating that the general rules of construction applicable to wills also apply to trusts).

The plain language of the trust shows that Stillwell intended her estate to vest and the class of grandchildren-beneficiaries to close at her death. In particular, the fourth paragraph of the trust is entitled "**Provisions Applicable *Upon Death of Grantor.***" (Emphasis added.) The paragraph subsequently identifies beneficiaries of the trust in a clause that contains the header, "Beneficiaries *upon Death of Grantor.*" (Emphasis added.) Moreover, although the trust defined "grandchild" to include "future born or adopted grandchildren," that definition did not change the fact that the class closed at Stillwell's death. Instead, the definition was in place so that in the event Stillwell had additional grandchildren during her lifetime, they would also be included as beneficiaries with the other named grandchildren. In sum, Stillwell's estate vested and the class of beneficiaries closed at her death. Accordingly, given that Avery was not Stillwell's grandchild at that time, she was not a class member and is not entitled to a share of the estate; the probate court erred by concluding otherwise.

For the reasons set forth in this opinion, the probate court's order is affirmed in part and reversed in part. We do not retain jurisdiction. Both parties

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[1] Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority, *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 444 n 4; 773 NW2d 29 (2009).

having presented valid arguments on appeal, neither party may tax costs. MCR 7.219(A).

BORRELLO, P.J., and FITZGERALD and OWENS, JJ., concurred.

PEOPLE v DEROCHE

Docket No. 304759. Submitted December 6, 2012, at Detroit. Decided January 29, 2013, at 9:00 a.m.

Craig Michael Deroche was charged with possession or use of a firearm by a person under the influence of alcoholic liquor, MCL 750.237. Police officers responded to a call involving a verbal altercation and were informed that defendant had been drinking, that there had been an argument, and that he had run into the woods. The police searched for defendant to check on his welfare, but they were unable to locate him. Two hours later, officers investigated a disturbance call at a home and were informed that defendant was in the house with a gun and that the witness had seen defendant in the house, but had not seen a gun. They were also informed by defendant's mother-in-law in the house that defendant no longer had the gun because she had taken and hidden it. A police officer spoke with defendant after he came downstairs, then arrested him for possession of a firearm while intoxicated. Defendant filed a motion in the 52-1 District Court to dismiss the charge as violating the Second Amendment of the United States Constitution and to suppress evidence as the result of an unlawful seizure. The court, Brian MacKenzie, J., dismissed the charge on the basis of the Second Amendment, but also concluded that the officer's continued presence in the house after the weapon was secured was unlawful. The prosecution appealed the dismissal in the Oakland Circuit Court. The circuit court, Colleen A. O'Brien, J., affirmed the dismissal without addressing the Second Amendment issue, concluding that the evidence was unlawfully seized in violation of the Fourth Amendment of the United States Constitution. The prosecution appealed, and defendant cross-appealed by leave granted.

The Court of Appeals *held*:

Both the United States and Michigan Constitutions grant individuals the right to keep and bear arms for self-defense, US Const, Am II; Const 1963, art 1, § 6. The core of the Second Amendment is the right of responsible citizens to use arms in defense of hearth and home, but that right is not absolute. Gun possession may be categorically regulated by classes of persons,

such as felons and the mentally ill. To determine whether a facially constitutional statute is unconstitutional as applied to a particular person, it must be determined (1) whether the challenged law burdens conduct that falls with the scope of the Second Amendment right as historically understood and (2) whether, using the intermediate scrutiny standard, the government could establish that there is a reasonable fit between the asserted substantial or important governmental objective and the burden placed on the individual. MCL 750.237, which prohibits a person from possessing or carrying a firearm when he or she is under the influence of intoxicating liquor, is a presumptively lawful regulatory measure because individuals under the influence of intoxicating liquor could pose a serious danger to society if permitted to possess or carry a firearm. Defendant's lawful possession of a handgun in his own home, with no evidence to suggest that it was to be used for an unlawful purpose, was protected by the Second Amendment. While preventing intoxicated individuals from committing crimes involving handguns is an important governmental objective, the infringement of defendant's right in this case was not substantially related to that objective. Defendant's possession of the gun was constructive rather than actual when the police officers entered the home. The government's legitimate concern is not that a person who has consumed alcohol is in the vicinity of a firearm but that he or she actually has it in his physical possession. The district court did not err by holding that MCL 750.237, as applied to defendant was unconstitutional.

Affirmed.

CONSTITUTIONAL LAW — FIREARMS — CONSTRUCTIVE POSSESSION WHILE INTOXICATED.

MCL 750.237 prohibits a person from possessing or carrying a firearm when he or she is under the influence of intoxicating liquor; an intoxicated individual may possess a firearm in her or her home without violating MCL 750.237 when the possession was constructive and there is no evidence that the individual was going to use the gun for an unlawful purpose; lawful constructive possession of a handgun in an individual's home while that individual is intoxicated is protected by the Second Amendment (US Const. Am II; Const 1963, art 1, § 6).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney,

Thomas R. Grden, Appellate Division Chief, and *Matthew A. Fillmore*, Assistant Prosecuting Attorney, for the people.

The Law Offices of Steven W. Dulan (by *Steven W. Dulan*) for defendant.

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM. This case presents a question of first impression, namely whether the Second Amendment of the United States Constitution precludes a prosecution for possession or use of a firearm by a person under the influence of alcoholic liquor, MCL 750.237, when the prosecution's theory is one of constructive possession in the defendant's own home. We conclude that it does.

Two Novi police officers were dispatched to a call involving a verbal altercation. When they arrived at the scene, they were informed by a man identified as James Hamlin (a friend of defendant) that defendant had run off into the woods, that there had been an argument, and that defendant had been drinking. The officers searched the area for defendant to do a welfare check, but they were unable to locate him and ended their search.

Approximately two hours later, one of those officers, Officer Shea, along with other officers, was dispatched to a disturbance call at a home. Hamlin was again present, outside the home, and informed the officers that defendant was inside the house with a gun. But he also told Officer Shea that he could see defendant in the house, but did not see a gun.

The officers approached the house and spoke with defendant's mother-in-law at the door. The mother-in-law stated that defendant no longer had a gun and that she had taken it and hidden it in the house. She let the

officers in and showed them the gun that she had hidden in the bottom of a garbage can in the laundry room; the clip was found next to the gun. Officer Shea indicated that he wished to speak with defendant and was informed that defendant was upstairs.

The officers made their first contact with defendant while they were standing at the bottom of the stairs and defendant stood at the top of the stairs. Defendant initially refused to come down, but eventually complied with the officers' request. They stepped outside onto the front porch. Defendant was arrested for possession of a firearm while intoxicated.

Defendant moved in the district court both to suppress evidence on the basis of an unlawful entry into his home and to dismiss the charge under the Second Amendment. The district court conducted an evidentiary hearing, concluding that while there was evidence based on a blood alcohol test that defendant was intoxicated, no evidence was introduced to show that defendant was in actual physical possession of the gun. The district court dismissed the charge, primarily relying on the Second Amendment argument. But it also concluded that the officers' continued presence in the home after securing the weapon was unlawful.

The prosecution appealed the dismissal in the circuit court. The circuit court declined to address the Second Amendment issue, but agreed with the district court that there had been a Fourth Amendment violation and, therefore, concluded that the district court had properly dismissed the charge. The prosecution now appeals and defendant cross-appeals by leave granted.

We take the opposite approach to that of the circuit court. We decline to address the search question and instead affirm the district court on the basis of the Second Amendment.

Defendant argues that MCL 750.237, as applied to defendant, is unconstitutional because it violates his federal and state right to bear arms in his home for purposes of self-defense. We agree. We review de novo issues of constitutional construction. *People v Yanna*, 297 Mich App 137, 142; 824 NW2d 241 (2012). We presume statutes to be constitutional unless their unconstitutionality is clearly apparent and, if possible, the statute is to be construed as constitutional. *Id*. at 146.

Both the United States Constitution and the Michigan Constitution "grant individuals a right to keep and bear arms for self-defense." *Id*. at 142. The Second Amendment of the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." US Const, Am II.[1] Article 1, § 6 of the 1963 Michigan Constitution, which is Michigan's equivalent to the Second Amendment, states, "Every person has a right to keep and bear arms for the defense of himself and the state." "The Second Amendment is fully applicable to the states through the Fourteenth Amendment." *Yanna*, 297 Mich App at 142; see also *McDonald v Chicago*, 561 US ___; 130 S Ct 3020, 3050; 177 L Ed 2d 894 (2010). Therefore, we review this issue within the parameters of the United States Supreme Court's interpretation of the Second Amendment.

The Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." *Dist of Columbia v Heller*, 554 US 570, 592; 128

[1] In addressing whether the rights protected by the Second Amendment extended to individuals, the United States Supreme Court concluded, "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an *individual* right to keep and bear arms." *Dist of Columbia v Heller*, 554 US 570, 595; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (emphasis added).

S Ct 2783; 171 L Ed 2d 637 (2008). "At the 'core' of the Second Amendment is the right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.' " *United States v Barton*, 633 F3d 168, 170 (CA 3, 2011), quoting *Heller*, 554 US at 635. In striking down a statute that banned the possession of handguns in the District of Colombia, the Supreme Court held:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family" would fail constitutional muster. [*Heller*, 554 US at 628-629 (citation omitted).]

Thus, the Supreme Court concluded that the "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id*. at 635.

While acknowledging "the problem of handgun violence in this country," the Supreme Court stressed that the "Constitution leaves . . . a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Id*. at 636 (emphasis added; citation omitted). The Supreme Court therefore recognized that the right to carry and bear arms under the Second Amendment is not unlimited. *Id*. at 626-627. Specifically, the Supreme Court stated that

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [*Id*.]

Notably, the Supreme Court clarified in an accompanying footnote that in providing these examples, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id*. at 627 n 26. That language suggests and has been interpreted to mean that "the Second Amendment permits categorical regulation of gun possession by classes of persons—e.g., felons and the mentally ill . . . ." *United States v Booker*, 644 F3d 12, 23 (CA 1, 2011); see *United States v Skoien*, 614 F3d 638, 640 (CA 7, 2010) ("[S]tatutory prohibitions on the possession of weapons by some persons are proper—and, importantly for current purposes, that the legislative role did not end in 1791. That *some* categorical limits are proper is part of the original meaning, leaving to the people's elected representatives the filling in of details."); see also *United States v Yancey*, 621 F3d 681, 683 (CA 7, 2010) ("We have already concluded, based on our understanding of *Heller* and *McDonald*, that some categorical firearms bans are permissible; Congress is not limited to case-by-case exclusions.").

It follows that a statute, such as the one in this case, could fall within the categories of presumptively lawful regulatory measures.[2] Like the restrictions preventing felons, the mentally ill, or illegal drug users from

[2] Recently, a few federal courts have concluded that it is constitutionally permissible to prohibit individuals who have been convicted of a crime of domestic violence from possessing, shipping, or receiving firearms or prohibiting illegal drug users from firearm possession. *Booker*, 644 F3d at 22-26; *Skoien*, 614 F3d 640-641; *Yancey*, 621 F3d at 683-686.

possessing firearms because they are viewed as at-risk people in society who should not bear arms, individuals under the influence of alcoholic liquor may also pose a serious danger to society if permitted to possess or carry firearms because those individuals will have "difficulty exercising self-control, making it dangerous for them to possess deadly firearms." *Yancey*, 621 F3d at 685. At this juncture, assuming that the statute at hand is facially constitutional, *Yanna*, 297 Mich App at 145-146, the issue is whether the statute, as applied to defendant, is unconstitutional.

MCL 750.237(1), restricts the possession of a firearm as follows:

> An individual shall not carry, have in possession or under control, or use in any manner or discharge a firearm under any of the following circumstances:
>
> (a) The individual is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
>
> (b) The individual has an alcohol content of 0.08 or more grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> (c) Because of the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the individual's ability to use a firearm is visibly impaired.

Turning to whether this statute is unconstitutional as applied, various United States Courts of Appeals, including the Sixth Circuit, have adopted the following two-pronged approach in addressing Second Amendment challenges:

> Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood. [*United States v Chester*, 628 F3d 673, 680 (CA 4,

> 2010).] As the Seventh Circuit recognized, "*Heller* suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified." [*Ezell v Chicago*, 651 F3d 684, 702 (CA 7, 2011).] If the Government demonstrates that the challenged statute "regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 [Bill of Rights ratification] or 1868 [Fourteenth Amendment ratification]—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review." *Id*. at 702–[7]03.
>
> "If the government cannot establish this—if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Id*. at 703. Under this prong, the court applies the appropriate level of scrutiny. [*United States v Marzzarella*, 614 F3d 85, 89 (CA 3, 2010).] If the law satisfies the applicable standard, it is constitutional. *Id*. If it does not, "it is invalid." *Id*. [*United States v Greeno*, 679 F3d 510, 518 (CA 6, 2012).]

In applying this approach to the issue presented on appeal, the threshold inquiry is whether MCL 750.237 regulates conduct that falls within the scope of the Second Amendment right as historically understood. *Id*. at 518. The Second Amendment protects a "law-abiding" person's right to bear arms in his or her home as a means of self-defense. *Heller*, 554 US at 635. A right to possess a handgun in one's home as a means of self-defense is a constitutional right that is at the core of Second Amendment protection.

While Second Amendment rights are not unlimited, this conduct is protected. Aside from the statute at issue, defendant was not engaging in an unlawful

behavior and there was no evidence to suggest that defendant possessed the handgun for an unlawful purpose. Further, it was not established that this is a case in which someone was unlawfully allowed to own or possess a handgun in the first instance. Additionally, the prosecution has failed to establish that the conduct at issue has historically been outside of the scope of Second Amendment protection. *Greeno*, 679 F3d at 518. Given our earlier discussion, defendant's conduct fell within the protections of the Second Amendment. While the perceived danger associated with intoxicated individuals and handguns is real and important, these issues are addressed by analyzing the conduct under the second prong of the *Greeno* test as discussed below.

Upon finding that defendant's conduct falls within Second Amendment protections, the next inquiry is whether the government can justify by some standard of scrutiny the burden that it wishes to impose on defendant. While defendant argues that the appropriate standard of constitutional scrutiny should be strict scrutiny, the intermediate scrutiny standard is most appropriate.[3] Under this standard, the government bears the burden of establishing that there is a reasonable fit between the asserted substantial or important governmental objective and the burden placed on the individual. See *Marzzarella*, 614 F3d at 97-98. The prosecution has failed to meet this burden.

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[3] Because the burden here does not amount to a severe burden on one's Second Amendment rights, i.e., a complete ban on possession of a firearm in one's home, but amounts instead to a lesser burden that relates to the manner in which a person may lawfully exercise his or her Second Amendment rights, as in First Amendment jurisprudence, intermediate scrutiny applies. See *Marzzarella*, 614 F3d at 95-98. Additionally, defendant has not presented any state or federal cases since *Heller* that used a strict scrutiny standard when evaluating Second Amendment challenges.

While preventing intoxicated individuals from committing crimes involving handguns is an important governmental objective, the infringement on defendant's right in the instant case was not substantially related to that objective. We initially note that at the time of the officers' entry into the home, and at the time they were actually able to establish the level of defendant's intoxication, defendant's possession was constructive rather than actual. Thus, to allow application of this statute to defendant under these circumstances, we would in essence be forcing a person to choose between possessing a firearm in his or her home and consuming alcohol. But to force such a choice is unreasonable. As the facts illustrate, there was no sign of unlawful behavior or any perceived threat that a crime involving a handgun would be committed. We note that the Legislature, in crafting the concealed-pistol-license statute, recognized both the concern with an intoxicated person carrying a firearm and that it is unnecessary to prohibit an intoxicated person from merely being in the vicinity of a firearm. Under MCL 28.425k(2), it is an offense for a person to carry a concealed pistol while under the influence of alcohol.[4] But MCL 28.425k(3) provides for the intoxicated person to have the pistol secured in a vehicle in which the person is an occupant without violating the provisions of subsection (2). In other words, the government's legitimate concern is not that a person who has consumed alcohol is in the vicinity of a firearm, but that the person actually has it in his or her physical possession.

[4] And we note that the blood alcohol level proscribed under the concealed-pistol statute is much lower than that under the statute prohibiting the possession of a firearm while intoxicated. Compare MCL 28.425k(2)(c) and MCL 750.237(1)(b).

In conclusion, the government cannot justify infringing on defendant's Second Amendment right to possess a handgun in his home simply because defendant was intoxicated in the general vicinity of the firearm. Accordingly, the district court did not err by holding that MCL 750.237, as applied to defendant, was unconstitutional.

Affirmed.

JANSEN, P.J., and SAWYER and FORT HOOD, JJ., concurred.

PEOPLE v GREEN

Docket No. 308133. Submitted November, 7, 2012, at Lansing. Decided January 29, 2013. Reversed, 494 Mich 865.

Tony Allen Green was charged in the 56B District Court, Michael L. Schipper, J., with the delivery of marijuana, MCL 333.7401(2)(d)(*iii*), after he gave the controlled substance to Al Thornton. In accordance with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., defendant possessed a patient registry card for the use of marijuana for medical purposes and Thornton had the equivalent of a registry identification card because he had applied for it more than 20 days before the transfer of the marijuana, MCL 333.26429(b). Thornton did not pay money for the marijuana that defendant gave him and the amount transferred was below the amount that a registered qualifying patient is permitted to possess under MCL 333.7404(a). Defendant moved to quash the bind over, arguing that the transfer of marijuana between two patients was protected medical use under the MMMA. The court declined to consider defendant's argument and bound him over on the charged offense. Defendant then moved in the Barry Circuit Court to dismiss the charge, arguing that he was immune from prosecution, MCL 333.26424(a), because under MCL 333.26423(e), the phrase medical use included deliveries and transfers of marijuana to another registered qualified patient. The circuit court, Amy L. McDowell, J., agreed with defendant's argument and dismissed the charge, concluding that for purposes of immunity under the MMMA, transfers were not limited to the patient-caregiver relationship that was authorized under MCL 333.26424(b). The prosecution appealed.

The Court of Appeals *held*:

1. The medical use of marijuana is permitted to the extent that it is carried out in accordance with the MMMA. Section 4(a) provides that a defendant is immune from arrest, prosecution, or penalty if the defendant is a qualifying patient, who had been issued and possesses a registry identification card, and possesses less than 2.5 ounces of useable marijuana. It is not disputed that defendant was a qualifying patient who was issued and possessed a registry identification card, that the amount of marijuana

involved was less than 2.5 ounces of marijuana, and that defendant received no compensation for the transfer.

2. The phrase "medical use" is defined in MCL 333.26423(e) to mean the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marijuana, or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition. The circuit court properly dismissed the delivery of marijuana charge against defendant. Under the express terns of MCL 333.26423(e), the transfer and delivery of marijuana between registered patients specifically constitute "medical use" that is protected by § 4(a) of the MMMA. While this court recognized in *Michigan v McQueen*, 293 Mich App 644, 668 (2011), that the patient-to-patient sale of marijuana was not protected by the immunity granted by the MMMA because the term "sale" was not included in the statutory definition of "medical use," the transfer or delivery of marijuana without compensation is expressly included in that statutory definition, MCL 333.26423(e). The Court of Appeals declined to read a restriction limiting transfers to a patient-caregiver relationship into the statute.

Affirmed.

CONTROLLED SUBSTANCES — MARIJUANA — MICHIGAN MEDICAL MARIHUANA ACT — IMMUNITY FROM ARREST, PROSECUTION, OR PENALTY — WORDS AND PHRASES — MEDICAL USE — TRANSFER OR DELIVERY OF MARIJUANA.

The phrase "medical use" as defined in the Michigan Medical Marihuana Act (MMMA) means the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marijuana, or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition; the transfer or delivery of marijuana between qualified registered patients, without compensation, constitutes "medical use" for purposes of determining immunity from arrest, prosecution, or penalty for such transfer or delivery under § 4(a) of the MMMA (MCL 333.26423[e]; MCL 333.26424[a]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Jennifer Clark*, Assistant Attorney General, for the people.

Newburg Law, PLLC (by *Matthew R. Newburg* and *Eric W. Misterovich*) for defendant.

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

PER CURIAM. In this medical marijuana case, the prosecution appeals as of right the circuit court's order finding defendant, Tony Allen Green, a registered medical marijuana patient, immune from prosecution under MCL 333.26424(a) of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, for his transfer of marijuana to another registered medical marijuana patient.[1] Because we conclude that the uncompensated transfer of marijuana between patients constitutes the medical use of marijuana as permitted by the MMMA, we affirm.

The facts in this case are undisputed. On September 7, 2011, defendant gave Al Thornton marijuana. The transfer of marijuana occurred in Nashville, Michigan. On the date of the transfer, defendant possessed a patient registry card, and Thornton had submitted a valid application for a registry identification card more than 20 days before the transfer; thus, under MCL 333.26429(b), his application was the equivalent of a registry identification card. The amount of marijuana transferred was less than the 2.5 ounces that a registered qualifying patient is permitted to possess under § 4(a) of the MMMA. Authorities did not arrest Thornton in connection with his receipt of marijuana from defendant; however, defendant was arrested after authorities learned that he gave Thornton marijuana.

[1] Although the statutory provisions at issue refer to "marihuana," by convention this Court uses the more common spelling "marijuana" in its opinions.

At his preliminary examination in district court, defendant argued that bindover was not appropriate because a transfer of marijuana between two patients constituted protected medical use under the MMMA. The district court declined to consider defendant's argument and bound him over to the circuit court on the charge of delivery of marijuana in contravention of MCL 333.7401(2)(d)(*iii*). On November 28, 2011, defendant moved the circuit court to dismiss the charges on the basis of § 4(a) of the MMMA. Defendant argued that, because under MCL 333.26423(3)(e) "medical use" includes "delivery" and "transfer," he was immune from prosecution under § 4(a). The prosecution opposed defendant's motion and argued that delivery of marijuana was only authorized under § 4(b), the provision governing primary caregivers, and was thus not applicable to defendant because defendant was not Thornton's primary caregiver.

Following the parties' arguments, the circuit court concluded that the plain language of § 4(a) entitled defendant to a presumption of medical use, a presumption which the prosecution failed to rebut. The circuit court noted that the statutory definition of "medical use" included the "transfer" of marijuana, and in this case, defendant transferred marijuana to Thornton. The circuit court opined that the transfer could be inferred to have occurred for the purpose of assisting in the use or administration of marijuana to alleviate the patient's pain. The circuit court rejected the prosecution's argument that transfers could only occur in the context of a patient-caregiver relationship. In making this determination, the circuit court noted that patients were not required to select a primary caregiver, a conclusion underscored by the fact that children under the age of 18 are required under MCL 333.26426(b), to have a primary caregiver. Thus there did not need to be a patient-caregiver relation-

ship to justify the transfer of marijuana under the MMMA. Having found defendant was engaged in the "medical use" of marijuana, the circuit court granted defendant's motion to dismiss, and on December 22, 2011, the circuit court entered a conforming order. The prosecution now appeals as of right.

On appeal, the prosecution argues that the circuit court erred by dismissing the charges against defendant because the MMMA does not grant immunity for patient-to-patient transfers of marijuana. Thus, the issue before us is whether the immunity granted by § 4(a) of the MMMA extends to uncompensated patient-to-patient transfers of marijuana.

We review for an abuse of discretion a trial court's decision on a motion to dismiss charges against a defendant. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010). "A trial court may be said to have abused its discretion only when its decision falls outside the range of principled outcomes." *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012).

We review de novo a trial court's interpretation of the MMMA. *Michigan v McQueen*, 293 Mich App 644, 653; 811 NW2d 513 (2011). The MMMA was enacted as a result of an initiative adopted by the voters in the November 2008 election. *Id*. at 658. This Court explained the rules of construction that apply to the interpretation of an initiative law in *People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010):

> "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and "[w]e must consider both the plain meaning of the

> critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005).

It is illegal for a person to possess, use, manufacture, create, or deliver marijuana under the Public Health Code (PHC), MCL 333.1101 *et seq*. *McQueen*, 293 Mich App at 658; see also MCL 333.7401(2)(d); MCL 333.7403(2)(d); MCL 333.7404(2)(d). The medical use of marijuana is permitted "to the extent that it is carried out in accordance with the provisions" of the MMMA. MCL 333.26427(a). The MMMA "sets forth very limited circumstances" under which those involved with the use of marijuana may avoid criminal liability; the MMMA did not repeal any drug laws. *McQueen*, 293 Mich App at 659.

In this case, defendant moved for dismissal of his marijuana charge on the basis of the immunity provided in § 4(a) of the MMMA. MCL 333.26424(a) provides:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

As explained in *Nicholson*, 297 Mich App at 198, "a defendant is immune from arrest, prosecution, or penalty pursuant to § 4(a) if 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." Additionally, medical use in accordance with the MMMA is required for § 4(a) immunity to apply. *Id.*; MCL 333.26424(a).

In this case, it is not disputed that defendant was a qualifying patient who was issued and possessed a registry identification card. Also not disputed is the fact that the amount of marijuana involved was less than the 2.5 ounces permitted by the MMMA, and that defendant received no compensation. Thus, the only issue is whether the medical use requirement for § 4(a) immunity is satisfied. "Medical use" is defined by the MMMA to mean "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(e).

On the basis of the MMMA's definition of "medical use," this Court in *McQueen* concluded that the MMMA did not authorize patient-to-patient sales of marijuana. *McQueen*, 293 Mich App at 670.[2] Specifically, this Court concluded that the patient-to-patient sale of marijuana was not protected by the immunity granted in the

[2] In *McQueen*, 293 Mich App at 670 n 19, this Court expressly declined to consider whether uncompensated patient-to-patient transfers of marijuana were protected by the MMMA, stating:

> Plaintiff and the Attorney General, as amicus curiae, ask us to hold that patient-to-patient conveyances of marijuana that are without compensation are not permitted by the MMMA. Their position is that the only conveyance of marijuana permitted by the MMMA is the conveyance of marijuana from a primary caregiver to his or her patients. Because defendants' operation of [a medical marijuana dispensary] involves the selling of marijuana, and because the selling of marijuana is not permitted by the MMMA,

MMMA because the term "sale" was not included in the statutory definition of "medical use." *Id.* at 668. This Court explained:

> The delivery or transfer of marijuana is only one component of the sale of marijuana—the sale of marijuana consists of the delivery or transfer *plus* the receipt of compensation. The "medical use" of marijuana, as defined by the MMMA, allows for the "delivery" and "transfer" of marijuana, but not the "sale" of marijuana. MCL 333.26423(e). We may not ignore, or view as inadvertent, the omission of the term "sale" from the definition of the "medical use" of marijuana. [*Id.*]

Unlike the sale of medical marijuana, the delivery or transfer of marijuana, absent the exchange of compensation, is specifically included in the MMMA's definition of "medical use." Thus, the circumstances present in this case are distinguishable from the circumstances in *McQueen*. Nevertheless, the prosecution argues that the statute's inclusion of "transfer" in the definition of "medical use" only refers to the transfer of marijuana between caregivers and patients, and that the transfer of marijuana between patients does not constitute medical use. The prosecution supports this argument by reading § 4 as limiting patients to only two options: either grow their own marijuana or name a primary caregiver to provide them with marijuana. However, adoption of the prosecution's position would require us to read limitations into the MMMA that the plain language of the statute does not express because the MMMA does not explicitly limit patients in the fashion the prosecution urges. Further, the MMMA does not place any restrictions on the transfer or delivery of marijuana between adult patients, and we decline to

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we need not, and do not, reach the issue whether the MMMA permits uncompensated patient-to-patient conveyances of marijuana.

read any such restriction into the act. See *People v Burton*, 252 Mich App 130, 135; 651 NW2d 143 (2002) ("It is not the job of the judiciary to write into a statute a provision not included in its clear language."). Consequently, we hold that the circuit court did not err by granting defendant's motion to dismiss the charged crime because the transfer and delivery of marijuana between registered patients constitutes "medical use" that is protected by § 4(a) of the MMMA.

Affirmed.

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

POLANIA v STATE EMPLOYEES' RETIREMENT SYSTEM

Docket No. 308593. Submitted January 15, 2013, at 9:10 a.m. Decided January 29, 2013, at 9:10 a.m. Leave to appeal sought.

Maureen Polania, an employee of what is now the Department of Human Services, applied for nonduty disability retirement benefits at the Office of Retirement Services in 2009 after she had stopped working due to asserted bipolar disorder, diabetes, high cholesterol, neurogenic dermatitis, traumatic brain injury, emotional problems, and poor hearing. That office had one independent medical advisor assess Polania's psychiatric condition and another independent medical advisor assess Polania's physical condition. After reviewing Polania's medical records, both independent medical advisors concluded that Polania did not have a total and permanent nonduty disability and the retirement services office denied Polania's application on the basis that its medical advisors did not recommend a nonduty disability retirement. Polania appealed the decision. Following a hearing, the hearing officer issued a proposal for decision, concluding that Polania was not eligible for nonduty disability retirement services. The State Employees' Retirement System Board thereafter issued a decision and order adopting the hearing officer's proposed decision and denied Polania's request for benefits. The board concluded that neither independent medical advisor had certified that Polania was totally and permanently disabled, which it determined was required under MCL 38.24 for her to be eligible for nonduty disability retirement benefits. Polania sought review of the board's decision in the Ingham Circuit Court. The court, William E. Collette, J., rejected an interpretation of MCL 38.24 that would give the state's independent medical advisor final authority on whether a claimant was totally and permanently disabled and thus eligible for nonduty disability retirement benefits. On the basis of the evidence presented, the court concluded that the board's decision was not supported by competent, substantial, and material evidence on the record and reversed the board's denial of benefits. The State Employees' Retirement System appealed by leave granted.

The Court of Appeals *held*:

1. To qualify for nonduty disability retirement benefits, MCL 38.24(1) requires (1) a member to file an application for benefits no

later than one year after termination of the member's state employment, (2) a medical advisor to conduct a medical examination of the member and certify in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired, and (3) a member must have been a state employee for at least 10 years. If all the requirements are met, the board has discretion to decide whether to retire the employee. Conversely, the board cannot retire an employee if the criteria have not been met. The review of an employee's medical records is sufficient to constitute a medical examination for purposes of MCL 38.24(1). In this case, the court erred by reversing the board's decision and directing that Polania be granted nonduty disability retirement benefits. The board had properly determined that it lacked authority to grant Polania's request because both medical advisors refused to certify that she was totally and permanently disabled, a requirement under MCL 38.24(1)(b) before nonduty disability retirement benefits could be awarded. There was competent, material and substantial evidence to support the board's decision and the court should have affirmed the decision.

2. The medical advisor certification requirement of MCL 38.24(1) does not conflict with Const 1963, art 6, § 28 and MCL 24.306(1). These provisions provide for the review of agency decisions; they do not limit the Legislature's authority to establish criteria, nor do they give the agency authority to ignore those criteria.

Reversed and remanded.

CIVIL SERVICE — STATE EMPLOYEES — RETIREMENT — NONDUTY DISABILITY RETIREMENT — MEDICAL EXAMINATIONS — MEDICAL ADVISOR CERTIFICATION — TOTAL AND PERMANENT DISABILITY.

The State Employees' Retirement System Board has discretion to award nonduty disability retirement benefits if (1) a member files an application for benefits no later than one year after termination of the member's state employment, (2) a medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired, and (3) a member had been a state employee for at least 10 years; the Board cannot award nonduty disability retirement benefits to a member if a medical advisor does not certify that he or she was totally and permanently disabled (MCL 38.24[1]).

Troy W. Haney and *Robert J. Riley* for Maureen Polania.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kyle McLaughlin*, Assistant Attorney General, for the State Employees' Retirement System.

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM. In this dispute over employee benefits, respondent State Employees' Retirement System appeals by delayed leave granted the trial court's opinion and order reversing its decision to deny petitioner, Maureen Polania's request for nonduty disability retirement benefits. On appeal, we conclude that the State Employees' Retirement System Board (Board) properly interpreted and applied the applicable law. Moreover, because its decision was supported by competent, material, and substantial evidence on the whole record, the trial court erred when it reversed the Board's decision. For these reasons, we reverse and remand for entry of an order affirming the Board's denial of benefits.

I. BASIC FACTS

Polania worked as a social worker since either 1989 or 1990 for what is now the Department of Human Services. She stopped working for the department in March 2009 and applied for nonduty disability retirement benefits with the Office of Retirement Services (Retirement Services) in June of that same year. On her application she stated that she had stopped working for the department because she was unable to cope with the stress, was unable to control her blood-sugar levels, was suffering from memory loss, and had nervous anxiety. She claimed that she was permanently and totally

disabled as a result of bipolar disorder, diabetes, high cholesterol, neurogenic dermatitis, traumatic brain injury, emotional problems, and poor hearing.

In November 2009, Retirement Services' designated medical advisor, psychiatrist Paul Liu, D.O., provided a statement of disability concerning Polania's psychiatric condition. Liu summarized the psychological records that he had reviewed to assess whether Polania was permanently disabled as a result of her mental impairments, including reports by Polania's treating psychiatrist, Dr. Kumar Anil Jain, and the records from a mental evaluation done by another psychiatrist, Dr. Basivi Baddigam, M.D., on behalf of Retirement Services in August 2009.

Liu ultimately determined that Polania was not permanently disabled. He relied in part on Jain's reports, which showed that Jain had diagnosed Polania with bipolar disorder, but also described Polania's treatment plan and provided that she could return to work in January 2010. Liu also found it noteworthy that after his examination, Baddigam had determined that Polania would be "able to work if her bipolar systems are in remission with the treatment." Because the records showed that Polania's bipolar disorder was treatable and that she had successfully worked for years with bipolar disorder, Liu anticipated that Polania's "condition will continue to improve with treatment and therefore not be permanent." As such, he concluded that Polania did not meet the definition for total disability.

Retirement Services had another medical advisor, David Mika, D.O., evaluate Polania's physical condition. On the basis of his review of Polania's medical records, Mika opined that Polania did not "have a total and permanent non-duty disability."

In a letter dated November 18, 2009, Retirement Services notified Polania that it was denying her request for nonduty disability benefits. Retirement Services explained that it was denying the request because its medical advisors "did not recommend a non-duty disability retirement."

In January 2010, Polania appealed Retirement Services' decision to deny her request for nonduty disability benefits. A hearing was held on Polania's appeal in September 2010. The hearing officer issued a proposal for decision in November 2010. Citing MCL 38.24, the hearing officer determined that a claimant cannot obtain nonduty disability benefits unless the Retirement Services' medical advisor certifies that the claimant is permanently and totally disabled. The hearing officer noted that the record evidence showed that neither of the Retirement Services' medical advisors "certified that [Polania] is totally and permanently disabled." For that reason, the hearing officer concluded that Polania was "not eligible for non-duty disability retirement."

In April 2011, the Board issued its decision and order. In its decision, the Board adopted the hearing officer's proposed decision and denied Polania's request for benefits. The Board agreed that Polania was not entitled to nonduty disability benefits because neither of the Retirement Services' medical advisors certified that Polania was totally and permanently disabled, which certification is required under MCL 38.24.

Polania appealed the Board's decision to the circuit court in July 2011. In her petition, Polania argued that the Board erred when it interpreted MCL 38.24 to provide that a claimant cannot obtain nonduty disability retirement benefits unless the state's medical advisor certifies that the claimant is totally and permanently disabled. She further alleged that, because she

presented compelling evidence that she was totally and permanently disabled, the Board erred by denying her request. For those reasons, she asked the trial court to reverse the Board's decision and enter an order awarding her nonduty disability retirement benefits.

The trial court held oral arguments on Polania's petition in December 2011 and entered its judgment in January 2012. In its opinion, the trial court rejected an interpretation of MCL 38.24 that gives the state's medical advisor the last word on whether a claimant can receive nonduty disability retirement benefits: "It is also clear that Respondent's [independent medical advisors] do not have the first, last, and only word on whether or not an applicant qualifies for non-duty disability retirement benefits." The court came to that conclusion, in part, because such an interpretation would "effectively eliminate this Court's power to conduct a judicial review of the Board's decision pursuant to the Administrative Procedures Act and Michigan's Constitution." The court then went on to evaluate the record evidence and determined that the Board's decision to deny Polania's request for benefits was "not supported by competent, substantial, and material evidence on the whole record." For that reason, it reversed the Board's decision and remanded the case to the Board for entry of a decision granting Polania's request for nonduty disability retirement benefits.

The Board then appealed to this Court by delayed leave granted.

II. NONDUTY DISABILITY RETIREMENT BENEFITS

A. STANDARDS OF REVIEW

On appeal, the Board argues that the circuit court incorrectly applied the law when it determined that the

Board could retire Polania even though its medical advisors had not certified that she was totally and permanently disabled. When reviewing the agency's decision, the trial court had to determine whether the agency's decision was "contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 223; 771 NW2d 423 (2009) (quotation marks and citation omitted). If the agency's decision was not contrary to law and was otherwise supported by competent, material, and substantial evidence on the whole record, the trial court had to affirm the agency's decision. *Gordon v Bloomfield Hills*, 207 Mich App 231, 232; 523 NW2d 806 (1994), citing Const 1963, art 6, § 28. This Court's review in turn is limited to determining whether the trial court properly applied those principles: we must determine whether the trial court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's findings. *Dykstra*, 283 Mich App at 222.

This appeal also involves the proper interpretation of the State Employees' Retirement Act, MCL 38.1 *et seq*. And this Court reviews de novo the proper interpretation of statutes. *Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601, 608; 780 NW2d 611 (2009).

B. QUALIFYING FOR NONDUTY DISABILITY BENEFITS

Throughout the proceedings below, the Retirement Service and the Board have consistently taken the position that in order for Polania to be eligible for

nonduty disability benefits under MCL 38.24, the Board's medical advisor must first certify that she is totally and permanently disabled. The Board maintains that in the absence of such a certification it must deny her request for benefits. We must, therefore, first determine whether the Board correctly interpreted MCL 38.24 to impose a certification requirement.

Historically, there has been some confusion about the role that the medical advisors[1] play in the Board's disability determinations; specifically, there has been confusion as to whether the medical advisor must certify the employee's disability before the Board can retire the employee.

Before 2002, former MCL 38.24 authorized the Board to retire a state employee and award him or her benefits if the employee had a qualifying disability and had been a state employee for at least 10 years:

> [U]pon application . . . a member who has been a state employee at least 10 years [and who] becomes totally and permanently incapacitated for duty as the result of causes occurring not in the performance of duty to the state, may be retired by the retirement board: Provided, The medical advisor after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, and such incapacity is likely to be permanent and that such member should be retired. [1955 PA 237, former MCL 38.24.]

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[1] The Legislature has not defined the term "medical advisor" within the State Employees' Retirement Act. See MCL 38.1f. However, the agency has defined "medical advisor" to mean "a physician designated by the retirement system." Mich Admin Code, R 38.21(1)(j). The Legislature authorized the Board to hire medical employees to assist in the operation of the retirement system. See *VanZandt v State Employees' Retirement System*, 266 Mich App 579, 586-587; 701 NW2d 214 (2005), citing MCL 38.6. And it is clear from the context that the agency's definition for medical advisor is consistent with the Legislature's use of that term in the act.

The final clause—the proviso—appeared to serve as a limit on the Board's authority to retire a disabled employee; the Board could only retire the employee if the medical advisor, after examining the employee, certified that the employee was "mentally or physically incapacitated for the further performance of duty", the incapacity was "likely to be permanent", and that the employee should be retired. See *id.*

In *Gersbacher v State Employees' Retirement Sys*, 145 Mich App 36; 377 NW2d 334 (1985), this Court examined a somewhat similar proviso that applied to duty disability benefits under MCL 38.21. With that statute the Legislature authorized the Board to retire an employee for disability arising from the performance of his or her duties with the following apparent limitation:

> "Provided, the medical advisor after a medical examination of said member shall certify in writing that said member is mentally or physically totally incapacitated for the further performance of duty in the service of the state, and that such incapacity will probably be permanent, and that said member should be retired: And provided further, That the retirement board concurs in the recommendation of the medical advisor." [*Gersbacher*, 145 Mich App at 44, quoting MCL 38.21 (emphasis removed).]

On appeal to this Court, the retirement system argued that the Board had no authority to retire the employee because the medical advisor in that case did not certify that the employee was totally and permanently incapacitated. But the Court in *Gersbacher* rejected the notion that the employee had to receive the medical advisor's certification before the Board could retire him:

> Petitioner construes the statute too narrowly. While the term "provided" suggests that certification of total, permanent, physical incapacitation is a prerequisite, other lan-

> guage indicates that this is not true. The term "medical advisor" suggests action only in an *advisory* capacity. Further, the statute provides that the retirement board is to concur in the "*recommendation*" of the medical advisor. Read as a whole, we are of the opinion that the Legislature intended that the retirement board have the ability to override the decision of the medical advisor and to retire an individual even without the medical advisor's certificate. [*Id.* at 44-45.]

Twenty years later, examining the language of prior MCL 38.24, this Court concluded that this proviso was in fact a legislatively imposed limitation on the Board's authority to retire an employee:

> The language of MCL 38.24 clearly provides that, although the Board has discretion in the decision whether to retire a state employee ("may be retired by the retirement board"), it cannot exercise that discretion unless and until the medical advisor certifies that the employee is incapacitated ("Provided, The medical advisor . . . shall certify that such member is . . . incapacitated. . . ."). [*VanZandt v State Employees' Retirement System*, 266 Mich App 579, 587; 701 NW2d 214 (2005).

The Court in *VanZandt* further rejected the analysis in *Gersbacher* on the basis of differences in the language between MCL 38.21 and MCL 38.24. See *id.* at 587 n 5. Nevertheless, this Court determined that it did not need to decide the matter because the circuit court clearly erred when it concluded that the Board's denial was not supported by competent, material, and substantial evidence. *Id.* at 588. Thus, there remained some doubt as to whether an employee must obtain the medical advisor's certification to be eligible for nonduty disability retirement under the prior version of MCL 38.24.

The Legislature amended MCL 38.24 to its current form in 2002. See 2002 PA 93. MCL 38.24(1) now provides in relevant part:

> Except as may otherwise be provided in [MCL 38.33 and MCL 38.34], a member who becomes totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member's performance of duty may be retired if all of the following apply:
>
> (a) The member, the member's personal representative or guardian, the member's department head, or the state personnel director files an application on behalf of the member with the retirement board no later than 1 year after termination of the member's state employment.
>
> (b) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired.
>
> (c) The member has been a state employee for at least 10 years.

Although the statute continues to provide the Board with the discretion to retire a disabled employee, the Legislature unambiguously limited that discretion to those situations in which the employee has met *all* the criteria provided under MCL 38.24(1). That is, the Board must examine the record and determine that each of the criteria provided under MCL 38.24(1) are true and then it *may* choose to retire the employee. It necessarily follows then, that if any of the criteria are not met, the Board *cannot* retire the employee. Accordingly, the Legislature has removed any doubt about the role of the medical advisor in nonduty disability cases; the Board must examine the record and determine whether a "medical advisor" has conducted a medical examination on the employee and certified "in writing" that the employee was "mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that [he or she] should be retired." MCL 38.24(1)(b).

The Board correctly understood that under the plain meaning of MCL 38.24(1)(b), Polania had to have such a certification before the Board could retire her. Because the record showed that both the medical advisors—one who evaluated her mental health and one who evaluated her physical health—refused to certify that Polania was totally and permanently disabled, the Board properly determined that it did not have the authority to grant Polania's request for retirement benefits and, on that basis, denied her claim. The Board did not have to examine the competing medical evidence to determine whether it should exercise its discretion—under the facts of this case, it had no discretion to grant Polania's request for benefits. For these reasons, the trial court erred when it determined that the Board's interpretation of MCL 38.24(1)(b) was incorrect. Moreover, there was no dispute that the medical advisors did not certify that Polania was totally and permanently disabled. As such, there was competent, material, and substantial evidence to support the Board's decision and the trial court erred when it determined otherwise. Consequently, the trial court had to affirm the Board's decision to deny Polania's request for benefits. *Gordon*, 207 Mich App at 232.

We further cannot agree with the trial court's conclusion that the Legislature's decision to provide a certification requirement under MCL 38.24(1)(b) conflicts with Const 1963, art 6, § 28 and MCL 24.306(1). These provisions provide for the review of agency decisions; they do not limit the Legislature's authority to establish eligibility criteria nor do they give agencies the authority to ignore those criteria. Even with strict eligibility criteria, the circuit court's power to directly review remains the same: the court must examine the Board's decision to determine whether it was "authorized by law," Const 1963, art 6, § 28, or otherwise in "violation of the constitution or a statute" or affected

"by other substantial and material error of law," MCL 24.306(1)(a) and (f), and must determine whether the decision was supported by "competent, material and substantial evidence on the whole record," Const 1963, art 6, § 28; MCL 24.306(1)(d).

Consistent with Const 1963, art 6, § 28 and MCL 24.306(1), the trial court should have reviewed the Board's interpretation of MCL 38.24(1)(b) and determined that the Board did not err when it concluded that MCL 38.24(1)(b) constituted a limitation on its authority to retire an employee. It then should have reviewed the record to determine whether the Board's finding that Polania had not established the certification required under MCL 38.24(1)(b) was supported by competent, material and substantial evidence on the whole record. Given the undisputed evidence that the medical advisors had not certified that Polania was totally and permanently disabled, the trial court should have concluded that the Board's decision was supported by the record.

This is not to say that we are unsympathetic to the trial court's concerns; there may be powerful incentives—whether conscious or subconscious—for a medical advisor in the Board's employ to refuse to certify employees with a total and permanent disability. And it seems inequitable that an employee who has substantial evidence that he or she is totally and permanently disabled is nevertheless precluded under MCL 38.24(1)(b) from seeking review of a medical advisor's refusal to certify his or her disability. This is especially true when, as here, the employee's evidence is founded on his or her long-time treating physicians' opinions and the Board's decision is dictated by the opinion of a medical advisor who had never examined the employee.[2] But this Court—like the Board

[2] This Court has held that a medical examination within the meaning of MCL 38.24(1)(b) can be founded solely on a review of an employee's

itself—is not at liberty to ignore the Legislature's policy choices simply because we might find them to be unjust or unwise. *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012).

III. CONCLUSION

The trial court erred when it determined that the Board did not properly interpret MCL 38.24(1)(b) as a limitation on the Board's authority to retire an employee. The Board correctly understood that it could not retire Polania unless its medical advisors certified that she was totally and permanently disabled as provided under MCL 38.24. The trial court further erred when it concluded that the Board's decision was not supported by competent, material and substantial evidence on the whole record. It was undisputed that both the Board's medical advisors refused to certify that Polania was totally and permanently disabled. Accordingly, the trial court erred when it reversed the Board's decision and instructed it to grant Polania's request for nonduty disability retirement benefits. Consequently, we reverse the trial court's decision, vacate its order reversing the Board's decision, and remand to the trial court for entry of an order affirming the Board's decision.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because this appeal involved an important question of public concern, we order that neither of the parties may tax their costs. MCR 7.219(A).

SAWYER, P.J., and MARKEY and M. J. KELLY, JJ., concurred.

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medical records. *Monroe v State Employees' Retirement Sys*, 293 Mich App 594, 605-607; 809 NW2d 453 (2011).

ZCD TRANSPORTATION, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE CO

Docket No. 304719. Submitted November 9, 2012, at Detroit. Decided November 27, 2012. Approved for publication January 29, 2013, at 9:15 a.m.

ZCD Transportation, Inc., brought an action in the Wayne Circuit Court against State Farm Mutual Automobile Insurance Company to recover expenses incurred for transporting its insured, Arnold Grinblatt, who had been injured in an automobile accident. Before the accident, Grinblatt was unable to walk, but he was able to use a personal mobility scooter and to drive a specially modified van. Because the accident left Grinblatt too weak to move himself from the scooter to the van and vice versa, he hired plaintiff to provide transportation services. Plaintiff charged a pick-up fee of $35, a wait fee of $30 an hour, and $3 a mile with a minimum charge for 10 miles regardless of the number of miles actually driven. Defendant moved for summary disposition, arguing that it was not obligated to pay plaintiff for Grinblatt's personal trips, including those for which he had a doctor's prescription, or for medical transportation expenses incurred when Grinblatt was not actually in the vehicle because these expenses were not related to his care, recovery, or rehabilitation under MCL 500.3107(1). The court, Kathleen Macdonald, J., granted defendant's motion under MCR 2.116(C)(10). Plaintiff appealed.

The Court of Appeals *held*:

1. Transportation expenses unrelated to medical treatment are not recoverable under MCL 500.3107(1) even if prescribed by a doctor as being necessary for the patient's care, recovery, and rehabilitation. Under MCL 500.3105(1), an insurance company is required to provide first-party insurance benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. Those benefits include allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. Expenses for recovery and rehabilitation are costs expended to bring insureds to a condition of health or ability sufficient to resume their

preinjury lives. The scope of the term "care" is limited to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident but that may not restore a person to his or her preinjury state. Services that were required both before and after the injury, but can no longer be provided by the injured person himself or herself because of the injury, are replacement services, not allowable expenses, because they are not for the injured person's care. Accordingly, the transportation services that were not directly related to Grinblatt's medical treatment but were solely to maintain his preinjury quality of life constituted replacement services rather than allowable expenses because Grinblatt did his own pleasure driving before the accident and, but for the injuries sustained in the accident, would have continued to do so.

2. The cost of transportation and mileage to and from medical appointments were allowable expenses, given that plaintiff could not have transported Grinblatt to and from the appointments without first picking him up and then either waiting for him or returning to get him afterward. Because the pick-up and wait-time aspect of the service was actually rendered and the fees were incurred, the issue was whether those charges were reasonable, which was a question of fact to be determined on remand.

3. The trial court properly concluded that defendant was entitled to summary disposition to the extent that plaintiff sought payment for mileage that Grinblatt did not actually travel.

Affirmed in part and reversed in part; case remanded for further proceedings.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — REPLACEMENT SERVICES — TRANSPORTATION EXPENSES UNRELATED TO MEDICAL TREATMENT.

MCL 500.3105(1) requires an insurance company to provide first-party insurance benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle; under MCL 500.3107(1), those benefits include allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for the injured person's care, recovery, or rehabilitation and also include expenses not exceeding $20 a day reasonably incurred in obtaining ordinary and necessary services in lieu of those that, had the person not been injured, he or she would have performed during the first three years after the date of the accident for the benefit of himself or herself or of his or her dependent; transportation services that are not directly related to an insured's medical

treatment but are solely to maintain the insured's preinjury quality of life constitute replacement services rather than allowable expenses; transportation expenses unrelated to medical treatment are not recoverable under MCL 500.3105(1) even if prescribed by a doctor as being necessary for the patient's care, recovery, and rehabilitation.

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — EXPENSES FOR TRANSPORTATION TO AND FROM MEDICAL APPOINTMENTS — PICK-UP AND WAIT-TIME FEES.

The cost of transportation and mileage to and from medical appointments are allowable expenses under MCL 500.3107(1); whether pick-up and wait-time fees charged in connection with transporting an insured to and from medical appointments are reasonable is a question of fact.

3. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — EXPENSES FOR TRANSPORTATION TO AND FROM MEDICAL APPOINTMENTS — MINIMUM MILEAGE CHARGES.

Charges for transportation services that are not actually rendered to an insured, such as minimum mileage charges, are not allowable expenses for purposes of MCL 500.3105(1).

Leo E. Januszewski, P.C. (by *Leo E. Januszewski*), for plaintiff.

Hewson & Van Hellemont, P.C. (by *Stacey L. Heinonen*), for defendant.

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM. Plaintiff, ZCD Transportation, Inc., appeals as of right a circuit court order granting the motion for summary disposition of defendant, State Farm Mutual Automobile Insurance Company, pursuant to MCR 2.116(C)(10) in this action to recover first-party no-fault benefits. We affirm in part, reverse in part, and remand for further proceedings.

Arnold Grinblatt was injured in an automobile accident in 2001. Before the accident, Grinblatt was unable to walk and got around using a personal mobility

scooter. He was able to drive using a van fitted with a lift and hand controls. After the accident, Grinblatt was too weak to move himself from the scooter to the driver's seat of the van and vice versa. He therefore hired plaintiff to provide transportation services, both for medical appointments and for personal trips unrelated to medical treatment. Plaintiff's fee for the service consisted of three components: (1) a pick-up fee of $35 to come and get the client, (2) a wait fee of $30 an hour, billed in 15-minute increments if the driver had to wait for the client, and (3) mileage. Plaintiff charged $3 a mile, but every client was charged for a minimum of 10 miles for a one-way trip and 20 miles for a round trip, regardless of the number of miles actually driven. Plaintiff acknowledged that a majority of Grinblatt's trips involved distances less than the mileage minimum.

Defendant objected to paying for plaintiff's personal trips and for medical transportation costs to the extent that plaintiff sought compensation for times when Grinblatt was not actually in the vehicle being transported. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10).

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is appropriate if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to deter-

mine whether a genuine issue of any material fact exists to warrant a trial." *Spiek*, 456 Mich at 337. The determination of what constitutes an allowable expense under the no-fault act is a question of law that is also reviewed de novo. *In re Geror*, 286 Mich App 132, 134; 779 NW2d 316 (2009).

Under the no-fault act, an insurance company is "required to provide first-party insurance benefits . . . for certain expenses and losses." *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Specifically, an insurer must pay personal protection benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). Those benefits include:

> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation[, and]
>
> * * *
>
> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [MCL 500.3107(1)].

Because benefits are only payable for accidental injury arising out of the ownership, operation, maintenance, or use of a vehicle and benefits include allowable expenses, the allowable expenses must be "causally connected to the accidental bodily injury arising out of an automobile accident." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005).

Therefore, the product, service, or accommodation claimed as an allowable expense must be related to the insured's injuries. *Id*. An expense is an "allowable expense" if (1) the expense is for an injured person's care, recovery, or rehabilitation, (2) the expense is reasonably necessary, (3) the expense is incurred, and (4) the charge is reasonable. *Douglas v Allstate Ins Co*, 492 Mich 241, 259; 821 NW2d 472 (2012).

The terms "care," "recovery," and "rehabilitation" are to be given their ordinary meanings. *Hamilton v AAA Mich*, 248 Mich App 535, 546; 639 NW2d 837 (2001). Both recovery and rehabilitation "refer to restoring an injured person to the condition he was in before sustaining his injuries." *Griffith*, 472 Mich at 534-535. Thus, expenses for recovery and rehabilitation "are costs expended in order to bring an insured to a condition of health or ability sufficient to resume his preinjury life." *Id*. at 535. The scope of the term "care" is limited "to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident." *Id*. "Care" "may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state." *Id*. The Supreme Court recently reaffirmed *Griffith*'s definition of "care," stating that "although services for an insured's care need not restore a person to his preinjury state, the services must be related to the insured's injuries to be considered allowable expenses." *Douglas*, 492 Mich at 260.

Allowable expenses and replacement services are two "separate and distinct categories" of benefits. *Johnson*, 492 Mich at 180; accord *Douglas*, 492 Mich at 262. "Services that were required both before and after the injury, but after the injury can no longer be provided by

the injured person himself or herself *because* of the injury, are 'replacement services,' not 'allowable expenses.' " *Johnson*, 492 Mich at 180. That is because while the services "might be necessitated by the injury if the injured person otherwise would have performed them himself, they are not *for* his care . . . ." *Douglas*, 492 Mich at 263.

An expense is "reasonably necessary" if (1) it is objectively reasonable and (2) it is necessary for the insured's care, recovery, or rehabilitation. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 163; 802 NW2d 281 (2011). An expense is incurred when the insured becomes liable to pay. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003). There must at least be evidence that the service provider expected compensation for its services. *Burris v Allstate Ins Co*, 480 Mich 1081 (2008). The insurer "is not obliged to pay any amount except upon submission of evidence that services were actually rendered and of the actual cost expended." *Moghis v Citizens Ins Co of America*, 187 Mich App 245, 247; 466 NW2d 290 (1991).

We agree with defendant that transportation expenses unrelated to medical treatment are not recoverable even if prescribed by a doctor as being necessary for the patient's care, recovery, and rehabilitation.[1] Those transportation services, which were not directly related to Grinblatt's medical treatment but were solely

[1] The doctor wrote the prescription as dictated to him by Grinblatt "under the presumption that [it] would be submitted to the insurer and that would be the insurer's decision as to what was covered." While the doctor testified that rehabilitation included participation in social or recreational activities and "community reintegration," the tenor of his testimony was that the social and community aspects of rehabilitation were necessary for a patient's complete recovery in that they were part of a normal lifestyle but it was up to the lawyers and insurance companies to determine what was compensable under the no-fault act.

to maintain his preinjury quality of life, constituted replacement services, not allowable expenses, because Grinblatt did his own pleasure driving before the accident and, but for the injuries sustained in the accident, would have continued to do so. Further, plaintiff admitted that it provided the service to Grinblatt as a courtesy and did not expect him to pay for it.

On the other hand, it has long been recognized that the cost of transportation and mileage to and from medical appointments are allowable expenses. *Davis v Citizens Ins Co of America*, 195 Mich App 323, 328; 489 NW2d 214 (1992); *Neumann v State Farm Mut Auto Ins Co*, 180 Mich App 479, 486; 447 NW2d 786 (1989); *Swantek v Auto Club of Mich Ins Group*, 118 Mich App 807, 808-810; 325 NW2d 588 (1982). The expense was incurred to some extent because plaintiff provided the service to Grinblatt and apparently would have turned to him for payment if defendant were not liable. However, plaintiff's charges clearly included a fee for medical transportation even when Grinblatt was not in the vehicle and being transported. For example, the record shows that plaintiff billed for picking Grinblatt up from his home in order to transport him to a doctor's office and for either waiting for him to obtain his treatment or coming back to get him after his treatment so it could take him home. It stands to reason that plaintiff would have to charge for these services even though Grinblatt was not in the vehicle because it cannot transport him to and from medical appointments unless it first picks him up at home and then waits for him or comes back to get him to take him home again. Because the pick-up and wait-time aspect of the service was actually rendered and the fees were incurred, the issue is whether those charges were reasonable. See *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 388 NW2d 216 (1986) (in which the defendant had paid providers for

nursing services and the dispute was whether the expense was reasonably necessary and, if so, whether the charge was reasonable). Neither party has addressed that issue or provided any evidence from which to gauge the reasonableness of the charges. Therefore, the reasonableness of the charges remains a question of fact to be determined.

The record also shows that plaintiff charged a separate mileage fee for actually transporting Grinblatt and often charged for more miles than he actually traveled. To that extent, plaintiff sought payment for transportation services not actually rendered. Therefore, the trial court properly concluded that defendant was entitled to judgment to the extent that plaintiff sought payment for mileage beyond that actually traveled by Grinblatt.

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

JANSEN, P.J., and STEPHENS and RIORDAN, JJ., concurred.

LUCAS v AWAAD

MEIER v AWAAD

Docket Nos. 292785, 292786, and 295973. Submitted May 3, 2012, at Detroit. Decided January 29, 2013, at 9:20 a.m.

In Docket No. 292785, Amber Lucas brought an action in the Wayne Circuit Court against Yasser Awaad, M.D., Awaad's former employer, Oakwood Healthcare, Inc., and related business entities (collectively, the Oakwood defendants), alleging that Awaad had falsely diagnosed her children with epilepsy/seizure disorder for the purpose of inflating his billings. Lucas sought damages based on various tort theories. Defendants moved for summary disposition of Lucas's claim for intentional infliction of emotional distress under MCR 2.116(C)(8). The court, Daphne Means Curtis, J., denied the motion. In a second amended complaint, Lucas added allegations of fraud, silent fraud, failure to disclose the truth, and conspiracy. The court also denied defendants' motion for summary disposition of these claims. Defendants appealed.

In Docket No. 292786, Stephen and Julie Meier and other parents of minors whom Awaad had diagnosed with epilepsy/seizure disorder brought an action in the Wayne Circuit Court, alleging, among other things, that Awaad and the Oakwood defendants violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., by engaging in false, misleading, and deceptive acts or omissions that did not involve medical judgment; providing an unconscionable incentive for Awaad to generate improper billings; and engaging in improper coding and billing practices. Plaintiffs further alleged that defendant Oakwood Professional Billing processed the fraudulent billings with knowledge that there was a revenue-sharing agreement between Awaad and the Oakwood defendants and with knowledge of his improper billing practices. Defendants moved for summary disposition under MCR 2.116(C)(8), and the court, Daphne Means Curtis, J., denied the motion. Defendants appealed.

In Docket No. 295973, Benjamin Meier and other minor plaintiffs, through their next friends, brought a medical malpractice action in the Wayne Circuit Court against Awaad and the Oakwood defendants, alleging that Awaad's false diagnoses of epilepsy/seizure disorder had subjected them to inappropriate

medication, treatment, and medical testing. Defendants filed a motion for summary disposition under MCR 2.116(C)(8), which the court, Daphne Means Curtis, J., denied. Plaintiffs moved for a default and to strike defendants' affidavits of meritorious defense on the ground that they failed to address Awaad's alleged failure to properly and accurately read the results of specific tests that could have ruled out the condition of epilepsy. Defendants moved to strike plaintiffs' affidavits of merit and notices of intent, arguing that they failed to state the applicable standard of care or the manner in which the standard was breached as required by MCL 600.2912d. The court denied defendants' motion and granted plaintiffs' motion in part, agreeing that the affidavits of meritorious defense did not satisfy the requirements of MCL 600.2912e and giving defendants 14 days to file amended affidavits. After concluding that defendants had failed to make a good-faith effort to comply with MCL 600.2912e in filing the amended affidavits, the court entered a default against defendants with regard to whether the applicable standard of care required Awaad to correctly read and interpret the EEGs and whether he had in fact done so. The court also struck Awaad's affidavit because it was not an amendment to previously filed affidavits. Defendants appealed.

The Court of Appeals consolidated the three cases for appeal.

The Court of Appeals *held*:

1. The trial court erred by denying defendant's motion for summary disposition with respect to Lucas's claim for intentional infliction of emotional distress because it actually sounded in medical malpractice, regardless of how it was labeled. The alleged actions occurred during the course of a professional relationship between Awaad and Lucas, given that Lucas's consent to medical procedures on behalf of her children was required, and the claim raised questions of medical judgment beyond the realm of common knowledge and experience given that, in order to prevail, Lucas would have had to establish that her children did not have epilepsy or seizure disorder.

2. The trial court erred by denying defendants' motion for summary disposition with respect to Lucas's claim of fraud because that claim raised questions of medical judgment beyond the realm of common knowledge and experience and therefore sounded in medical malpractice. The court also erred by denying summary disposition of the silent-fraud claim, which required a showing that defendants suppressed the truth with the intent to defraud plaintiff and that defendants had a legal or equitable duty of disclosure. Defendants had no duty to inform Lucas of Awaad's alleged history of fraudulently diagnosing seizure disorders. Fur-

ther, a duty to refrain from communicating false diagnoses was not equivalent to a duty to disclose, and defendants' duty to report Awaad's conduct to appropriate government agencies under federal law was not a duty to disclose to Lucas.

3. The trial court erred by denying defendants' motion for summary disposition with respect to plaintiffs' MCPA claim. The MCPA prohibits unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. However, MCL 445.904(1)(a) provides that the MCPA does not apply to a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under state or federal statutory authority. In determining whether this exception applied, the relevant inquiry was whether the general transaction was specifically authorized by law, not whether the specific misconduct alleged was prohibited. Because the practice of medicine is specifically authorized and regulated by law, plaintiffs' MCPA claim was barred by MCL 445.904(1)(a).

4. The trial court erred by concluding that defendants' affidavits of meritorious defense failed to satisfy MCL 600.2912e and by entering a default against defendants on that ground. While the affidavits did not state that Awaad had correctly read and interpreted the relevant tests, the affidavits clearly identified defendants' defense against this claim, which was that epilepsy diagnoses are not based solely on the tests plaintiffs identified, and there was no further factual basis that would have helped develop this theory. However, the trial court correctly struck Awaad's affidavit of meritorious defense as untimely because it was an entirely new affidavit rather than amendment of a previously submitted affidavit and it did not relate back to the timely filed affidavits of meritorious defense.

Affirmed in part and reversed in part; case remanded for further proceedings.

1. ACTIONS — TORTS — INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS — MEDICAL MALPRACTICE.

A claim sounds in medical malpractice, regardless of how it is labeled, if it pertains to an action that occurred within the course of a professional relationship and raises questions of medical judgment beyond the realm of common knowledge and experience.

2. ACTIONS — TORTS — SILENT FRAUD — DUTY TO DISCLOSE — FALSE MEDICAL DIAGNOSES.

A claim of silent fraud requires a showing that the defendant suppressed the truth with the intent to defraud the plaintiff and

that the defendant had a legal or equitable duty of disclosure; a healthcare provider has no duty to inform a patient of a doctor's success rates, including a history of falsely diagnosing other patients; a duty to refrain from communicating false diagnoses is not equivalent to a duty to disclose for purposes of a silent-fraud claim; the duty to report a doctor's misconduct to government agencies under federal law does not run to patients.

3. STATUTES — CONSUMER PROTECTION ACT — TRANSACTIONS OR CONDUCT AUTHORIZED BY LAW — MEDICAL SERVICES — CODING AND BILLING PRACTICES.

The Consumer Protection Act, MCL 445.901 *et seq*., prohibits unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce; MCL 445.904(1)(a) provides that the Consumer Protection Act does not apply to a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under state or federal statutory authority; in determining whether this exception applies, the relevant inquiry is whether the general transaction was specifically authorized by law, not whether the specific misconduct alleged was prohibited; the practice of medicine is specifically authorized and regulated by law.

Secrest Wardle (by *Bruce A. Truex* and *Janet Callahan Barnes*) for the plaintiffs in Docket Nos. 292785 and 292786.

Secrest Wardle (by *Bruce A. Truex* and *Drew W. Broaddus*) for the plaintiffs in Docket No. 295973.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Christina A. Ginter* and *Charles W. Fisher*) for defendants in Docket Nos. 292785, 292786, and 295973.

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

WILDER, J. In these consolidated appeals, defendant Dr. Yasser Awaad and his professional corporation, Yasser Awaad, M.D., P.C., and defendants Oakwood Healthcare, Inc., Great Lakes Pediatric Neurology, P.C.,

Oakwood Professional Billing, L.L.C., and Oakwood United Hospitals, Inc.,[1] appeal by leave granted orders entered in three related lawsuits. All three lawsuits arise from allegations that Awaad intentionally misdiagnosed his pediatric neurological patients with epilepsy/seizure disorder for the purpose of increasing his billings. We affirm in part, reverse in part, and remand.

I. BACKGROUND

Awaad is a board-certified pediatric neurologist who was formerly employed by the Oakwood defendants. All three of these appeals arise from allegations that Awaad falsely diagnosed several of his pediatric patients, including the minor plaintiffs in Docket No. 295973 and the children of the plaintiffs in Docket Nos. 292785 and 292786, with epilepsy/seizure disorder. All plaintiffs aver that Awaad intentionally made false diagnoses in order to increase his billings pursuant to the Oakwood defendants' compensation system. Plaintiffs maintain that the Oakwood defendants are vicariously liable for Awaad's misfeasance.

A. DOCKET NO. 292785

In Docket No. 292785, the plaintiff is Amber Lucas, who is the parent of children allegedly misdiagnosed by Awaad. Lucas filed suit, seeking damages personal to herself based on various tort theories, including intentional infliction of emotional distress and fraud. The trial court granted Lucas leave to file a second amended complaint. Although Lucas subsequently moved to file

[1] Oakwood United Hospitals, Inc., is only a party in Docket Nos. 292786 and 295973. For simplicity's sake, the defendants, not including Awaad and his professional corporation, will be referred to as the "Oakwood defendants."

additional amended complaints, none of those motions had been decided at the time the orders on appeal were issued. Thus, only the second amended complaint is relevant on appeal.

Lucas's second amended complaint included claims of intentional infliction of emotional distress against all the defendants, allegedly caused by extreme and outrageous conduct by Awaad in "falsely diagnosing the condition of epilepsy/seizure disorder in [her children] who did not suffer the condition [and] communicating that know[n] false diagnosis" for the purpose of inflating billings.

Defendants moved for partial summary disposition of this claim under MCR 2.116(C)(8) and argued that Lucas did not have a legally cognizable claim for intentional infliction of emotional distress arising from Awaad's misdiagnosis of her children. Defendants argued that Lucas could not recover for emotional distress caused by defendants' treatment of her children because she was not a "bystander" to the alleged harm, which defendants contend was a required element for recovery. Defendants also argued that Lucas's claim sounded in medical malpractice and that there was no valid cause of action for a parent's emotional distress arising from medical malpractice involving a child patient.

Lucas argued in response that her complaint alleged the required elements for intentional infliction of emotional distress. Plaintiff denied that the bystander requirement applied to her claim and also refuted defendants' contention that her claim was subject to the procedural requirements of a medical malpractice action. Lucas emphasized that her claim was not based on Awaad's malpractice against her children, but, rather, was based on his intentionally fraudulent communications to her.

The trial court denied defendants' motion for summary disposition. The trial court first determined that Lucas was not obligated to meet the bystander requirements because her claim was based on Awaad's alleged communication of a false diagnosis *directly to her*. The trial court also rejected defendants' argument that Lucas's claim sounded in medical malpractice, reasoning that Lucas's claim was not premised on a duty of care owed to the children as their physician.

In her second amended complaint, Lucas also asserted in count III that the defendants were liable for "Silent Fraud and Failure to Disclose the Truth," and count VIII alleged that defendants were liable for "Fraud and Silent Fraud and Conspiracy."

Defendants moved for summary disposition of all the fraud and conspiracy claims. Defendants argued that Lucas's allegations of fraud were not stated with particularity as required by MCR 2.112(B)(1). Defendants also maintained that Lucas failed to allege when her children were wrongly diagnosed, when they received treatment, and what treatments each child received. With respect to the Oakwood defendants, defendants argued that Lucas made only vague and general allegations that the Oakwood defendants failed to take proper action in response to unidentified investigations and audits. Defendants also argued that allegations of false diagnoses sounded solely in medical malpractice and could not support an independent claim for fraud.

Lucas argued in response that her allegations were sufficient to state a claim for fraud and that defendants could learn the details of her case, including the dates of diagnoses and treatment, through discovery. Lucas denied that her claims for fraud and conspiracy sounded in medical malpractice because her claims were based

on defendants' alleged breaches of duties owed to her, with whom they had no professional relationship. Lucas also argued that defendants owed her a duty not to misrepresent diagnoses and treatment recommendations for her children. Lucas cited medical ethics codes requiring physicians to deal honestly and openly with patients. Finally, Lucas contended that a physician owes a minor patient's parent the same fiduciary duty of honesty that a physician owes to an adult patient because the parent makes decisions on behalf of the child.

The trial court concluded that Lucas's claim did not sound in medical malpractice because Lucas alleged false communication by defendants, not incorrect diagnoses. The trial court also ruled that Lucas had pleaded sufficient facts to establish a claim for fraud based on defendants' alleged false information made for the purpose of increasing billings. In accordance with these findings, the trial court denied defendants' motion for partial summary disposition with respect to fraud, silent fraud, and conspiracy.

B. DOCKET NO. 292786

In Docket No. 292786, the plaintiffs are parents of minors who were patients of Awaad.[2] The plaintiffs filed their complaint on September 12, 2008, and asserted several of the same claims raised by Lucas in Docket No. 292785, including fraud, silent fraud, conspiracy, and intentional infliction of emotional distress. The only claim at issue in Docket No. 292786, however, is

[2] We note that the name of one of the plaintiffs, "Btheag Jaber," appears to have been misspelled in the lower court filings. The caption of this case retains that spelling for the sake of consistency. We further note that "Laura Abel-Slater" also appears as "Laura Abdel-Slater" in some lower court filings.

count IX,[3] which alleged that Awaad and the Oakwood defendants violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.

The plaintiffs alleged that defendants violated the MCPA by engaging in "false, misleading and deceptive acts and/or omissions" that did not involve medical judgment; that the Oakwood defendants' employment agreements with Awaad "provided an unconscionable incentive for Yasser Awaad to generate improper billings and removed his medical judgment"; and that Awaad "engaged in improper coding and billing practices, which included false, misleading and deceptive acts and/or omissions" that did not involve medical judgment. Plaintiffs further alleged that defendant Oakwood Professional Billing processed the fraudulent billings with knowledge of the revenue-sharing agreement between Awaad and the Oakwood defendants and with knowledge of his improper billing practices.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that plaintiffs failed to state a claim under the MCPA because the allegations did not involve "trade or commerce" as that term is used in MCL 445.903(1). Defendants also contended that plaintiffs' claims were based on transactions that fall under the exception to the MCPA found in MCL 445.904(1)(a), which provides that the MCPA does not apply to conduct "specifically authorized" by state or federal laws that are administered by a regulatory board.

In response, plaintiffs argued that the MCPA should be liberally construed to fulfill its goal of protecting consumers, including patients who are harmed by the commercial and business aspects of the practice of

[3] Although the various plaintiffs brought many of the same claims, defendants opted to selectively target claims in each action.

medicine. Plaintiffs denied that their claims were based on conduct involving medical judgment and, instead, characterized their claims as based on defendants' "purposeful conduct to steal from Plaintiffs, which is based solely on Defendants' entrepreneurial, commercial, and business aspect of the practice of medicine." With respect to the exception in MCL 445.904(1)(a), plaintiffs argued that it was an affirmative defense and that they were not required to plead facts in avoidance of the defense in order to state a valid claim for relief.

The trial court denied defendants' motion for summary disposition, mainly on the basis that plaintiff's allegations related to the "entrepreneurial, commercial and/or business aspect of the practice of medicine."

C. DOCKET NO. 295973

In Docket No. 295973, the minor plaintiffs, through their next friends, sued defendants for medical malpractice. Plaintiffs alleged that they were injured by Awaad's false diagnoses of epilepsy/seizure disorder, which subjected the minor plaintiffs to inappropriate medication, treatment, and medical testing. The only pertinent claims on appeal are the medical malpractice claims found in count VII against the Awaad defendants and in count VIII against the Oakwood defendants.

Pursuant to MCL 600.2912d, the minor plaintiffs supported their medical malpractice claims with affidavits of merit executed by Dr. Michael Kohrman, a board-certified specialist in child neurology. In accordance with MCL 600.2912e, defendants filed affidavits of meritorious defense executed by Dr. Michael Duchowny and Dr. Michael Johnston.

Defendants moved for summary disposition of plaintiffs' malpractice claims under MCR 2.116(C)(8). Defendants argued that plaintiffs' "boilerplate" allegations of

malpractice were not sufficiently specific to establish valid claims against defendants. Defendants contended that plaintiffs could not establish malpractice merely by alleging that Awaad had incorrectly diagnosed patients with epilepsy without alleging that he had breached a standard of practice. Defendants acknowledged at the summary disposition hearing that their motion was based, in part, on the alleged inadequacy of plaintiffs' affidavits of merit.

The trial court concluded that plaintiffs' complaint and the affidavits of merit contained sufficient allegations of malpractice to withstand a motion for summary disposition under MCR 2.116(C)(8).

Plaintiffs then moved to strike defendants' affidavits of meritorious defense because they allegedly failed to address statements in plaintiffs' affidavits of merit that defendants had failed to properly and accurately read the results of EEGs, MRIs, PETs, and other tests to rule out the condition of epilepsy. Plaintiffs also argued that, as a result of the inadequate affidavits of meritorious defense, the trial court should enter a default against defendants.

Defendants argued in response that the affidavits satisfied all the requirements of MCL 600.2912e because they set forth the applicable standard of practice for a pediatric neurologist, which was to diagnose epilepsy/seizure disorder on the basis of clinical history and examination and evaluation of the patient. Defendants asserted that plaintiffs' challenge to the affidavits of meritorious defense was based only on "the fundamental disagreement between the parties regarding the medical issues underlying the claim of liability that lies at the very heart of this case."

Defendants then moved to strike plaintiffs' affidavits of merit and notices of intent. Defendants argued that

plaintiffs' affidavits of merit failed to state the applicable standard of care or the manner in which the standard was breached, as required by MCL 600.2912d. Defendants contended that the bare assertion that "testing" had been "improperly" interpreted failed to explain the manner in which the standard of practice had been breached. Plaintiffs argued in response that the trial court had already ruled on the sufficiency of plaintiffs' affidavits of merit when it denied defendants' motion for summary disposition.

The trial court concluded that the affidavits of meritorious defense did not satisfy the requirements of MCL 600.2912e because the affidavits did not address whether Awaad correctly read and interpreted the EEG test results. However, instead of entering a default against defendants as plaintiffs requested, the trial court gave defendants 14 days to file amended affidavits. And the trial court denied defendants' motion to strike plaintiffs' affidavits of merit and notices of intent, stating that it had already addressed those same arguments when it ruled on defendants' motion for summary disposition.

On July 7, 2009, defendants filed amended affidavits of meritorious defense. Duchowny prepared an affidavit for each child, and Johnston prepared an affidavit for Benjamin Meier. Duchowny summarized each child's signs and symptoms, the course of treatment recommended by Awaad, and the child's progress as observed at each office visit. Although each affidavit of meritorious defense contained information specific to each child, they all provided the same information regarding the standard of care for Awaad and the other defendants, especially with respect to the use of EEGs as a diagnostic tool to confirm or rule out a diagnosis of epilepsy/seizure disorder. At this time, defendants also

submitted an affidavit of meritorious defense executed by Awaad. Unlike Duchowny's and Johnston's affidavits, Awaad's affidavit stated that he correctly read the EEG results.

Plaintiffs filed a renewed motion to strike defendants' amended affidavits of meritorious defense. Plaintiffs argued that the amended affidavits failed to correct the deficiencies in the original affidavits because they did not indicate whether the standard of practice required Awaad to correctly read and interpret the EEGs. Plaintiffs maintained that a second deficiency was that the affidavits failed to state that Awaad correctly read and interpreted the EEGs. Plaintiffs also argued that Awaad's affidavit should be rejected because it was not an amended affidavit and had not been filed with leave of the court.

Defendants argued that the affidavits of meritorious defense were sufficient because they stated that Awaad complied with the applicable standard of care. Defendants further argued that if their affidavits were not compliant, default would be an unjustly harsh sanction.

With respect to the substance of the affidavits, the trial court first determined that "defendants' affidavits fail to identify a valid defense to plaintiffs' claims regarding the correct reading and interpretation of the EEGs." The trial court also ruled that the affidavits failed to provide a defense to plaintiffs' claims "that the standard of care required Dr. Awaad to correctly read and interpret the EEGs, and that Dr. Awaad breached that standard of care when he failed to correctly read and interpret the EEGs." Finally, the trial court concluded that "the affidavits of meritorious defense are substantively void of the statutorily required content under MCL 600.2912e as to these issues."

The trial court also found that default was warranted "because defendants have failed to make a good-faith effort to comply with the requirements of MCL 600.2912e," explaining:

> This Court specifically found at the June 23, 2009 hearing on plaintiffs' first motion to strike defendants' affidavits that the affidavits were defective because they did not address whether the standard of care required Dr. Awaad to correctly read and interpreted [sic] the EEGs and whether Dr. Awaad did, in fact, correctly read and interpret the EEGs. Despite plaintiffs' request for a default, this Court allowed defendants 14 days to file affidavits addressing the issue of the EEGs. However, as explained above, defendants' affidavits remain deficient. Given that this Court explicitly explained how defendants' affidavits were defective and gave defendants 14 days in which to file amended affidavits addressing Dr. Awaad's reading of the EEGs, the Court finds that defendants did not make a good-faith attempt to file affidavits which were responsive to plaintiffs' claims.

The trial court therefore entered a default against defendants with respect to whether the standard of care required Awaad to correctly read and interpret the EEGs and whether he had, in fact, correctly read and interpreted the EEGs. The trial court also struck Awaad's affidavit because it was not an amendment of previously filed affidavits.

II. ANALYSIS

A. DOCKET NO. 292785

Defendants argue that the trial court erred when it denied their motion for summary disposition with regard to Lucas's allegations of intentional infliction of emotional distress, fraud, and conspiracy. This Court reviews a trial court's decision on a motion for sum-

mary disposition de novo. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). A court must "determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.* In doing so, a reviewing court accepts the factual allegations in the complaint as true and construes them in a light most favorable to the nonmoving party. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008).

1. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The trial court erred when it denied defendants' motion for summary disposition with respect to Lucas's claim for intention infliction of emotional distress.

" 'To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff.' " *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 321; 788 NW2d 679 (2010) (citation omitted). "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Accordingly, "[l]iability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.*

Defendants do not directly address whether the complaint alleges each of the necessary elements for a claim for intentional infliction of emotional distress. Instead, they contend that Lucas's claim sounds in medical malpractice rather than being an independent claim of intentional infliction of emotional distress.

Defendants correctly assert that Lucas's labeling of her claim as intentional infliction of emotional distress is not dispositive of whether her claim sounds in medical malpractice. In determining the nature of a claim, "[i]t is well established that '[t]he gravamen of an action is determined by reading the claim as a whole' and looking 'beyond the procedural labels to determine the exact nature of the claim.' " *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (citations omitted). Our Supreme Court in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004), set forth a two-part test to determine whether an alleged claim is a medical malpractice claim, regardless of the labels the plaintiff uses. The two questions a court must answer are

> (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Id.* at 422.]

We answer the first question in the affirmative because there can be no dispute that the alleged actions occurred within the course of a professional relationship. While Awaad was not providing healthcare to Lucas, Lucas was acting on behalf of her children, the patients, in the patient-physician relationship because,

as their mother, she was responsible for providing the necessary medical consent on behalf of her children. See *In re Rosebush*, 195 Mich App 675, 683; 491 NW2d 633 (1992) ("It is well established that parents speak for their minor children in matters of medical treatment."). Like consent given by any patient for any medical procedure, Lucas's consent on behalf of her children was to have been "informed consent." "The doctrine of informed consent requires a physician to warn a patient of the risks and consequences of a medical procedure." *Wlosinski v Cohn*, 269 Mich App 303, 308; 713 NW2d 16 (2005). As a result, a doctor must engage in a substantive discussion with the parent of a minor patient in order to share these risks and consequences and to obtain the parent's consent for the proposed medical procedure. Thus, the parent stands in the place of the child in the patient-physician relationship. Further, under the Public Health Code, MCL 333.1101 *et seq*., a parent represents a child patient in other instances as well. For example, a medical provider must maintain a minor patient's medical records for at least seven years unless the medical provider obtains the parent's authorization for early destruction. MCL 333.16213(1); MCL 333.16213(7)(c) (defining "patient" to include a parent of a minor who received medical treatment). Therefore, because Lucas stood in the place of her minor children with respect to providing consent in a relationship between a patient and a healthcare provider, we hold that the relationship between her and Awaad was indeed a "professional relationship."

We also answer the second question in the affirmative because Lucas's claim raises questions of medical judgment beyond the realm of common knowledge and experience. Because defendants moved for summary disposition under MCR 2.116(C)(8), the pertinent inquiry is whether Lucas's complaint alone is sufficient to

state a claim and justify recovery. *Smith*, 231 Mich App at 258. The crux of Lucas's claim of intentional infliction of emotional distress is that Awaad intentionally and knowingly communicated a false diagnosis to Lucas for the purpose of financial gain. In other words, Lucas alleges that Awaad improperly diagnosed Lucas's children with epilepsy/seizure disorder when he knew that in fact they did not have the disorder. Thus, in order to prevail, Lucas would necessarily have to establish that her children did *not* suffer from epilepsy/seizure disorder. Establishing this fact would, in turn, necessarily require expert testimony involving issues of medical judgment beyond the realm of common knowledge and experience.

Tipton, 266 Mich App 27, is analogous to the present case. In *Tipton*, the plaintiff sued the defendant hospital and the defendant doctor under the MCPA. The plaintiff alleged that the defendants both failed to inform the plaintiff that the defendant doctor had been involved in five prior birth trauma medical malpractice lawsuits, even though none of them had resulted in a verdict or settlement against the doctor. *Id*. at 28. The Court held that summary disposition was proper for the defendants because the plaintiff's complaint sounded in medical malpractice. *Id*. at 37. Importantly, the Court determined that the crux of plaintiff's complaint was that the doctor "was unreliable and unable to render safe prenatal and delivery care simply because he was involved in prior birth trauma medical malpractice lawsuits." *Id*. at 35. But because a doctor's involvement in prior medical malpractice lawsuits does not render him "unreliable per se or unable to prove safe medical care," the plaintiff would be required to show that the doctor was indeed unreliable or unable to provide safe medical care. *Id*. at 36. The Court determined that this would necessarily require expert testimony involving

medical judgment, which placed it in the realm of medical malpractice. *Id*. In this case, because the crux of Lucas's claim for intentional infliction of emotional distress is that Awaad knowingly provided *false* diagnoses, expert testimony concerning medical judgment is required in order for Lucas to prove the falsity of the diagnoses.

In sum, Lucas's allegation of intentional infliction of emotional distress sounds in medical malpractice because the alleged actions occurred during the course of a professional relationship and the claim requires an examination of medical expertise or medical judgment in order for Lucas to prevail. Accordingly, the trial court erred by denying defendants' motion for summary disposition with respect to the claim for intentional infliction of emotional distress.

2. FRAUD AND SILENT FRAUD

Defendants next argue that the trial court erred when it denied their motion for summary disposition on Lucas's claims of fraud and silent fraud. We agree.

A plaintiff asserting a claim of fraud must demonstrate these six elements: (1) that the defendant made a material representation; (2) that it was false; (3) that the defendant made the representation knowing that it was false or made it recklessly without knowledge of its truth; (4) that the defendant intended that the plaintiff would act on the representation; (5) that the plaintiff relied on the representation; and (6) that the plaintiff suffered injury as a result of having relied on the representation. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 408; 751 NW2d 443 (2008).

To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud

the plaintiff and that the defendant had a legal or equitable duty of disclosure. *Roberts v Saffell*, 280 Mich App 397, 403-404; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009). A plaintiff cannot merely prove that the defendant failed to disclose something; instead, "a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Id*. at 404.

Defendants argue that Lucas's claim of fraud sounds in medical malpractice. We agree. The gravamen of Lucas's fraud complaint is that Awaad communicated the diagnoses of epilepsy/seizure disorder "when he knew that such disorders did not in fact exist." Similar to Lucas's claim of intentional infliction of emotional distress, this claim requires proof that Lucas's children "did not in fact" suffer from seizure/epilepsy disorder. This evidence requires the presentation of expert testimony addressing questions involving the exercise of medical judgment or medical competency. Therefore, for the reasons we stated earlier, we conclude that Lucas's claim of fraud sounds in medical malpractice.

With respect to Lucas's silent fraud claim, defendants argue that there "is no duty owed to a parent that would give rise to a claim by the parent against the health care provider." We agree. While duty is irrelevant in a fraud claim, it is relevant in a silent fraud claim. *Roberts*, 280 Mich App at 403-404. As noted earlier, in order for "the suppression of information to constitute silent fraud there must exist a legal or equitable duty of disclosure." *Id*. at 404. Regarding duty, Lucas alleged the following in her complaint:

> • Defendants owed a duty to Lucas to notify her that Awaad "had engaged in a systematic pattern and practice of falsely diagnosing epilepsy/seizure disorder in hundreds of his pediatric patients."

> • Awaad owed a duty to Lucas "to refrain from communicating to [her] the diagnosis of . . . epilepsy/seizure disorder . . . when he knew that such disorders did not in fact exist."
>
> • Defendants "had a duty to report [Awaad's] false diagnosis, treatment and billings to appropriate government agencies pursuant to federal law."

Whether a duty exists is a question of law, not a question of fact. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004). "[O]nly factual allegations, not legal conclusions, are to be taken as true under [MCR 2.116(C)(8)]." *Davis v Detroit*, 269 Mich App 376, 379 n 1; 711 NW2d 462 (2006). At the outset, we note that the last two alleged duties are not pertinent to Lucas's claims of silent fraud. A duty to "refrain from communicating" is not equivalent to a duty to disclose. And defendants' alleged duty to report to government agencies is not a duty to disclose to Lucas.

Regarding Lucas's first alleged duty, we hold that Lucas failed to provide sufficient facts to support a conclusion that defendants owed her a duty to inform her of Awaad's prior conduct. In short, the mere fact that defendants were healthcare providers for her children, or that Lucas was in a professional relationship with Awaad, is insufficient to create such a duty to disclose. It is established that physicians do not have a duty to disclose their success rates to patients in order to obtain informed consent for particular medical procedures. *Wlosinski*, 269 Mich App at 308-311. While Lucas is not suggesting that defendants had a duty to disclose Awaad's "success rates," Lucas maintains that defendants had a duty to disclose Awaad's alleged history of fraud related to his prior seizure disorder diagnoses. We conclude that this is a distinction without an appreciable difference; both instances involve dis-

closing alleged past poor performance. Moreover, if Awaad had no duty to disclose his prior conduct, we see no rationale for extending this duty to disclose to the other defendants. That outcome would result in the nonattending defendants owing a *greater* duty than the treating physician, which would be illogical. Therefore, defendants' motion for summary disposition under MCR 2.116(C)(8) should have been granted with respect to Lucas's silent fraud claims.

B. DOCKET NO. 292786

In Docket No. 292786, plaintiffs are parents of children who were allegedly falsely diagnosed with epilepsy/seizure disorder by Awaad. They brought multiple claims against defendants, but the only one relevant on appeal is plaintiffs' claim under the MCPA. We hold that the trial court erred by denying defendants' motion for summary disposition with respect to plaintiffs' MCPA claim.

The MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). Plaintiffs' complaint alleges that defendants violated the MCPA by engaging in improper coding and billing practices that included "false, misleading and deceptive acts and/or omissions," but did not involve medical judgment. They allege that the Oakwood defendants were implicit in Awaad's fraudulent billings by entering into revenue-sharing agreements that gave him the incentive to engage in these fraudulent practices and by accepting a share of the illegally obtained billings. They contend that Awaad's practice of billing patients and their insurers on the basis of intentionally false diagnoses violated MCL 445.903(1)(s) (failure to disclose material facts to a consumer), (u) (failure to refund to a customer

payment for a terminated agreement), (bb) (false representations of material fact), and (cc) (failure to reveal facts that are material to the transaction in view of favorable representations).

In *Nelson v Ho*, 222 Mich App 74; 564 NW2d 482 (1997), the plaintiff asserted an MCPA claim against a defendant surgeon, alleging that he used deceptive practices by falsely advising the plaintiff that he used dissolvable sutures in her nasal surgery. *Id.* at 77-78. This Court concluded that the practice of medicine could neither be entirely excepted from nor entirely included in the definition of "trade or commerce" and held "that only allegations of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of the entrepreneurial, commercial, or business aspect of a physician's practice may be brought under the MCPA." *Id*. at 83. In contrast, "[a]llegations that concern misconduct in the actual performance of medical services or the actual practice of medicine would be improper" under the MCPA. *Id.* This Court concluded that the plaintiff's claim was not based on practices in trade or commerce, explaining:

> We do not consider either one of these allegations to charge defendant with misconduct in the entrepreneurial, commercial, or business aspect of his practice. Rather, we consider these to be principally attacks on the actual performance of defendant's medical services, which would be more appropriately addressed in the context of a timely filed medical malpractice claim. Therefore, the MCPA does not apply, and plaintiff has failed to state a claim upon which relief can be granted. [*Id*. at 84.]

In the present case, plaintiffs argue that their claim is based on the entrepreneurial, commercial, and business aspect of the medical practice because it is based on fraudulent billing practices. They emphasize that Awaad falsely diagnosed patients with epilepsy in order

to maximize his earnings under his employment and revenue-sharing agreements and that the Oakwood defendants participated in this fraud by entering into revenue-sharing agreements that gave Awaad an incentive to falsely diagnose patients, by cooperating in Awaad's fraudulent billings, and by sharing in Awaad's illegal gains. Similar to Lucas's fraud claims in Docket No. 292785, plaintiffs' MCPA claims are not based on an alleged mistake in medical judgment but instead on alleged fabrications for the purpose of enriching Awaad and the Oakwood defendants. Plaintiffs allege that there was no medical judgment involved in issuing false diagnoses for financial gain. This claim therefore pertains to the entrepreneurial, commercial, and business aspects of medical practice under the MCPA.

However, MCL 445.904(1)(a) provides that the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Two years after this Court issued its opinion in *Nelson*, our Supreme Court held that in determining whether a transaction or conduct is outside the scope of the MCPA, "the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is 'specifically authorized.' Rather, it is whether the *general* transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Smith v Globe Life Ins Co*, 460 Mich 446, 465; 597 NW2d 28 (1999) (emphasis added).

Because the state specifically authorizes the general transaction here, plaintiffs' MCPA claim must fail. This situation is analogous to the situation in *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007). In *Liss*, the plaintiffs sued the defendant, a

residential homebuilder, under the MCPA, alleging that the defendant failed to timely complete construction of the plaintiffs' home in accordance with the building contract and that the construction was not done in a workmanlike manner. *Id.* at 206-207. The defendant asserted that the transaction at issue, residential homebuilding, was excepted from the MCPA under MCL 445.904(1)(a) because home construction is a licensed and regulated industry. *Id.* at 207. The Michigan Supreme Court agreed, holding that the statutory exception applied because residential homebuilders are licensed under the Occupational Code, MCL 339.101 *et seq*., and are regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board pursuant to a set of administrative rules. The Court concluded that the *general* transaction of contracting to build a residential home is thus specifically authorized by law and therefore excepted from the MCPA. *Liss*, 478 Mich at 213-214.

There is no dispute that the practice of medicine is specifically authorized and regulated by law. See MCL 333.17001 to MCL 333.17084. Accordingly, plaintiffs' MCPA claim is barred by that statute's exception for transactions specifically authorized by law, MCL 445.904(1)(a); *Smith*, 460 Mich at 465, and the trial court erred when it failed to grant defendants' motion for summary disposition on this claim.

C. DOCKET NO. 295973

1. DEFENDANTS' AFFIDAVITS OF MERITORIOUS DEFENSE

Defendants argue that the trial court erred by concluding that defendants' affidavits of meritorious defense failed to satisfy the statutory requirements of MCL 600.2912e. We agree, and because we agree, we

also reverse the trial court's entry of default against defendants based on the trial court striking defendants' affidavits. However, we hold that the trial court correctly struck Awaad's affidavit of meritorious defense as untimely.

The question of whether an affidavit of meritorious defense is sufficient under MCL 600.2912e is reviewed de novo as a question of law. See *Jackson v Detroit Med Ctr*, 278 Mich App 532, 545; 753 NW2d 635 (2008) (whether a notice of intent complies with statutory requirements is reviewed de novo as a question of law). The question of whether Awaad's affidavit was permissibly filed also presents a question of law subject to de novo review. See *id.*

In a malpractice claim, the plaintiff must file an affidavit of merit along with the complaint. MCL 600.2912d. The defendant, in turn, must file an affidavit of meritorious defense. MCL 600.2912e(1) provides the requirements for an affidavit of meritorious defense:

> (1) . . . The affidavit of meritorious defense shall certify that the health professional has reviewed the complaint and all medical records supplied to him or her by the defendant's attorney concerning the allegations contained in the complaint and shall contain a statement of each of the following:
>
> (a) The factual basis for each defense to the claims made against the defendant in the complaint.
>
> (b) The standard of practice or care that the health professional or health facility named as a defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.
>
> (c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.

> (d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered.

a. DUCHOWNY AND JOHNSTON AFFIDAVITS

Pursuant to MCL 600.2912d, the minor plaintiffs supported their medical malpractice claims with affidavits of merit executed by Kohrman. All the affidavits of merit are identical, with only the name of the child plaintiff being changed. Kohrman averred, in pertinent part, that the applicable standard of care required Awaad to do the following:

> 3. Perform or otherwise obtain examinations and/or testing to confirm or to rule out the condition of epilepsy. Such testing . . . include[s], but [is] not limited to, EEGs, MRIs, PET and other diagnostic and imaging studies.
>
> 4. Properly and accurately read the results of testing to confirm or to rule out the condition of epilepsy. Such test results include, but are not limited to, EEGs, MRIs, PET and other diagnostic and imaging studies.

Kohrman also averred that Awaad breached the standard of care by failing to comply with the above requirements.

In response, defendants filed (amended) affidavits of meritorious defense by Duchowny and Johnston on July 7, 2009. Duchowny stated that the applicable standard of care for a pediatric neurologist "is to appropriately evaluate, examine, monitor, diagnose, and treat a patient in the same set of circumstances" as each plaintiff. Duchowny further stated:

> The standard of practice is especially based upon clinical information such as patient history and data received from the patient's family. The standard of practice required

> taking into account the above information, in coordination with examination and evaluation of the patient.
>
> While it is within the standard of practice for a pediatric neurologist to order EEG testing or to consider the results of EEG testing or other testing that is performed, EEG testing is performed because it may provide information that would confirm a diagnosis based on clinical history, or because it may help in selecting which anti-seizure medication, among many possible anti-seizure medications, should be provided to a patient. Some anti-seizure medications can accentuate seizures, and EEG testing may help to determine whether this is occurring.
>
> The standard of practice does not require that a pediatric neurologist order EEG testing or rely on EEG tests to determine whether a diagnosis of epilepsy/seizure disorder should be made, or to determine the course of treatment. A patient's clinical history and physical findings alone, if suggestive of a seizure disorder/epilepsy, are sufficient to support both a diagnosis of epilepsy/seizure disorder and the propriety of a particular course of treatment for that condition. The existence of a "normal" EEG test, and even multiple "normal" EEGs, cannot rule out epilepsy/seizure disorder, and cannot "override" or negate a clinical history and physical findings that are suggestive of epilepsy/seizure disorder.

Duchowny opined that Awaad complied with the applicable standard of care in treating the minor plaintiffs. Duchowny also provided summaries of the care provided for each child.

The trial court determined that defendants' affidavits were deficient because they did not specifically address whether the standard of care required Awaad to correctly read and interpret the EEG test results and whether Awaad breached that standard of care when he failed to correctly read and interpret the EEGs. As a result, the trial court concluded that "the affidavits of meritorious defense are substantively devoid of the statutorily required content under MCL 600.2912e as to these issues."

We conclude that the trial court erred when it made this determination. While we agree that the affidavits did not state that Awaad correctly read and interpreted the EEG tests, the affidavits clearly identified defendants' defense against this claim. Typically, defenses are based on an assertion that the defendant did not breach the applicable standard of care, which is but one element in a malpractice case.[4] However, defenses are not limited to this element. If any element in a malpractice claim is not met, then a plaintiff cannot prevail. In this case, defendants' affidavit of meritorious defense attacked plaintiffs' specific claim that Awaad had misinterpreted the EEG tests by addressing the causation element. The affidavit stated:

> As to the EEG testing in particular, any claimed acts or alleged omissions with respect to EEG testing did not cause any injury because the EEG tests, regardless of their results, could not have negated or overridden the clinical diagnosis in these cases, and because the diagnosis and treatment were within the standard of practice, regardless of any EEG test results.

Thus, for this *particular* defense, there is no further factual basis that would help develop this theory. MCL 600.2912e(1)(a) only requires a "factual basis for *each defense*," not a factual basis for each *claim* asserted by the plaintiff. If no factual basis is applicable for a particular defense, then no factual basis needs to be, or could be, provided. We note that the affidavits of meritorious defense did provide extensive factual bases for

[4] In a medical malpractice case, a plaintiff must establish (1) the appropriate standard of care governing the defendant's conduct, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that defendant's breach of the standard of care proximately caused plaintiff's injuries. See *Kalaj v Khan*, 295 Mich App 420, 426; 820 NW2d 223 (2012).

defenses related to other aspects of plaintiffs' malpractice claim,[5] which are not at issue on appeal.

With respect to plaintiffs' claim that the standard of care requires the pediatric neurologist to order EEG testing and to correctly interpret EEG testing, defendants' affidavit from Duchowny addressed the issue as follows:

> The standard of practice does not require that a pediatric neurologist order EEG testing or rely on EEG tests to determine whether a diagnosis of epilepsy/seizure disorder should be made, or to determine the course of treatment. A patient's clinical history and physical findings alone, if suggestive of a seizure disorder/epilepsy, are sufficient to support both a diagnosis of epilepsy/seizure disorder and the propriety of a particular course of treatment for that condition. The existence of a "normal" EEG test, and even multiple "normal" EEGs, cannot rule out epilepsy/seizure disorder, and cannot "override" or negate a clinical history and physical findings that are suggestive of epilepsy/seizure disorder.

The affidavit from Johnston addressed the issue almost identically. Thus, the affidavits of meritorious defense adequately address this issue by providing a different standard of care.

In sum, plaintiffs' affidavits of merit stated that the applicable standard of care required Awaad to understand and recognize the signs and symptoms of epilepsy, recognize that the signs and symptoms displayed by his patients were inconsistent with epilepsy, and perform testing, including EEGs, to "confirm or to rule out the condition of epilepsy." Plaintiffs' affidavits also provided that the standard of care required the physician to "[p]roperly and accurately read the results" of the

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[5] For example, the seven-page affidavit regarding patient Mariah Martinez contains 15 paragraphs of facts relating to her various office visits and treatment.

tests, including EEGs, to confirm or rule out the condition of epilepsy. Defendants' affidavits sufficiently responded to these assertions by stating that the applicable standard of practice requires a pediatric neurologist to base a diagnosis of epilepsy on the patients' signs, symptoms, physical condition, and clinical history. Defendants' expert stated that the standard of practice does not involve relying on EEG test results to confirm or rule out a diagnosis of epilepsy, although the physician might consider EEG test results in making decisions regarding the patients' treatment. Moreover, defendants' expert stated that any alleged breach involving misreading or misinterpreting an EEG test would not have affected any diagnosis.

As a result, the trial court erred when it struck Duchowny's and Johnston's affidavits of meritorious defense.

b. AWAAD'S AFFIDAVIT

After plaintiffs' delay in serving defendants with their complaints and affidavits of merit, the trial court granted defendants a 91-day stay of proceedings to allow them sufficient time to prepare and file affidavits of meritorious defense. Consequently, defendants were required to file and serve affidavits of meritorious defense on or before January 14, 2009. At issue is whether Awaad's affidavit of meritorious defense was untimely when it was filed on July 7, 2009, the same date that the other amended affidavits of meritorious defense were filed pursuant to the trial court's order of June 23, 2009.

Defendants argue that Awaad's affidavit should be treated as an amendment of the previously filed affidavits. We disagree. Awaad's affidavit was an entirely new affidavit, not an amendment of a previously submitted

affidavit. Accordingly, defendants' failure to file the affidavit by the January 14, 2009, deadline precluded them from subsequently filing it under the guise of an "amendment."

Defendants also contend that Awaad's affidavit relates back to the timely filed affidavits of meritorious defense and, therefore, is permissible under MCR 2.118. MCR 2.118(A)(1) provides that a party may amend a pleading by right within 14 days after being served with a responsive pleading or within 14 days after serving the pleading if a responsive pleading is not required. Outside of this time frame, a party may not amend a pleading unless the court grants leave to do so or the adverse party consents in writing. MCR 2.118(A)(2). As amended effective May 1, 2010, MCR 2.118(D) provides:

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

The italicized sentence became effective May 1, 2010, after the trial court struck Awaad's affidavit as untimely. Similarly, MCR 2.112(L)(2)(b) was amended effective May 1, 2010, and now provides that "[a]n affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301." In *Ligons v Crittenton Hosp*, 490 Mich 61, 88; 803 NW2d 271 (2011), our Supreme Court held that these amendments do not apply retroactively. Accordingly, Awaad's affidavit, even if it were deemed an amendment, would not be permitted under the amended court rules.

The Supreme Court also held that an affidavit of merit is not a pleading and, as such, may not be amended under the previous version of MCR 2.118. *Id*. at 81. The Court concluded, "Because permitting amendment of a defective AOM [affidavit of merit] runs counter to the established statutes, court rules, and cases governing this area of law, we hold that a plaintiff may not amend a deficient AOM under the version of MCR 2.118 in effect during the pendency of this suit in the trial court." *Id*. at 85. This holding applies by analogy to affidavits of meritorious defense under MCL 600.2912e. Accordingly, the trial court properly struck Awaad's affidavit.

2. PLAINTIFFS' AFFIDAVIT OF MERIT

Defendants next argue that the trial court erred when it failed to find plaintiffs' affidavits of merit deficient. We disagree. Whether plaintiffs' affidavits of merit complied with the requirements of MCL 600.2912d is reviewed de novo as a question of law. See *Jackson*, 278 Mich App at 545.

MCL 600.2912d(1) provides that the plaintiff in a medical malpractice action must file with the complaint "an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements of an expert witness under [MCL 600.2169]." The affidavit must contain a statement of each of the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1).]

The failure to include any of these required items of information renders the affidavit of merit insufficient. *Ligons*, 490 Mich at 77.

In attempting to comply with MCL 600.2912d(1)(a), plaintiffs' affidavits of merit set forth standards of care for Awaad and the other defendants that can be summarized as follows:

- Defendants were required to understand the signs and symptoms of epilepsy;
- Defendants were required to recognize that the patients did not exhibit those symptoms;
- Defendants were required to order testing, including EEGs, MRIs, and PET tests, to confirm or rule out the condition of epilepsy;
- Defendants were required to accurately interpret those test results;
- Defendants were required to refer the patients to, and/or obtain consultation from, physicians with the education, training, and experience to recognize the signs and symptoms of epilepsy;
- Defendants were required to refrain from diagnosing and undertaking procedures related to epilepsy when they were not qualified to do so;
- Defendants were required to refrain from administering and prescribing anti-seizure medications when the patients did not suffer from epilepsy;
- Defendants were required to refrain from diagnosing patients as suffering from epilepsy when they did not; and
- Defendants were required to refrain from ordering/performing testing which was unnecessary, including, but not limited to, EEG testing.

In addressing MCL 600.2912d(1)(b), the affidavits then, by using the exact same verbiage from the standard-of-care section of the affidavit, stated that defendants breached the various standards of care. As an example, the following is how the affidavit addressed the first standard of care with respect to Awaad:

> 4. The applicable standard of practice or care in this matter required a physician practicing the specialty of pediatric neurology[,] and specifically Yasser Awaad, M.D., to:
>
> 1. Appreciate and understand the signs and symptoms associated with the condition of epilepsy.
>
> * * *
>
> 8. It is my opinion that Yasser Awaad, M.D. breached the applicable standard of practice or care by failing to:
>
> 1. Appreciate and understand the signs and symptoms associated with the condition of epilepsy.

This process was repeated for each of the nine standards of care provided, thereby satisfying the requirements of MCL 600.2912d(1)(b) and (c).

Additionally, the requirement under MCL 600.2912d(1)(d) was met as well. Our Supreme Court has noted that an affidavit

> answering the question "How was the breach the proximate cause of the injury?" requires more than "The breach caused the injury." In other words, the mere correlation between alleged malpractice and an injury is insufficient to show proximate caus[ation]. [*Ligons*, 490 Mich at 77-78, citations and quotation marks omitted).]

The affidavit of merit explained that Awaad's wrongful diagnosis resulted in the children and their parents having to unnecessarily attend numerous office visits and unnecessarily submit to EEG, MRI, and other

testing. The affidavit also described that the incorrect diagnoses resulting in the prescription of medication that not only was not needed, but also caused adverse side effects, such as delays in cognition and speech. These explanations address the salient question of *how* the breaches proximately caused injuries to the plaintiff children.

Defendants contend that these assertions do not provide specific information with respect to the applicable standard of care and Awaad's failure to comply with that standard. Defendants assert that the affidavits of merit are unacceptably vague because they do not identify what testing was done, or what testing should have been done, or what signs and symptoms each patient presented. Defendants further argue that the affidavits of merit do not explain how the alleged breaches of the standard of care led to an incorrect diagnosis, or how compliance with the standard of care would have avoided the incorrect diagnosis and unnecessary treatment. However, this lack of specificity does not render the affidavits noncompliant with the statute. Because we conclude that the affidavits of merit met the requirements of MCL 600.2912d(1), the trial court did not err when it denied defendants' motion to strike.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

K. F. KELLY, P.J., and BOONSTRA, J., concurred with WILDER, J.

PEOPLE v CREWS

Docket No. 305830. Submitted January 10, 2013, at Detroit. Decided February 5, 2013, at 9:00 a.m.

Anthony J. Crews pleaded guilty in the Monroe Circuit Court to one count of second-degree home invasion, MCL 750.110a(3), and was sentenced by the court, Joseph A. Costello, Jr., J., to 75 to 180 months in prison. The Court of Appeals denied defendant's delayed application for leave to appeal in an unpublished order, entered June 4, 2009 (Docket No. 291927). The Supreme Court then denied defendant's application for leave to appeal the order of the Court of Appeals, 485 Mich 977 (2009). The trial court subsequently denied defendant's motion for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), but granted defendant's motion for resentencing. Following a hearing at which the parties stipulated that an offense variable (OV) had been improperly scored but defendant did not challenge the scoring of his prior record variables (PRVs) or any other OVs, the court sentenced defendant to 71 to 180 months in prison. Defendant filed another motion for resentencing and, at a hearing on the motion, argued that he had received ineffective assistance of counsel and that there were several scoring errors in regard to the calculation of his minimum sentence range under the legislative sentencing guidelines, including errors in the scoring of three PRVs. The trial court denied the request for resentencing, holding that defendant had failed to demonstrate ineffective assistance of counsel or any error with regard to the score assessed for PRV 1, regarding prior high-severity felony convictions, or PRV 5, regarding prior misdemeanor convictions or prior misdemeanor juvenile adjudications. The trial court did order that defendant's presentence investigation report be corrected with regard to the score for PRV 2, regarding prior low-severity felony convictions, and that the five points erroneously assessed for OV 11, criminal sexual penetration, be assessed instead under OV 12, contemporaneous felonious criminal acts. The changes did not affect defendant's minimum sentencing guidelines range. The Court of Appeals, MARKEY and BECKERING, JJ. (MURPHY, C.J., dissenting), granted defendant's delayed application for leave to appeal in an unpublished order, entered October 21, 2011 (Docket No. 305830).

The Court of Appeals *held*:

1. In order for a felony conviction under another state's law to constitute a prior high-severity felony conviction for purposes of scoring PRV 1, MCL 777.51, the defendant must have committed a crime in another state that corresponds to a crime listed in offense class M2, A, B, C, or D or a crime that is punishable by a maximum term of 10 years' imprisonment or more.

2. In order for a felony conviction under another state's law to constitute a prior low-severity felony conviction for purposes of scoring PRV 2, MCL 777.52, the defendant must have committed a crime in another state that corresponds to a crime listed in offense class E, F, G, or H or, if not corresponding to a felony listed in offense class M2, A, B, C, D, E, F, G, or H, that is punishable by a maximum term of imprisonment of less than 10 years.

3. Defendant's two prior felony convictions of second-degree burglary in Ohio were punishable by a maximum of eight years' imprisonment, therefore, for those convictions to be considered high-severity felony convictions, the requirements of MCL 777.51(2)(b) had to be met. Under subsection 51(2)(b), the felony of second-degree burglary in Ohio, Ohio Rev Code Ann 2911.12(A)(2), had to be a felony "corresponding" to one listed in offense class M2, A, B, C, or D in order for a conviction of second-degree burglary to be considered a prior high-severity felony conviction.

4. The term "corresponding" in MCL 777.51(2)(b) means similar or analogous. "Analogous" means corresponding in some particular and "similar" means having qualities in common. The goal of the corresponding requirement is to ensure that convictions for out-of-state crimes and in-state crimes under statutes that seek to prevent the same harm are scored in the same category. The Legislature did not intend that minor differences between the wording of a Michigan criminal statute and its analog in a different state would result in the out-of-state conviction's not being counted as a prior offense if the two statutes address the same type of conduct.

5. The felony of second-degree burglary in Ohio, Ohio Rev Code Ann 2911.12(A)(2), is sufficiently similar to second-degree home invasion in Michigan, MCL 750.110a(3), to satisfy the plain meaning of the term "correspond" for purposes of scoring PRV 1. Defendant's two second-degree burglary convictions in Ohio were properly considered prior high-severity felony convictions in scoring PRV 1.

6. Ten points are properly scored for PRV 5, MCL 777.55, prior misdemeanor convictions or prior misdemeanor juvenile adjudications, when the offender has three or four prior misdemeanor convictions or prior misdemeanor juvenile adjudications. Qualifying convictions or adjudications from other states constitute prior misdemeanor convictions or juvenile adjudications, however, a conviction or adjudication should be counted only if it was for an offense against a person or property, a controlled substance offense, or a weapon offense.

7. Defendant's juvenile adjudications in California for assault, an offense against a person, and for petty theft, an offense against property, were properly scored under PRV 5. Defendant's two convictions for disorderly conduct were not for offenses against a person or property, a controlled substance offense, or a weapon offense and, therefore, could not be scored under PRV 5. Defendant's conviction in Ohio following his plea of guilty to the crime of attempting to commit an offense, Ohio Rev Code Ann 2923.02(A), stemmed from a charge of possession or use of drugs. Ohio's attempt statute specifically ties an attempt conviction to the crime attempted. The trial court did not err by classifying the attempt conviction as a conviction for a controlled-substance offense and scoring 10 points under PRV 5 because defendant had at least three qualifying prior misdemeanor convictions or juvenile adjudications.

8. Defense counsel cannot be deemed deficient for failing to advance a novel legal argument. Defendant failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness when counsel failed to object to the scoring of PRV 1 on the basis of a novel legal argument. Defendant failed to demonstrate that prejudice resulted from his counsel's failure to object to the scoring of PRV 1 earlier in the proceedings. Because PRV 5 was properly scored, defense counsel was not ineffective for failing to make a futile objection regarding such scoring.

Affirmed.

1. SENTENCES — PRIOR RECORD VARIABLE 1 — PRIOR RECORD VARIABLE 2.

The Legislature, by distinguishing between high- and low-severity prior felony convictions for purposes of scoring prior record variables 1 and 2 of the sentencing guidelines, intended to provide sentencing courts with a mechanism for matching criminal conduct prohibited by other states with similar conduct prohibited by Michigan statutes, with the focus on the type of conduct and harm that each respective statute seeks to prevent and punish (MCL 777.51, 777.52).

2. SENTENCES — PRIOR RECORD VARIABLE 1 — WORDS AND PHRASES — CORRESPONDING.

The term "corresponding" in the statute pertaining to scoring prior record variable 1 that provides, in part, that a prior high-severity felony conviction means a conviction for a felony under the law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D, means similar or analogous; "analogous" means corresponding in some particular and "similar" means having qualities in common; the goal of the corresponding requirement is to ensure that convictions for out-of-state crimes and in-state crimes under statutes that seek to prevent the same harm are scored in the same category (MCL 777.51[2][b]).

3. SENTENCES — PRIOR RECORD VARIABLE 1 — CORRESPONDING STATUTES.

The felony of second-degree burglary in Ohio, Ohio Rev Code Ann 2911.12(A)(2), corresponds with second-degree home invasion in Michigan, MCL 750.110a(3), for purposes of scoring prior record variable 1 of the sentencing guidelines, MCL 777.51.

4. CONSTITUTIONAL LAW — ATTORNEY AND CLIENT — EFFECTIVE ASSISTANCE OF COUNSEL.

Defense counsel cannot be deemed ineffective or deficient on the basis of counsel's failure to advance a novel legal argument; defense counsel is not ineffective when counsel fails to make a futile objection.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William Paul Nichols*, Prosecuting Attorney, and *Michael C. Brown*, Assistant Prosecuting Attorney, for the people.

Martha Beach Soltis for defendant.

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM. We granted defendant's delayed application for leave to appeal the trial court's order denying his motion for resentencing. Because the trial court's calculation of defendant's minimum sentence range under the legislative sentencing guidelines was accurate, we affirm.

Defendant pleaded guilty to one count of second-degree home invasion, MCL 750.110a(3), on August 22, 2008. Defendant was sentenced on September 18, 2008. At the hearing, the trial court found that defendant's minimum sentence range was 50 to 100 months, and sentenced defendant to 75 to 180 months' imprisonment. Defendant did not challenge the information in his presentence investigation report (PSIR) or the scoring of the legislative sentencing guidelines at the hearing; however, on May 7, 2009, he filed a delayed application for leave to appeal in this Court. This Court denied the application, and defendant filed an application for leave to appeal in the Michigan Supreme Court, which also denied leave to appeal.

On August 16, 2010, defendant filed motions for a *Ginther*[1] hearing and for resentencing in the trial court. The trial court denied defendant's motion for a *Ginther* hearing, but granted his motion for resentencing. A resentencing hearing was held on January 6, 2011, at which the parties stipulated that offense variable (OV) 11, MCL 777.41, had been improperly scored. Defendant did not challenge the scoring of his prior record variables (PRVs) or any of the other OVs at the hearing. Defendant's minimum sentence range was recalculated to be 36 to 71 months. The trial court noted that it still felt its original sentence was appropriate, and sentenced defendant to 71 to 180 months' imprisonment.

On June 30, 2011, defendant filed another motion for resentencing, and the trial court held a hearing on the motion on July 22, 2011.[2] At the hearing, defendant

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] The trial court noted that defendant's characterization of his motion as one for resentencing was incorrect because defendant had previously filed a motion for resentencing. The trial court noted that defendant's motion should have been categorized as a motion for postjudgment relief

argued that he had received ineffective assistance of counsel at his previous sentencing hearings and that there were several scoring errors in regard to the calculation of his minimum sentence range under the legislative sentencing guidelines, including errors in the scoring of PRV 1, MCL 777.51, PRV 2, MCL 777.52, and PRV 5, MCL 777.55. Specifically, defendant argued that PRV 1 was improperly scored because his convictions for burglaries in Ohio did not correspond to any Michigan felonies and, accordingly, could not be used as prior high-severity offenses under PRV 1. Defendant further argued that one of the convictions on which his PRV 2 score was based "does not exist," and that at least one of the offenses relied on for the PRV 5 score was not a crime that could be scored under PRV 5.

In a written order, the trial court denied defendant's request for resentencing, holding that defendant had failed to demonstrate ineffective assistance of counsel or any error in regard to the score assessed for PRV 1 or PRV 5. However, the trial court ordered that defendant's PSIR be corrected in regard to PRV 2 and OV 11.[3] Thereafter, defendant filed a delayed application for leave to appeal the trial court's order and this Court granted defendant's application. Defendant now ap-

pursuant to MCR 6.500 *et seq*. However, the trial court addressed the merits of defendant's arguments and denied relief on that basis.

[3] The prosecutor agreed that PRV 2 should have been scored at five points; however, the change did not affect defendant's minimum sentencing guidelines range. In regard to OV 11, the trial court noted that the parties had misspoken on the record at the earlier hearing when they stipulated the assessment of five points for OV 11, not OV 12, MCL 777.42; thus, the court stated that the five points assessed for OV 11 should be removed and assessed under OV 12 instead. This change similarly did not affect defendant's minimum sentencing guidelines range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

peals the trial court's July 22, 2011, order denying his June 30, 2011, motion for resentencing. On appeal, defendant argues that the trial court erred by scoring 50 points under PRV 1 and by scoring 10 points under PRV 5. Defendant also claims ineffective assistance of counsel in regard to defense counsel's failure to object to the scoring of PRV 1 and PRV 5.

I. STANDARD OF REVIEW

"This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation marks and citations omitted). We will uphold a scoring decision if there is any evidence to support it. *Id.* "An appellate court must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence." *Id.*; MCL 769.34(10). The interpretation of the statutory sentencing guidelines is a question of law that we review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001); *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009).

Resolution of defendant's arguments on appeal requires statutory interpretation. We interpret statutes "to give effect to the intent of the Legislature as expressed by the statute's actual language" and "to enforce the statute's clear and unambiguous language without judicial construction." *People v Wood*, 276 Mich App 669, 671; 741 NW2d 574 (2007). A dictionary may be consulted to determine the meaning of a word that has not acquired a unique meaning at law. *Id.*

II. PRIOR RECORD VARIABLE 1

In regard to PRV 1, defendant argues that 50 points should not have been scored because his convictions for burglary in Ohio constitute prior low-severity felony convictions and, thus, should have been scored under PRV 2.

The purpose of Michigan's legislative sentencing guidelines is "to insure that sentencing decisions are based on a consistent set of legally relevant factors and that such factors are assigned equal importance for all offenders." *People v Whitney*, 205 Mich App 435, 436; 517 NW2d 814 (1994). Thus, the sentencing guidelines' factors "exist to insure that sentencing factors are weighted equally for all offenders." *Id*. at 437. Relevant here, the sentencing guidelines provide instructions for scoring a defendant's prior convictions, and the guidelines differentiate between prior high-severity and prior low-severity felony convictions. PRV 1 and PRV 2 consider prior felony convictions; PRV 1 is scored for prior high-severity felony convictions, and PRV 2 is scored for prior low-severity felony convictions. MCL 777.51; MCL 777.52.

In order for a felony conviction under another state's law to constitute a prior high-severity felony conviction for purposes of PRV 1, the defendant must have committed a crime in another state that corresponds to a crime listed in offense class M2, A, B, C, or D or a crime that is punishable by a maximum term of 10 years' imprisonment or more. MCL 777.51(2).[4] A felony con-

[4] MCL 777.51(2) provides:

> As used in this section, "prior high severity felony conviction" means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:
>
> (a) A crime listed in offense class M2, A, B, C, or D.

viction under another state's law constitutes a prior low-severity felony conviction for purposes of PRV 2 if the crime the defendant committed in another state corresponds to a crime listed in class E, F, G, or H or if the crime is not listed in class M2, A, B, C, D, E, F, G, or H and is punishable by a maximum term of imprisonment that is less than 10 years. MCL 777.52(2).[5] Thus, it is clear that by distinguishing high- and low-severity felony convictions the Legislature intended to provide sentencing courts with a mechanism for matching criminal conduct prohibited by other states with similar conduct prohibited by Michigan statutes, with the focus on the type of conduct and harm that each respective

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(b) A felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D.

(c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more.

(d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more.

[5] MCL 777.52(2) provides:

As used in this section, "prior low severity felony conviction" means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:

(a) A crime listed in offense class E, F, G, or H.

(b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.

(c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

(d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

statute seeks to prevent and punish.

In this case, defendant was previously twice convicted of second-degree burglary in Ohio in violation of Ohio Rev Code Ann 2911.12(A)(2). Second-degree burglary is a felony under Ohio law, and second-degree felonies in Ohio are punishable by a maximum of eight years' imprisonment. Ohio Rev Code Ann 2929.14(A)(2).[6] Under MCL 777.51(2)(d), convictions for crimes punishable by a maximum term of imprisonment of 10 years or more need not correspond to any crime listed in offense class M2, A, B, C, D, E, F, G, or H and constitute prior high-severity felony convictions on the basis of the possible sentence alone. However, because the maximum sentence for a violation of Ohio Rev Code Ann 2911.12(A)(2) is eight years, MCL 777.51(2)(d) is not applicable in this case, and the requirements of MCL 777.51(2)(b) must be satisfied. Consequently, for defendant's two prior Ohio burglary convictions to be considered prior high-severity felony convictions under PRV 1, Ohio Rev Code Ann 2911.12(A)(2) must "correspond" to a Michigan crime listed in offense class M2, A, B, C, or D. MCL 777.51(2)(b).

MCL 777.51 does not define "corresponding," and this Court has never interpreted the term.[7] Thus, the precise meaning of "corresponding" is an issue of first impression. Any term not defined by the statute "should be accorded its plain and ordinary meaning, taking into account the context in which the words are used . . . ." *People v Lange*, 251 Mich App 247, 253; 650 NW2d 691 (2002). *Random House Webster's College*

[6] Defendant's PSIR indicates he was sentenced to two years' imprisonment for each burglary conviction.

[7] Similarly, MCL 777.52, MCL 777.53, and MCL 777.54, which mirror MCL 777.51 and respectively address the scoring of PRV 2, PRV 3, and PRV 4, do not define the term "corresponding."

Dictionary (1997) defines "correspond" as "to be in agreement or conformity; match" and also as "to be similar or analogous."

Under the first definition of "correspond," MCL 777.51(2)(b) would require a felony under a law of the United States or another state "to be in agreement or conformity" with or to "match" a crime listed in offense class M2, A, B, C, or D in order for the felony conviction to be scored under PRV 1. However, reading the definition further, a "similar or analogous" crime is also sufficient. Considering the context in which the term "correspond" appears, *Lange*, 251 Mich App at 253, we conclude that this second definition of "correspond," defining it as "similar or analogous," is the appropriate plain and ordinary definition to apply in this case. Different states often have analogous laws describing essentially the same crime(s), while the specific statutory language used to define those crimes often differs from state to state. Requiring that the offenses match or agree almost exactly would contravene the apparent intent of the Legislature, which is to permit scoring of all convictions for offenses in the listed classes and any analogous offenses committed in another state. Clearly, the goal of the "corresponding" requirement is to ensure that convictions for out-of-state crimes and in-state crimes under statutes that seek to prevent the same harm are scored in the same category. Thus, the Legislature could not have intended that minor differences between the wording of a Michigan criminal statute and its analog in a different state would result in the out-of-state conviction's not being counted as a prior offense if the two statutes address the same type of conduct. As such, in the context of MCL 777.51(2)(b), "corresponding" would be more appropriately construed as being "similar or analogous." "Analogous" is defined as "corresponding in some particular" and

"similar" is defined as "having qualities in common." *Random House Webster's College Dictionary* (1997). In light of this definition of "corresponding," the precise issue before us is whether Ohio Rev Code Ann 2911.12(A)(2), which defines the felony of second-degree burglary in Ohio, defines a crime that is similar or analogous to a Michigan crime in a high-severity crime class.

Ohio Rev Code Ann 2911.12(A)(2) provides:

> No person, by force, stealth, or deception, shall do any of the following:
>
> * * *
>
> (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]

Initially, we note that Michigan's home invasion statute and Ohio's burglary statute seek to prohibit the same type of conduct generally, and, thus, broadly correspond to each other. However, MCL 777.51(2)(b) clearly requires that the Ohio offense correspond "to *a* crime listed in offense class M2, A, B, C, or D" in order to be scored as a prior high-severity felony conviction under PRV 1. (Emphasis added.) Thus, the fact that Ohio's burglary statute seeks to protect against the same type of harm as Michigan's home invasion statute is not sufficient to score defendant's prior Ohio convictions under PRV 1 because defendant's Ohio convictions must correspond to a specific Michigan crime in the appropriate class.

Under Michigan law, home invasion is divided into three degrees. First-degree home invasion,

MCL 750.110a(2), is a class B offense; second-degree home invasion, MCL 750.110a(3), is a class C offense; and third-degree home invasion, MCL 750.110a(4), is a class E offense. MCL 777.16f. All three degrees of home invasion share two common elements (1) breaking and entering or entering without permission and (2) that the entered structure be a dwelling. MCL 750.110a. "Dwelling" is defined as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." MCL 750.110a(1)(a).

We begin by observing that the two elements shared by all three degrees of home invasion under Michigan's statute correspond to elements of Ohio Rev Code Ann 2911.12(A)(2). First, the element of breaking and entering or entering without permission clearly corresponds to the Ohio element requiring trespass by force, stealth, or deception. Next, Michigan's dwelling element that addresses the type of structure being entered corresponds to the Ohio requirement that the trespass occur in "an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present . . . ." Ohio Rev Code Ann 2911.12(A)(2). The dwelling element in the Michigan statute corresponds to Ohio's requirements because in Michigan, "the intent of the inhabitant to use a structure as a place of abode is the primary factor" used to determine whether a structure constitutes a dwelling within the context of MCL 750.110a. *People v Powell*, 278 Mich App 318, 321; 750 NW2d 607 (2008). "The owner's temporary absence, the duration of any absence, or a structure's habitability will not automatically preclude a structure from being considered a dwelling for purposes of the home-invasion

statute." *Id*. at 322. Ohio's statutory definition of "occupied structure," Ohio Rev Code Ann 2909.01(C),[8] is analogous to Michigan's definition of "dwelling" in this context.

In addition to these common elements that are indistinguishable, the Ohio statute at issue requires that the offender act "with purpose to commit . . . any criminal offense[.]" Ohio Rev Code Ann 2911.12(A)(2). Under Michigan's statutory scheme, this element is expressed differently in the three degrees of home invasion. First-degree home invasion requires either that the offender be armed with a dangerous weapon or that another person be lawfully present in the dwelling. MCL 750.110a(2). Second-degree home invasion in Michigan requires only that the offender possess the intent to commit a felony, larceny, or assault or actually commit a felony, larceny, or assault while inside the dwelling. MCL 750.110a(3). Finally, third-degree home invasion, in addition to the common elements, requires only the intent to commit a misdemeanor or the actual

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[8] Ohio Rev Code Ann 2909.01(C) provides, in pertinent part:

> "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:
>
> (1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.
>
> (2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.
>
> (3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.
>
> (4) At the time, any person is present or likely to be present in it.

commission of a misdemeanor while inside the dwelling. MCL 750.110a(4).[9] Thus, the remaining question is which, if any, intent element of Michigan's three degrees of home invasion corresponds to the intent element of Ohio Rev Code Ann 2911.12(A)(2).

At the outset, we eliminate first-degree home invasion as a Michigan statute to which Ohio Rev Code Ann 2911.12(A)(2) corresponds because our first-degree home invasion statute is clearly meant to prohibit a greater type of harm than that which Ohio Rev Code Ann 2911.12(A)(2) seeks to prevent. Next, we note that the only difference between second- and third-degree home invasion is the intent element. Second-degree home invasion requires the intent to commit a felony, larceny, or assault; whereas, third-degree home invasion requires only the intent to commit a misdemeanor. By comparison, Ohio Rev Code Ann 2911.12(A)(2) does not distinguish between felonies and misdemeanors or by the type of offense committed; it requires only an intent to commit "any criminal offense." Thus, a person guilty of violating Ohio Rev Code Ann 2911.12(A)(2)

[9] Ohio, like Michigan, separates the crime of burglary, its analog to home invasion, into degrees. Ohio's statutory scheme recognizes four degrees of the crime. Like first-degree home invasion in Michigan, "aggravated burglary" in Ohio is a felony of the first degree that includes the elements of the lesser burglary degrees but also requires that another person be present at the time and that the offender inflict or attempt or threaten to inflict physical harm on another or that the offender have a deadly weapon on their person or under their control. Ohio Rev Code Ann 2911.11. The likelihood of the presence of another individual and criminal intent differentiates the second, third, and fourth degrees of burglary. Second-degree burglary requires that another person be present or likely to be present; whereas third-degree burglary requires only trespass into an occupied structure with the intent to commit any criminal offense regardless of whether another person is likely to be present. The fourth-degree felony concerns "trespass in a habitation when a person is present or likely to be present," and does not require that the offender have any intent to commit a criminal offense. Ohio Rev Code Ann 2911.12.

would, if the person had committed the offense in Michigan, be guilty of either second-degree home invasion or third-degree home invasion depending on the nature of the intended criminal offense.

While we recognize that this is a close question under these circumstances, we conclude that Ohio Rev Code Ann 2911.12(A)(2) corresponds to second-degree home invasion, MCL 750.110a(3). A person who intends to commit "any criminal offense" may in fact intend to commit a felony, a larceny, or an assault; thus, at least some of the offenders found guilty of violating Ohio Rev Code Ann 2911.12(A)(2) would have violated MCL 750.110a(3) had the conduct occurred in Michigan. In order to be scored under PRV 1, an out-of-state felony must only "correspond" to a crime in a listed offense class. The plain meaning of "correspond" does not require statutes to mirror each other under all circumstances; rather, it requires only that statutes be analogous or similar, meaning that they have "qualities in common." *Random House Webster's College Dictionary* (1997). Here, while exact matching is not required, almost all the elements of Ohio Rev Code Ann 2911.12(A)(2) and MCL 750.110a(3) do in fact match. Further, the one element of Ohio Rev Code Ann 2911.12(A)(2) that does not exactly match MCL 750.110a(3) still encompasses all offenders who intend to commit a felony, larceny, or assault as required by MCL 750.110a(3). The only difference is Ohio Rev Code Ann 2911.12(A)(2) also encompasses offenders who intend to commit other crimes. Thus, we conclude that the statutes are sufficiently similar to satisfy the plain meaning of the term "correspond" as required for scoring under PRV 1.

III. PRIOR RECORD VARIABLE 5

Next, defendant argues that PRV 5 was improperly scored because he does not have the required number of

prior misdemeanor convictions and prior misdemeanor juvenile adjudications that were an offense "against a person or property, a controlled substance offense, or a weapon offense" as required by MCL 777.55(2)(a).

Ten points should be scored under PRV 5 when "[t]he offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications[.]" MCL 777.55(1)(c). Qualifying convictions or adjudications from other states constitute prior misdemeanor convictions. MCL 777.55(3). A conviction or adjudication should be counted only if "it is an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a).

According to defendant's PSIR, he had two juvenile adjudications in California, one for an assault in August 1999 and one for a petty theft in 2001. Defendant was convicted in Ohio as an adult of possession or illegal use of drug paraphernalia in July 2002; and he was twice convicted of disorderly conduct (September 2002 and January 2008). The PSIR also indicates that defendant pleaded guilty of the crime of "attempt[ing] to commit an offense"; this plea stemmed from a charge of possession or use of drugs. The trial court did not specify which of defendant's previous offenses it relied on to score PRV 5, but it did state that defendant "was correctly scored 10 points as in the end it will be seen that he had 3 or 4 qualifying convictions or adjudications. If one were to ignore the contest over the conviction for 'drug paraphernalia,' he would still have three qualifying offenses under PRV 5."

The juvenile adjudication for the assault concerns an offense against a person and the juvenile adjudication for the petty theft concerns an offense against property; thus, these adjudications were properly scored under PRV 5. However, the information contained in the PSIR

indicates that defendant's disorderly conduct convictions were not for offenses "against a person or property, a controlled substance offense, or a weapon offense" and, accordingly, cannot be scored under PRV 5. Thus, in order for 10 points to be properly assessed, either defendant's conviction of possession of drug paraphernalia or his attempt conviction must qualify as a prior misdemeanor conviction under PRV 5.

Defendant first argues that his Ohio conviction for attempting to commit an offense cannot be scored under PRV 5 because it is not a conviction for a controlled-substance offense. Specifically, defendant argues that his conviction was for an attempt only and that, because he was not actually convicted of the originally charged drug crime, his attempt conviction does not constitute "an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a). We disagree.

Defendant pleaded guilty of attempting to commit an offense in violation of Ohio Rev Code Ann 2923.02(A), which provides that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." Ohio Rev Code Ann 2923.02(E)(1) sets forth the penalties for the offense of attempting to commit an offense. The penalty for an attempt to commit an offense in Ohio is tied to the underlying crime that was attempted. Pertinent to this case, Ohio Rev Code Ann 2923.02(E)(1) provides:

> An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount

> or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

Thus, Ohio's attempt statute specifically ties an attempt conviction to the crime attempted, contrary to defendant's argument that his attempt conviction should be completely severed from the original substance-abuse charge.

Defendant's PSIR clearly indicates that the original charge leading to his attempt plea was a controlled-substance charge. Thus, the trial court did not err by classifying the attempt conviction as a controlled-substance offense. We must uphold a scoring decision if there is any evidence to support it. *Steele*, 283 Mich App at 490. The attempt conviction constitutes the third qualifying prior misdemeanor. Ten points should be scored under PRV 5 when a defendant has three or four qualifying prior misdemeanor convictions or misdemeanor juvenile adjudications. MCL 777.55(1)(c). Thus, the trial court did not err by scoring 10 points under PRV 5 because defendant has at least three qualifying prior misdemeanor convictions or juvenile adjudications.[10]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he received ineffective assistance of counsel at his first two sentencing hearings

[10] Defendant also argues that his drug-paraphernalia conviction does not constitute a conviction for a controlled substance offense and, accordingly, could not be counted under PRV 5. While we acknowledge that this is a much closer question, we need not address this argument because only three prior misdemeanor convictions or juvenile adjudications are necessary for a score of 10 points under PRV 5. Accordingly, any error by the trial court in relying on defendant's drug-paraphernalia conviction would not affect defendant's ultimate PRV 5 score and, thus, not affect his minimum sentence range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

because his attorney failed to object to the scoring of PRV 1 and PRV 5. Although defendant raised this issue in his motion for resentencing, no evidentiary hearing was held in regard to defendant's claims of ineffective assistance of counsel; accordingly, our review of defendant's claims is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to prevail on a claim of ineffective assistance of counsel, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness and that the deficiency so prejudiced the defendant as to deprive him or her of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

In regard to defense counsel's failure to object to the scoring of PRV 1, in order to object, defense counsel would have had to argue against scoring defendant's prior Ohio burglary convictions under PRV 1 on the basis of unclear, undefined statutory language without any Michigan caselaw to provide guidance on the issue. Under these circumstances, we conclude that defendant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness. Defense counsel "cannot be deemed deficient for failing to advance a novel legal argument." *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Moreover, the scoring of PRV 1 was finally objected to at the final resentencing hearing, albeit by new defense counsel, and the trial court rejected defendant's theory and held that PRV 1 was properly scored. Accordingly, while a successful objection to PRV 1 would have changed defendant's minimum sentencing guidelines range, de-

fendant has failed to demonstrate that any earlier objection to the scoring of PRV 1 would have been successful in light of the fact that the trial court rejected such an objection when it was raised. Thus, defendant has failed to demonstrate prejudice.

In regard to PRV 5, defendant has failed to demonstrate that counsel's performance was deficient because, as already discussed, PRV 5 was properly scored. Defense counsel was not ineffective for failing to make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Affirmed.

HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ., concurred.

PEOPLE v HILL

Docket No. 301564. Submitted September 11, 2012, at Detroit. Decided February 5, 2013, at 9:05 a.m.

Eric Conrad Hill was charged in the 43rd District Court with the manufacture of less than 5 kilograms or fewer than 20 plants of marijuana, after the police discovered marijuana plants growing under a light in a bedroom closet in defendant's home. The police entered defendant's home without a warrant to perform a welfare check after a discussion with one of his neighbors who had contacted the police because she was concerned that defendant might need assistance. The district court, Keith P. Hunt, J., granted defendant's motion to dismiss, concluding that the warrantless search of defendant's home was unconstitutional and that the community-caretaking exception to the warrant requirement did not apply. The prosecution appealed and the Oakland Circuit Court, Leo Bowman, J., agreed and affirmed the district court's dismissal of the charge. The Court of Appeals denied the prosecution's application for leave to appeal and the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 491 Mich 870 (2012).

The Court of Appeals *held*:

1. A warrantless search is constitutional when the police conduct the search as part of their community-caretaking function and the police actions are totally unrelated to their duties associated with investigating crimes. Rendering aid to persons in distress is a community-caretaking function. The police must be primarily motivated by the perceived need to render assistance or aid and may do no more than is reasonably necessary to determine whether an individual is in need of aid and assistance. An entering officer must possess specific and articulable facts that lead him or her to the conclusion that a person inside a home is in immediate need of aid. The officer's reasons must be reviewed, as well as the level of the intrusion; entry into a person's home is more intrusive than into his or her automobile because privacy of the home is at the core or the Fourth Amendment's protections. A reviewing court must consider the specifics of the entry; proof of the need for aid must be reasonable, but not ironclad. In this case, the circuit

court erred by affirming the district court's dismissal of the manufacturing of marijuana charge against defendant. The police officers' warrantless entry into defendant's home was constitutionally valid on the basis of the community-caretaking exception to the warrant requirement. The officers entered the house to perform a welfare check, they were not investigating a crime, and under the circumstances of this case it was reasonable to conclude that defendant may have been in need of assistance. Direct evidence definitively showing that defendant was present in the house and in actual need of assistance is not necessary for the community-caretaking exception to apply. The lack of definitive signs that defendant was present and in distress or danger did not negate the possibility that defendant was present and need of aid.

2. Evidence found as the result of a warrantless, unconstitutional entry is not subject to exclusion if the police were operating in good faith when the entry was made. The purpose of the exclusionary rule is to deter future Fourth Amendment violations. The deterrent value of exclusion is strong when the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights; the exclusionary rule is not applied in the absence of governmental misconduct. In this case, even if the community-caretaking exception does not apply, exclusion of the evidence was not necessary because the police had some evidence of need and acted in good faith when they entered defendant's home to check on his welfare; exclusion of the evidence would not deter police misconduct in the future.

Reversed and remanded for reinstatement of the marijuana manufacturing charge.

MARKEY, J., dissenting, would have affirmed the circuit court's order that affirmed the district court's order excluding the marijuana plants and dismissing the charge against defendant. She would have concluded that the warrantless search and seizure could not be justified by the emergency-aid exception to the warrant requirement because there were no credible, specific, and articulable facts that anyone was inside defendant's home that might need immediate aid. Judge MARKEY would also have concluded that the community-caretaking exception did not apply because there was no evidence to support a reasonable belief that there was an imminent threat to life or property. In addition, there was no evidence to support a finding that the police acted in good faith when they entered defendant's home without a warrant.

SEARCHES AND SEIZURES — WARRANTLESS SEARCHES — COMMUNITY-CARETAKING EXCEPTION — POLICE OFFICERS — REASONABLENESS OF ENTRY.

A warrantless search is constitutional when the police conduct the search as part of their community-caretaking function and the police actions are totally unrelated to their duties associated with investigating crimes; the police must be primarily motivated by the perceived need to render assistance or aid and may do no more than is reasonably necessary to determine whether an individual is in need of aid and assistance; an entering officer must possess specific and articulable facts that lead him or her to the conclusion that a person inside a home is in immediate need of aid; direct evidence definitively showing that a person is present in his or her home and in actual need of assistance is not necessary for the community-caretaking exception to apply.

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

The Law Offices of Terri L. Antisdale (by *Terri L. Antisdale*) for defendant.

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

MURPHY, C.J. Defendant was charged with the manufacture of less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*), after the police discovered marijuana plants under a grow light in a bedroom closet in defendant's home. The police entered defendant's house without a warrant on the basis of a discussion with one of defendant's neighbors who was worried about his well-being, along with other circumstantial evidence that suggested defendant was in need of assistance. The district court granted defendant's motion to suppress the evidence and it dismissed the charge, concluding that the warrantless search of defendant's home was unconstitutional and that the community-caretaking exception to the warrant re-

quirement was not implicated under the facts presented. The circuit court affirmed the district court's ruling on the prosecution's appeal. This Court denied the prosecution's application for leave to appeal, but our Supreme Court, in lieu of granting leave, remanded the case to this Court "for consideration as on leave granted." *People v Hill*, 491 Mich 870; 809 NW2d 563 (2012). We hold that the warrantless entry into defendant's home by police did not violate the protections against unreasonable searches and seizures set forth in article 1, § 11, of the Michigan Constitution and the Fourth Amendment of the United States Constitution; given all the surrounding circumstances, the community-caretaking exception to the warrant requirement was implicated. Moreover, even were we to assume that a constitutional violation occurred, this is not a case in which the exclusionary rule should apply as there is no evidence of police misconduct. Accordingly, we reverse and remand for reinstatement of the marijuana manufacturing charge.

We review for clear error findings of fact made by a trial court at a hearing on a motion to suppress evidence predicated on allegations that the police violated a defendant's constitutional rights. *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011). However, matters regarding the application of facts to constitutional principles, such as the right to be free from unreasonable searches and seizures, are reviewed de novo. *Id*.

Entry into a person's home by the police absent a warrant may be constitutionally valid under certain limited circumstances. *Id*. at 311. Although many warrantless searches are properly deemed unconstitutional pursuant to the warrant requirement, the United States Supreme Court has articulated several excep-

tions wherein a warrantless search is reasonable and thus constitutional, including a search by police conducted as part of their community caretaking function. *Id.* at 311-312.[1] For the community-caretaking exception to apply, the actions of the police must be totally unrelated to the duties of the police to investigate crimes. *Id.* at 314, quoting *People v Davis*, 442 Mich 1, 22; 497 NW2d 910 (1993). Rendering aid to persons in distress is a community-caretaking function. *Id.* at 23 ("entries made to render aid to a person in a private dwelling [are] part of the community caretaking function").

The police must be primarily motivated by the perceived need to render assistance or aid and may not do more than is reasonably necessary to determine whether an individual is in need of aid and to provide that assistance. *Slaughter*, 489 Mich at 315 n 28. An entering officer is required to possess specific and articulable facts that lead him or her to the conclusion that a person inside a home is in immediate need of aid. *Id.* "Proof of someone's needing assistance need not be 'ironclad,' only 'reasonable.' " *Id.* (citation omitted). The *Slaughter* Court further observed:

> [C]ourts must consider the reasons that officers are undertaking their community caretaking functions, as well as the level of intrusion the police make while performing these functions, when determining whether a particular intrusion to perform a community caretaking function is reasonable. For instance, a police inventory of a car is much less intrusive than a police entry into a dwelling. This is because the privacy of the home stands at the very core of the Fourth Amendment and because in no setting is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's

[1] The Michigan Constitution is generally construed to provide the same protection as the Fourth Amendment. *Slaughter*, 489 Mich at 311.

> home. Thus, the threshold of reasonableness is at its apex when police enter a dwelling pursuant to their community caretaking functions. [*Id.* at 316 (citations, quotation marks, ellipses, and alterations omitted).]

Police officer Mike Emmi testified in this case that he and another officer went to defendant's home shortly after midnight on March 8, 2010, as part of a welfare check after defendant's neighbor had called police with concerns about defendant's well-being. According to Emmi, when the officers arrived, the neighbor approached them and indicated that in the last few days to a week she had not seen or heard from defendant and that, for the same time period, defendant's vehicle had not moved from his property, even though defendant would typically come and go in the vehicle on a regular basis. The neighbor also informed the officers that she could generally hear defendant working in his house during the night, but she had not heard him working for several nights. The neighbor mentioned that the interior lights in defendant's house had been on for a while and that she had seen defendant's cats looking out the home's windows. The neighbor was worried about defendant and explained to Emmi that all these circumstances were unusual. Officer Emmi noticed that an interior house light was turned on, that there were six to eight pieces of mail in the mailbox, which were a few days old at most, that a phonebook was sitting on the front porch, and that defendant's car, which was cold and covered with some leaves, was sitting in the driveway. Emmi testified that he and the other officer knocked on defendant's door several times, but there was no answer. The officers also contacted dispatch and asked the dispatcher to make a phone call to defendant's home.

Emmi indicated that the officers proceeded to knock on back windows and yell out, asking if anyone was

present, but there was no response. Emmi testified that he could hear "a humming noise" through one of the windows that sounded "like a humidifier or a heater." The officers were able to slide open an unlocked window and, according to Emmi, they "yelled inside several times in an attempt to locate anybody, but still did not receive an answer." Emmi indicated that most of the drapes were drawn and that he could not, for the most part, see inside the home by looking through the windows. Emmi stated that a decision was made to enter the house and search for defendant for purposes of a welfare check. The officers then contacted dispatch again and informed the dispatcher that they were going to enter the house to do a welfare check. The officers entered the house and eventually they opened a bedroom closet and found the marijuana plants. Emmi testified that the closet was "tall enough for a person." The officers discovered that the source of the humming noise was a heater near the marijuana plants; there is no indication or suggestion in the record that the officers entered the house because they suspected that the humming noise was coming from a heater typically used in marijuana growing operations. Emmi testified that defendant had a prior conviction, but Emmi was not aware of the conviction when he entered the house. Emmi claimed that he did not enter the home to investigate criminal activity. According to Emmi, there were no visible signs of a home invasion, no unusual odors emanating from the home, no signs of violence, and no sounds of someone in distress.[2]

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[2] We respectfully disagree with the dissent's interpretation of some of the testimony given by Emmi. The dissent states that the neighbor "admittedly had little to no interaction with defendant, who lived several houses away." *Post* at 416. Emmi testified that it was his belief that the neighbor lived "next-door one house west or two houses west" of defendant's residence, not "several" houses away. Emmi further testified

On application of the legal principles cited above and enunciated in *Slaughter*, we conclude that the community-caretaker exception to the warrant requirement was implicated after consideration of all the surrounding circumstances taken together. The lower courts mistakenly relied on a lack of direct evidence definitively showing that defendant was present and in actual need of aid or assistance. Although there were no signs of forced entry or sounds of someone in distress, the circumstances were such that an officer could reasonably conclude that defendant might be in need of aid or assistance. The neighbor informed the officers that defendant would leave his house and return on a normal basis using his vehicle to travel, and defendant's car, covered with some leaves, had been sitting in the driveway unused for several days and was parked there when the police arrived. This would reasonably suggest that defendant was in his house when police came upon the scene, which conclusion finds additional support in the evidence showing that it was after midnight and the

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that the neighbor knew defendant on "a first name basis" and that she knew him "as a friend as a neighbor." Emmi's testimony in general revealed that the neighbor was quite familiar with defendant's comings and goings, including the fact that he worked inside his house at night. There was no testimony indicating that the neighbor admitted to having little or no interaction with defendant. The dissent maintains that the neighbor was "of unknown credibility," *post* at 416, but while Emmi did not describe the nature of the contacts, he did testify that he "had a few contacts" with the neighbor in the past, and given Emmi's reliance on her concerns, it is reasonable to infer that the past contacts did not involve unreliable claims. The dissent also contends that Emmi entered defendant's home solely for the purpose of seeing "if . . . someone were inside." *Post* at 416. Emmi, however, testified multiple times that the purpose of entry was to do a welfare check. Finally, the dissent complains that Emmi failed to speak with other neighbors living next to or across the street from defendant. However, when asked about whether he contacted these other neighbors, Emmi testified that "there was no one there" as to the houses on the east and west sides and that neighbors from across the street approached him but only after the entry.

lights were on in defendant's house, which was common at night according to the neighbor because of defendant's proclivity to work in his house at night. These facts indicated that defendant was present in the house, there were extensive efforts by the police to obtain a response from anyone inside the home that failed, including knocking on the door and yelling through a window, and the neighbor had not heard any work activity that night by defendant, which was uncommon. Given the reasonable conclusion that defendant might have been in the home (the lights were on and the car was parked outside), and considering the lack of response to the police officers' aggressive efforts to communicate, it was reasonable to conclude that defendant was not only present but in need of attention, aid, or some kind of assistance. This becomes even more apparent when one considers the presence of the phonebook on the porch and the few days of mail that had accumulated in the mailbox. Moreover, the neighbor had informed the officers that she was worried about defendant and that the situation at defendant's home was unusual. When all the pieces of information are considered together and not individually, the sum of their parts equates to specific and articulable facts that would lead an officer to reasonably conclude that defendant was in need of aid. And the steps taken by the responding officers, who were motivated by the perceived need to render assistance, were no more than reasonably necessary to determine whether defendant was truly in need of aid. The lack of definitive signs that defendant was present and in distress or danger did not negate the possibility that defendant was present and in need of aid, and the surrounding circumstances suggested that such was the case.

Imagine that the police officers had decided against entering defendant's house and that defendant was

inside unconscious or otherwise unable to communicate and in critical need of medical attention as a result of a criminal act or physiological event. In such a scenario, if defendant had later died due to a lack of timely aid, the community uproar over the officers' failure to enter the home would be deafening, and public criticism regarding the lack of police action would be, in our view, reasonable and deserved in light of the surrounding circumstances.[3]

This leads us to a separate discussion relative to the application of the exclusionary rule. We find that, even if a constitutional violation by the officers had occurred on the basis of a lack of criteria sufficient to justify invocation of the community-caretaker exception, there is no need to invoke the exclusionary rule because the good-faith exception to the rule has gradually been extended by the courts to situations outside its traditional or historical contexts, and the police officers in this case were clearly acting in good faith.

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[3] The dissent takes us to task for not citing an appellate case that has virtually identical circumstances and in which the community caretaking exception was applied. However, as noted by our Supreme Court in *Slaughter*, 489 Mich at 319, community-caretaking functions are varied and are undertaken for different reasons; therefore, "reviewing courts must tailor their analysis to the specifics of a particular intrusion before determining whether it is reasonable." *Id*. Given the nature of these types of cases, it is highly unlikely that another appellate opinion has addressed nearly identical facts, such that a sound comparison could be made. Rather, we have proceeded as directed by *Slaughter* and tailored our analysis to the specific and unique facts regarding the particular entry at issue, resulting in our conclusion that the warrantless entry was reasonable. We agree with the general sentiments expressed in the lead opinion in *People v Ray*, 21 Cal 4th 464, 472; 88 Cal Rptr 2d 1; 981 P2d 928 (1999), that, in connection with the community-caretaking exception, "[l]ocal police 'should and do regularly respond to requests of friends and relatives and others for assistance when people are concerned about the health, safety or welfare of their friend, loved ones and others.' " (Citation omitted.)

In *Davis v United States*, 564 US ___; 131 S Ct 2419, 2426-2429; 180 L Ed 2d 285 (2011), the United States Supreme Court discussed the Fourth Amendment, the exclusionary rule, the good-faith exception to the rule, and the evolution of the good-faith exception to the exclusionary rule:

> The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment says nothing about suppressing evidence obtained in violation of this command. That rule—the exclusionary rule—is a "prudential" doctrine, created by this Court to "compel respect for the constitutional guaranty." Exclusion is "not a personal constitutional right," nor is it designed to "redress the injury" occasioned by an unconstitutional search. The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations. Our cases have thus limited the rule's operation to situations in which this purpose is "thought most efficaciously served." Where suppression fails to yield "appreciable deterrence," exclusion is "clearly . . . unwarranted."
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> Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. The analysis must also account for the "substantial social costs" generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.
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> Admittedly, there was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine. "Expansive dicta" in several decisions, suggested that the rule was a self-executing mandate implicit in the Fourth Amendment itself. As late

as . . . 1971 . . . the Court "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule." In time, however, we came to acknowledge the exclusionary rule for what it undoubtedly is—a "judicially created remedy" of this Court's own making. We abandoned the old, "reflexive" application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits. In a line of cases beginning with *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 [(1984)], we also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the "flagrancy of the police misconduct" at issue.

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the " 'deterrence rationale loses much of its force,' " and exclusion cannot "pay its way."

The Court has over time applied this "good-faith" exception across a range of cases. *Leon* itself, for example, held that the exclusionary rule does not apply when the police conduct a search in "objectively reasonable reliance" on a warrant later held invalid. . . .

Other good-faith cases have sounded a similar theme. *Illinois v Krull*, 480 US 340; 107 S Ct 1160; 94 L Ed 2d 364 (1987), extended the good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes. In *Arizona v Evans*, [514 US 1; 115 S Ct 1185; 131 L Ed 2d 34 (1995)], the Court applied the good-faith exception in a case where the police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by judicial employees. Most recently, in *Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 [(2009)], we extended *Evans* in a case where *police* employees erred in maintaining records in a warrant

> database. "[I]solated," "nonrecurring" police negligence, we determined, lacks the culpability required to justify the harsh sanction of exclusion.
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> * * *
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> Indeed, in 27 years of practice under *Leon*'s good-faith exception, we have "never applied" the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. [Citations omitted.]

The *Davis* Court held that when the police conduct a search in objectively reasonable reliance on appellate precedent that is binding, the exclusionary rule is inapplicable. *Davis*, 564 US at ___; 131 S Ct at 2423-2424.

The principles and sentiments expressed in *Davis* and found in the quoted passage above were also expressed by our Supreme Court in *People v Frazier*, 478 Mich 231, 247-251; 733 NW2d 713 (2007). The *Frazier* Court stated that "application of the exclusionary rule is inappropriate in the absence of governmental misconduct." *Id*. at 250.

In this case, the only police conduct that is deterred by applying the exclusionary rule is conduct in which the police, having at least some indicia of need, enter a home in a good-faith effort to check on the welfare of a citizen after a concerned neighbor contacted police. This is not the type of police conduct that we should be attempting to deter. The lower court rulings excluding the evidence and dismissing the charge would not deter police misconduct in the future; it would only deprive citizens of helpful and beneficial police action. The benefits of suppression are clearly outweighed by the heavy cost suffered by the community. The record does not reflect any police misconduct, nor does it indicate that officer Emmi and his partner engaged in or exhib-

ited deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights. Findings of such behavior cannot even be inferred from the existing record. Had there been little to no basis to enter defendant's house, or had there been some indication that the officers were motivated by the hope of finding criminal activity afoot, then one might be able to infer or find misconduct or deliberate, reckless, or grossly negligent disregard for the Fourth Amendment. But such conduct did not occur in this case. Rather, the record establishes that the police officers acted with an objectively reasonable good-faith belief that their conduct was lawful. They did not burst into defendant's home absent an assessment of the situation or absent alternative efforts to communicate with the homeowner. Instead, they spoke with defendant's neighbor, assessed the situation based on her comments and their personal observations, and then tried to communicate with any person inside the house before deciding that entry was necessary. At worst, the officers' conduct involved simple, isolated, and nonrecurring negligence. There is no indication that the police used the neighbor's concerns as a ruse or subterfuge to search defendant's home in an effort to find evidence of criminal wrongdoing. The officers' conduct was innocent and lacked the culpability required to justify the harsh sanction of exclusion. Accordingly, even were we to assume that the community-caretaker exception did not apply and that a constitutional violation occurred, exclusion of the marijuana was not required and thus the charge should not have been dismissed.

Reversed and remanded to the district court for reinstatement of the marijuana manufacturing charge. We do not retain jurisdiction.

WHITBECK, J., concurred with MURPHY, C.J.

MARKEY, J. (*dissenting*). On March 8, 2010, at about 12:30 a.m., Hazel Park police officer Mike Emmi broke, entered, and searched defendant's home purportedly to perform a "welfare check." Emmi acted after a ten-minute investigation into the complaint by a person of unknown credibility, who admittedly had little to no interaction with defendant, and who lived several houses away. When the prosecutor asked if his "concern at that time that there was possibly someone in the house that was in need of assistance," Emmi replied, "[t]he only time--the only thing we go in for is a check on a--for a person." This indicates that Emmi entered the home not on the reasonable belief that someone inside needed his assistance but only to see if, in fact, someone were inside. This was a search without a warrant that was neither reasonable nor justified by any exception to the warrant requirement of the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution. Both the district court, which heard Emmi's testimony, and the circuit court that reviewed the district court's decision concluded that the prosecutor failed to establish any exception to the warrant requirement and that the evidence seized during the unreasonable search and seizure must therefore be suppressed. I agree and therefore respectfully dissent. I would affirm the trial courts' decisions.

"A court's factual findings at a suppression hearing are reviewed for clear error, but the application of the underlying law—the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution—is reviewed de novo." *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011).

The Fourth Amendment of the United States Constitution guarantees to the people that their houses shall remain free from unreasonable intrusion by the government, providing:

> The right of the people *to be secure in their* persons, *houses*, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Emphasis added.]

Likewise, Const 1963, art 1, § 11 guarantees the security of people's houses:

> The person, *houses*, papers and possessions of every person *shall be secure from unreasonable searches and seizures*. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer *outside the curtilage of any dwelling house* in this state. [Emphasis added.]

Thus, "[t]he Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). The plain language of both constitutional protections demonstrates that their core value, second only to protecting people, is protecting people's houses from unreasonable governmental intrusion. "The United States Supreme Court has repeatedly stated that the 'physical *entry* of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . .' " *City of Troy v Ohlinger*, 438 Mich 477, 485; 475 NW2d 54 (1991), quoting *United States v United States Dist Court for the Eastern Dist of Mich*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972). "[T]he privacy of the home stands at the very core of the

Fourth Amendment and . . . in no setting is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Slaughter*, 489 Mich at 316 (quotation marks and brackets omitted), quoting *Payton v New York*, 445 US 573, 589-590; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

On the other hand, the Fourth Amendment and Const 1963, art 1, § 11 do not forbid all government searches and seizures, only those that are unreasonable. *Slaughter*, 489 Mich at 311. The two main requirements rendering a police search or seizure constitutionally reasonable are the presence of probable cause and the possession of a warrant. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). "Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment, 'subject only to a few specifically established and well-delineated exceptions.' " *Id*. (citation omitted). Thus, to show that their conduct was lawful, the police in this case were required to show either that they had a warrant—they did not—"or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement." *Id*.

State and federal courts have recognized several exceptions to the warrant requirement, including "searches of automobiles, searches incident to contemporaneous lawful arrests, inventory searches conducted according to established procedure, searches conducted during exigent circumstances, and searches the police undertake as part of their 'community caretaking' function." *Slaughter*, 489 Mich at 311-312. Providing emergency aid to injured persons is included within the community-caretaking function of the police. *Id.* at 314 n 28.

The emergency-aid exception allows the police to enter a protected area without a warrant "under cir-

cumstances where they believe some person is in need of assistance or to prevent serious harm to someone." *Davis*, 442 Mich at 12. Under the emergency aid exception,

> [the] police may enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion. In addition, the entry must be limited to the justification therefor, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance. [*Id.* at 25-26.]

Cases in which the emergency-aid exception have been held to apply include: (1) *Ohlinger*, 438 Mich at 480-483—while investigating a citizen report of a possible accident in which a man drove away while apparently injured, the police went to the driver's house where they saw through a window a man bleeding and apparently unconscious inside; (2) *People v Brzezinski*, 243 Mich App 431, 432, 434-435; 622 NW2d 528 (2000)—a citizen reported seeing a man who had seemed to be disoriented and injured leaving the scene of a suspicious fire, and the police found a person who matched that description passed out in the back of a car parked nearby; (3) *People v Beuschlein*, 245 Mich App 744, 756; 630 NW2d 921 (2001)—the police, who responded to a 911 domestic-disturbance call that had possibly involved the use of weapons, heard scuffling inside while waiting for someone to come to the door; and (4) *People v Tierney*, 266 Mich App 687, 691, 704-705; 703 NW2d 204 (2005)—at the home of a murder suspect the police saw through a window in the door a man with a rifle and ammunition close at hand who was sitting slumped over with his head on the table as if he had shot himself; he had not responded or reacted when the officers knocked on the door.

Under the circumstances of this case, the warrantless entry and search cannot be justified by the emergency-aid exception. Officer Emmi responded after midnight to speak to the complainant,[1] who lived a few houses down the street from defendant. She had called the police at some unknown point in time because she had not seen defendant or his vehicle move for a few days. The complainant did not testify at the hearing in district court, but Emmi testified the complainant knew defendant because they lived in the same neighborhood. Thus, Emmi had information that one neighbor had not seen defendant for a few days. Emmi did not speak with neighbors to defendant's immediate left or right or across the street regarding their knowledge of defendant's whereabouts. Emmi found there were lights on in the home, but no one responded to knocking, a telephone call, or shouts. The house was secure except for one unlocked window, and curtains or drapes blocked Emmi's view of the inside of the house. A couple days of mail was in the small box attached to the house, and a telephone book and some "junk mail" were on the porch. A car registered to defendant that had not been recently driven was in the driveway. There were no signs of forced entry or foul play or any other evidence to indicate that someone inside required assistance. Although the complainant had reported that defendant's cats would look out windows, Emmi testified the cats did not appear unfed or uncared for and "were just at the window." Emmi also testified that he could hear a humming noise from inside the house that he thought might be a humidifier or heater. Based on his ten-

[1] Emmi admitted to having had prior contacts with the complainant, as did narcotics officer Paul Holka, who when asked about the complainant, testified that, "Yes, I have heard that name."

minute investigation, Emmi testified that from "what we got from the neighbor, not seeing him in a while, lights on inside, cats trying to get out, we tried to do a welfare check and see if the person was inside." Emmi entered the house through the unlocked window. While searching the home, he found marijuana plants growing in a bedroom closet. Emmi indicated he searched the closet because it was big enough to accommodate a person. Officer Emmi had no specific and articulable facts to support a conclusion that (1) someone was in the home and (2) in need of immediate assistance.

At the conclusion of the testimony, the district court requested that the parties brief the search and seizure issues presented. Subsequently, the district court ruled that the prosecution had failed to present sufficient credible evidence to support a reasonable belief that someone was inside defendant's home *and* in need of emergency assistance. The court concluded that "it doesn't appear as though there's enough information to determine whether or not there was a person within [the house]." The district court questioned the credibility of the information the complainant provided, as well as the police investigation, stating:

> In this case, there was testimony from a neighbor.[2] And I'm not sure it was even established a proximity of that neighbor to the home in question.
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> She said it was very unusual for his behavior. Well, what's the foundation for that statement? How long as [sic] he known the neighbor? Or how long as [sic] she known the neighbor? To what degree does she have any interaction with this person?

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[2] The complainant did not testify in the district court proceedings; her information was only provided through the hearsay testimony of Emmi.

> The neighbor said that she hadn't seen the person in days, usually he comes and goes daily. It had been a few days up to a week. There was no close relationship between this witness and the neighbor. And when the police officer arrived, he sought to contact the neighbor to the right. There was no one home. Neighbor to the left, there was no one home. No inquiry as to the neighbor across the street.
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> So I don't think in this case we've established enough information. I mean, even if . . . we can argue that Officer Emmi corroborated it, I don't even think there's enough information to corroborate to determine whether or not someone was actually in that home. I mean, there's a plausible explanation. I left for Mackinaw [sic] Island, I asked my wife did you get someone to pick up our mail? No. So, we left on a Thursday, didn't get back on a [sic] Monday. We leave a light on, of course, to be sure that people think we're home. We lock our doors.
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> I just don't think the set of circumstances in this case meet the threshold requirements to enter the home without a warrant pursuant to the community caretaking function. And, therefore, the Court will dismiss the case.

On the prosecution's appeal, the circuit court summarized the facts and the district court's ruling that under *Davis*, 442 Mich at 25-26, the evidence did not support a reasonable belief that someone was inside defendant's home that needed immediate aid; rather, the evidence "simply supported that the homeowner may be out of town for a weekend trip." The circuit court concluded that the district court did not clearly err in its factual findings nor make an error of law in suppressing the evidence and dismissing the case.

I agree with the district court and the circuit court. The police possessed no credible, specific and articu-

lable facts that anyone was inside defendant's home that might need immediate aid. Defendant's neighbor indicated that she had not seen defendant for a few days, but she did not provide any information on the requisite requirements that he was at home and that he might be injured or in need of immediate assistance. The police conducted a patently cursory investigation: they did not question defendant's immediate neighbors to find out if they knew whether anyone was in the house; they made no effort to locate any of defendant's friends, relatives or co-workers; and they did not see or hear anything from within or without the house giving rise to a concern that required immediate action to protect life or property. As noted from the excerpts of Emmi's testimony, he simply did not know whether anyone was in the house, much less that there was someone there that needed immediate aid.

Indeed the facts of this case are no different from what officers everywhere would find day in and day out while people were away from their homes for any variety of reasons, reasons that provide no support of an objective reasonable belief that someone is in immediate need of the assistance contemplated by the caretaking exception. Indeed, the facts as presented here, if accepted as an appropriate invocation of the caretaking exception, are frighteningly amenable to flagrant violations of the Fourth Amendment. Under the pretense of concern for someone's well-being, officers could easily iterate mundane facts to support the warrantless entry of a citizen's home. I conclude therefore that the district court did not clearly err in its findings of fact, nor err in its conclusions of law that the warrantless search here was unreasonable under the Fourth Amendment and Const 1963, art 1, § 11. Consequently, the district court

properly applied the exclusionary rule,[3] and dismissed the case. The circuit court properly and correctly upheld its dismissal.

The prosecution also argues, and the majority agrees, that the entry and search in this case were justified under the community-caretaking exception as applied in *Slaughter*, 489 Mich 302. Again, I disagree. In *Slaughter* our Supreme Court held that the community-caretaking exception applied when a fireman, "responding to an emergency call involving a threat to life or property, reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside." *Slaughter*, 489 Mich at 316-317. *Slaughter* is clearly distinguishable from the instant case because *Slaughter* involved a situation in which firemen were "responding to an emergency call involving a threat to life or property" and needed to enter the house to address "an imminent threat of fire inside." There was simply no emergency call in this case and no emergency. Rather, a neighbor of unknown credibility provided information that she had not seen defendant or his car moved for a few days. But there was no evidence to suggest that anyone was in defendant's house or that anyone in the house was in danger; there is no evidence to support a reasonable belief that an imminent threat to life or property justified an exception to the warrant and probable cause requirement of the Fourth Amendment and Const 1963, art 1, § 11.

Because the warrantless entry and search of defendant's house was not authorized under the emergency-

[3] In general, "evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *In re Forfeiture of $176,598*, 443 Mich 261, 265; 505 NW2d 201 (1993). The "exclusionary rule" "is a cornerstone of American jurisprudence that affords individuals the most basic protection against arbitrary police conduct." *Id*.

aid or community-caretaking exceptions to the warrant requirement, the district court did not err by granting defendant's motion to suppress, and the circuit court did not err by affirming that decision.

Finally, I must strongly and respectfully disagree that this case presents a situation in which the application of the exclusionary rule may be excused because the police acted in good faith, and the application of the exclusionary rule would serve no deterrent purpose. I agree that the purpose of applying the exclusionary rule in this case would be to "deter future Fourth Amendment violations." *Davis v United States*, 564 US ___; 131 S Ct 2419, 2426; 180 L Ed 2d 285 (2011). Indeed, " 'the exclusionary rule is 'a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights . . . .' " *People v Frazier*, 478 Mich 231, 247; 733 NW2d 713 (2007) (citations and brackets omitted). But this case is unlike *Davis* where the police acted in objectively reasonable reliance on then binding judicial precedent.[4] *Davis*, 131 S Ct at 2428. Nor is the present case like *Frazier*. There the issue was the admissibility of the testimony of witnesses located as a result of the defendant's statement, which was later suppressed because a court determined that it was obtained as the result of ineffective assistance of counsel. *Frazier*, 478 Mich at 234-238. Thus, in *Frazier* there was "*no* police misconduct whatsoever," and the witnesses "identities were not obtained as a result of any police misconduct." *Id*. at 250-251.

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[4] Specifically, the police acted in reliance on *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), overruled in part *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009), as interpreted by the Eleventh Circuit Court of Appeals in *United States v Gonzalez*, 71 F3d 819, 825 (CA 11, 1996). "The search incident to Davis's arrest in this case followed the Eleventh Circuit's *Gonzalez* precedent to the letter." *Davis*, 131 S Ct at 2428.

The majority cannot cite a single appellate case that has upheld the warrantless midnight entry and search of a residence on the basis of the say-so of a neighbor, virtually a stranger to the home's occupant, who has simply not seen the occupant for a few days and wherein the police conduct a cursory ten-minute investigation disclosing no evidence—or even a hint—of imminent threat to life or property. In other words, no caselaw on similar facts exists which provides support of the proposition that the police could have been acting in good-faith reliance. Nor do I view the police conduct here as lacking culpability. A certified police officer in this state must be presumed to have a rudimentary understanding of the Fourth Amendment and its rules of thumb requiring probable cause and a warrant or consent before an entry may be made into a person's home. I conclude that the police conduct in this case was at a minimum sloppy to negligent. The police in this case violated the Fourth Amendment and Const 1963, art 1, § 11. Their conduct fully warrants applying the exclusionary rule to deter future police misconduct and to protect the constitutional rights guaranteed by the Fourth Amendment and Const 1963, art 1, § 11.

I would affirm.

PONTIAC COUNTRY CLUB v WATERFORD TOWNSHIP

Docket Nos. 305970 and 306727. Submitted February 6, 2013, at Lansing. Decided February 12, 2013, at 9:00 a.m.

The Pontiac Country Club and its owners, Lloyd and Fran Syron, filed a petition in the Tax Tribunal challenging the assessed and taxable values of nine parcels of property in Waterford Township. Petitioners used eight of the nine parcels as a golf course and the ninth as a used car lot. The parties ultimately did not dispute the value of the used car lot. During the proceedings, respondent requested that petitioners admit several statements of fact. Petitioners failed to respond to the request, and respondent moved to deem the statements admitted. Respondent also moved for summary disposition, contending that if the statements were admitted, petitioners would not be entitled to any relief. The tribunal deemed the statements admitted, including a statement that the property was properly assessed or assessed at below market value. The tribunal, however, denied the motion for summary disposition, concluding that the true cash value of the property was still in dispute. Additional motions for summary disposition filed by the parties were also denied. Following a hearing, the tribunal determined that the property's true cash value was accurate as initially assessed. Petitioners appealed the tribunal's opinion and order finding the true cash value of the parcels (Docket No. 305970). Respondent appealed the tribunal's subsequent order denying its motion for costs (Docket No. 306727). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. True cash value is the probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation. The petitioner has the burden to establish the property's true cash value, but even if the petitioner fails to show that the assessment was too high, the Tax Tribunal has the duty to determine the property's true cash value using the approach that most accurately reflects the value of the property. The tribunal may adopt the assessed valuation on the tax rolls as its independent finding of true cash value when competent and substantial evidence supports doing so, as long as it does not afford the

original assessment presumptive validity. Generally, competent and substantial evidence supports the tribunal's determination if it is within the range of the evidence advanced by the parties. In this case, competent, material, and substantial evidence supported the tribunal's determination. The tribunal rejected the valuation proposed by petitioners' expert because it was not credible, credibility being a matter for the tribunal to determine. The tribunal also rejected the valuation proposed by the township's expert because his valuation assumed that petitioners could rezone the property, but no rezoning had occurred. The tribunal's ultimate determination was between these two extremes and, thus, was within the range of the evidence advanced by the parties.

2. Costs may be awarded to the prevailing party under MCR 2.625(A)(1). The prevailing party when a single cause of action is alleged is the party who prevails on the entire record. At the very least, the party must show that his or her position was improved by the litigation. In this case, the Tax Tribunal did not err in applying the law and did not adopt a wrong legal principle when it determined that respondent was not a prevailing party because its position did not improve as a result of the litigation. Thus, the tribunal did not abuse its discretion when it denied respondent's motion for costs on that basis.

3. A court may find that a party's action is frivolous under MCR 2.625(A)(2), and award costs, when (1) the party initiated the suit for purposes of harassment, (2) the party's legal position was devoid of arguable legal merit, or (3) the party had no reasonable basis to believe that the facts underlying its legal position were true. An appellate court must affirm the Tax Tribunal's finding concerning whether a claim was frivolous unless competent, material, and substantial evidence does not support the finding. In this case, the tribunal found that the hearing to determine the property's true cash value was not frivolous and denied the township's motion for costs. Although the tribunal had deemed that petitioners admitted that the property was properly assessed or assessed at below market value, the admission did not specify what the true cash value of the property was. The tribunal did not err when it determined that a hearing was still required for it to fulfill its statutory duty to determine the property's true cash value.

Affirmed.

1. TAXATION — PROPERTY TAX — ASSESSMENTS — TRUE CASH VALUE.

True cash value is the probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation;

the petitioner has the burden to establish the property's true cash value, but even if the petitioner fails to show that the assessment was too high, the Tax Tribunal has the duty to determine the property's true cash value using the approach that most accurately reflects the value of the property; the tribunal may adopt the assessed valuation on the tax rolls as its independent finding of true cash value when competent and substantial evidence supports doing so, as long as it does not afford the original assessment presumptive validity; generally, competent and substantial evidence supports the tribunal's determination if it is within the range of the evidence advanced by the parties.

2. COSTS — PREVAILING PARTY.

Costs may be awarded to the prevailing party under MCR 2.625(A)(1); under MCR 2.625(B)(2), the prevailing party when a single cause of action is alleged is the party who prevails on the entire record; at the very least, the party must show that his or her position was improved by the litigation.

3. COSTS — FRIVOLOUS ACTIONS — DETERMINATION — TAX TRIBUNAL — STANDARD OF REVIEW.

A court may find that a party's action is frivolous under MCR 2.625(A)(2), and award costs, when (1) the party initiated the suit for purposes of harassment, (2) the party's legal position was devoid of arguable legal merit, or (3) the party had no reasonable basis to believe that the facts underlying its legal position were true; an appellate court must affirm the Tax Tribunal's finding concerning whether a claim was frivolous unless competent, material, and substantial evidence does not support the finding.

Law Offices of Fred Gordon, P.C. (by *Fred Gordon*), for petitioners.

Johnson, Rosati, Schultz & Joppich, P.C. (by *Stephanie Simon Morita*), for respondent.

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM. These consolidated appeals arise from an order of the Michigan Tax Tribunal (the Tribunal) finding the taxable values of nine parcels of property in Waterford Township. In Docket No. 305970, petitioners

Pontiac Country Club, Lloyd Syron, and Fran Syron (the Country Club) appeal as of right the Tribunal's order finding the true cash value of the parcels. In Docket No. 306727, respondent, Waterford Township (the Township), appeals as of right the Tribunal's order denying its motions for costs. We affirm.

I. FACTS

A. BACKGROUND FACTS

In June 2004, the Country Club challenged the assessed and taxable values of nine parcels of property located on Elizabeth Lake Road in the Township. The Country Club uses eight of the nine parcels in combination as a golf course, and the ninth as a used car lot. As the case progressed, the Country Club moved to amend its petition to include assessments for 2005 and 2006. The parties ultimately did not dispute the value of the used car lot. The Township assessed the combined true cash value of the properties at $3,919,360 in 2004; $3,862,560 in 2005; and $4,223,440 in 2006.

B. ADMISSIONS AND MOTIONS FOR SUMMARY DISPOSITION

In May 2006, the Township requested that the Country Club admit several statements as fact. After the Country Club failed to respond to the request, the Township moved to deem the statements admitted. The Township also moved for summary disposition, arguing that on the basis of the admitted facts, the Country Club would be unable to obtain any relief. The Country Club responded that even if the Tribunal deemed the statements admitted, the admissions did not establish the true cash value of the property.

On September 1, 2006, the Tribunal deemed that the Country Club admitted the statements, including that

"the subject property is properly assessed or assessed at below market value." However, the Tribunal denied the Township's motion for summary disposition, opining that the true cash value of the property was still in dispute. We note that a property's assessed value is 50 percent of its true cash value.

Both parties filed additional motions for summary disposition under MCR 2.116(C)(10). The Tribunal determined that the Country Club's motion was a motion for reconsideration, which it denied. It also denied the Township's motion, asserting that the true cash value of the properties remained in dispute. The Country Club filed an additional motion for summary disposition, which it based on the property's zoning restrictions. The Tribunal determined that the effect of the zoning restrictions was an issue of fact and denied the motion.

C. HEARING TESTIMONY

The hearing took place in January 2008. Michael Rende, the Country Club's appraiser, first used the income approach to value the property. He calculated the net operating income of the property by deducting the property's expenses from its gross income and capitalizing the result. Under that approach, Rende's estimate of the combined true cash value of the properties was $190,000 in 2004; $120,000 in 2005; and $90,000 in 2006.[1]

Rende also alternatively estimated the value of the land as if it were vacant and ultimately concluded that the property would be more valuable as vacant land. He testified that most of the parcels were zoned for commercial recreation and that there was little possibility

[1] It appears from the record that Rende's true-cash-value estimates did not include the value of the ninth parcel.

that the properties' zoning classifications would change. Rende determined that the true cash value of the land as vacant land was $700,000 for each year in light of the zoning restrictions.

Lloyd Syron, an owner of the property, testified that he had received two offers to purchase the property, one for $11,000,000 that was contingent on rezoning and the other for $6,000,000. The Township's appraiser, Raymond Bologna, later testified that these offers for sale occurred in 2002. Syron also testified that in 2005, he mortgaged the property for $600,000 and received a further $200,000 line of credit on it from the bank.

John Wood, the Township's chief assessor, testified that his original assessments in 2004, 2005, and 2006 were accurate. Wood also testified that he believed that the Township would permit rezoning the property because there was a high demand for vacant property in the Township. Larry Lockwood, head of the Township's planning division, testified that it was highly probable that the Township would permit rezoning.

Bologna testified that he used the income approach to appraise the property as it existed, and found that the true cash value of the property was $1,678,000 in 2004; $2,062,000 in 2005; and $2,676,000 in 2006.[2] Bologna testified that the valuation using the income approach was very low, and that he also applied a sales-comparison approach. Using the sales-comparison approach, Bologna testified that the highest and best use of the property was as vacant property zoned for residential or mixed commercial and residential developments. Bologna's estimate of the true cash value of the property as vacant land was $7,607,000 in 2004; $8,010,000 in 2005; and $6,910,000 in 2006. He testified

[2] These figures, and those valuing the property as vacant land, include the value Bologna attributed to the ninth parcel.

that he considered the likelihood that a zoning change could occur when analyzing the value of the property.

D. THE TRIBUNAL'S FINDINGS AND CONCLUSIONS

The Tribunal ultimately concluded that the Township accurately assessed the property's true cash value in 2004, 2005, and 2006. The Tribunal found that Rende's appraisal was not credible because he used improper appraising methods. The Tribunal considered Bologna's testimony, but noted that Bologna did not account for the possible costs and time required to rezone the property.

The Tribunal thoroughly considered the evidence concerning the highest and best use of the property and the effect of zoning on the property's value. It found credible Lockwood's testimony that it was likely that the property could be rezoned. However, the Tribunal ultimately found that the property did not "have an increased value for the potential of a different use without a zoning change . . . ." It found that, though the best use of the property might change with a zoning change, the Country Club's current use was appropriate.

The Tribunal rejected both parties' appraisals. It rejected the Country Club's appraisal as not credible, and rejected the Township's appraisal because it was based on "hypothetical property" instead of on the property as it was zoned. The Tribunal then concluded that the property's true cash value was accurate as initially assessed.

E. THE TOWNSHIP'S MOTIONS FOR COSTS

In September 2011, the Township also moved the Tribunal for costs (1) as the prevailing party and (2) for

the frivolous hearing. The Country Club argued that the Township was not entitled to costs. The Tribunal denied the Township's motion for costs, finding that the hearing was not frivolous and concluding that the Township was not a prevailing party.

II. TRUE CASH VALUE (DOCKET NO. 305970)

A. STANDARD OF REVIEW

This Court's review of a decision by the Tribunal is limited.[3] We must accept the Tribunal's factual findings if "competent, material, and substantial evidence on the whole record" supports them.[4] Substantial evidence supports the Tribunal's findings if a reasonable person would accept the evidence as sufficient to support the conclusion.[5]

B. LEGAL STANDARDS

The Michigan Constitution provides that true cash value is necessary to determine the tax applicable to real property.[6] The Legislature has provided that "property shall be assessed at 50% of its true cash value . . . ."[7] The Legislature has defined "true cash value" as "the usual selling price . . . that could be obtained for the property at private sale . . . ."[8] True cash value and fair market value are synonymous, and

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[3] *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012).

[4] Const 1963, art 6, § 28; *Mich Props*, 491 Mich at 427.

[5] *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994); *Wayne Co v Michigan State Tax Comm*, 261 Mich App 174, 186-187; 682 NW2d 100 (2004).

[6] Const 1963, art 9, § 3.

[7] MCL 211.27a(1).

[8] MCL 211.27(1).

both are "the probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation."[9]

The petitioner has the burden to establish the property's true cash value.[10] But even if the petitioner fails to show that the assessment was too high, the Tribunal has the duty to determine the property's true cash value using the approach that most accurately reflects the value of the property.[11] The Tribunal should consider multiple approaches to determine a property's true cash value, correlating, reconciling, and weighing the values derived under the various approaches to reach a final estimate of the property's value.[12]

C. APPLYING THE STANDARDS

The Country Club contends that the Tribunal improperly adopted the Township's assessment, instead of independently determining the parcels' true cash values. We do not agree that the Tribunal adopted the Township's assessment without any basis.

We conclude that the Tribunal fulfilled its duty to make an independent determination of true cash value in this case. The Tribunal may adopt the assessed valuation on the tax rolls as its independent finding of true cash value when competent and substantial evidence supports doing so, as long as it does not afford the original assessment

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[9] *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 28; 737 NW2d 187 (2007).

[10] MCL 205.737(3); *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 389; 576 NW2d 667 (1998).

[11] *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 631; 806 NW2d 342 (2011); *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).

[12] *Meadowlanes Dividend Housing Ass'n*, 437 Mich at 484-486.

presumptive validity.[13] Generally, competent and substantial evidence supports the Tribunal's determination if it is within the range of the evidence advanced by the parties.[14]

In this case, competent, material, and substantial evidence supported the Tribunal's determination. The Tribunal rejected Rende's proposed valuation because it was not credible. The credibility of the witnesses is a matter for the Tribunal to determine.[15] The Tribunal also rejected Bologna's determination because he based it on "hypothetical property": Bologna assumed that the Country Club could rezone the property, but the property was not yet rezoned. The Tribunal's ultimate determination was between these two extremes. Thus, the evidence supported the Tribunal's determination because it was within the range of evidence presented by the parties.

Further, there is no indication that the Tribunal presumed that the original assessment was valid. Wood testified about his methods in his initial assessments, and testified that he believed that his assessment methods were accurate. We conclude that the Tribunal did not shirk its duties to independently determine the parcels' true cash values.

III. COSTS (DOCKET NO. 306727)

The Township argues that the Tribunal erred when it denied the Township's motion for costs because (1) the Township was the prevailing party, and (2) the Country Club's action was frivolous.

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[13] *President Inn Props*, 291 Mich App at 640.

[14] See *id*. at 641-642.

[15] *Id*. at 636.

A. COSTS TO A PREVAILING PARTY

1. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a court's ruling on a motion for costs to the prevailing party.[16] We generally review de novo whether a party was a "prevailing party," because it is a question of law.[17] But when a party does not dispute the facts or allege fraud, we review whether the Tribunal "made an error of law or adopted a wrong principle."[18]

2. LEGAL STANDARDS

A subset of the Michigan Administrative Code sets forth the rules of practice and procedure for the Tribunal.[19] If no applicable rule exists within that subset, the Michigan Court Rules and certain sections of the Michigan Administrative Procedures Act[20] apply.[21] During the period relevant to this case, the applicable subset of the Michigan Administrative Code provided that "[t]he Tribunal may, upon motion or upon its own initiative, allow a prevailing party in a decision or order to request costs,"[22] but it did not define "prevailing party." Thus, we will examine our court rules and caselaw to determine whether the Township was the prevailing party in this action.

When a single cause of action is alleged, the prevailing party is "the party who prevails on the entire

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[16] *Fansler v Richardson*, 266 Mich App 123, 126; 698 NW2d 916 (2005).

[17] *Id*.

[18] *Mich Props*, 491 Mich at 527-528.

[19] Mich Admin Code, R 205.1101 *et seq*.

[20] MCL 24.201 *et seq*.

[21] Mich Admin Code, R 205.1111(4); *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694, 705-706; 714 NW2d 392 (2006).

[22] Mich Admin Code, R 205.1145(i).

record . . . ."[23] The party need not recover the full amount of damages that he or she requested.[24] But the party "must show, at the very least, that its position was improved by the litigation."[25]

3. APPLYING THE STANDARDS

In this case, the Tribunal determined that the Township "did not prevail in this case, because it requested an increase in true cash value, which did not happen." We conclude that the Tribunal did not err in applying the law and did not adopt a wrong principle when it determined that the Township was not a prevailing party.

The Township did not show that its position improved as a result of the litigation. The Township's position did not deteriorate as a result of the Country Club's petition, but neither did its position improve. And, as noted by the Tribunal, the Township requested an increase in the taxable values of the parcels, but did not receive an increase. Thus, the Tribunal did not err when it determined that the Township was not a prevailing party and did not abuse its discretion when it denied the Township's motion for costs.

B. FRIVOLOUS ACTIONS

1. STANDARD OF REVIEW

Generally, when reviewing whether an action is frivolous under MCR 2.625(A)(2), this Court reviews for

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[23] MCR 2.625(B)(2); *LaVene v Winnebago Indus*, 266 Mich App 470, 473-474; 702 NW2d 652 (2005).

[24] *Van Zanten v H Vander Laan Co, Inc*, 200 Mich App 139, 141; 503 NW2d 713 (1993).

[25] *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998); see also *Ullery v Sobie*, 196 Mich App 76, 82; 492 NW2d 739 (1992).

clear error a trial court's finding that an action is not frivolous,[26] because whether a party's claim is frivolous in a specific case is a question of fact.[27] However, this case involves a finding by the Tribunal. And we must affirm the Tribunal's findings of fact if competent, material, and substantial evidence on the record supports them.[28] We conclude that we must affirm the Tribunal's finding concerning whether a claim was frivolous unless competent, material, and substantial evidence does not support the finding.

2. LEGAL STANDARDS

A court may find that a party's action is frivolous under MCR 2.625(A)(2) when (1) the party initiated the suit for purposes of harassment, (2) "[t]he party's legal position was devoid of arguable legal merit," or (3) "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true."[29] Harassment is not at issue in this case.

3. APPLYING THE STANDARDS

The Township argues that the Country Club's action was frivolous because, in light of its admissions, there were no disputed evidentiary issues to take to a hearing.

We conclude that the trial court's finding that the Country Club's request for a hearing was not frivolous was supported by competent, material, and substantial

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[26] *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

[27] See *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1991), citing *Sarin v Samaritan Health Ctr*, 176 Mich App 790, 799; 440 NW2d 80 (1989) ("The trial court's finding of fact that the court rule was not violated may not be set aside unless clearly erroneous.").

[28] *Mich Props*, 491 Mich at 527.

[29] MCL 600.2591(3)(a).

evidence on the record. A party's admissions are binding, formal, and conclusive concessions of fact or of the application of law to the facts.[30] The dual purposes of admissions are: (1) to eliminate issues from the case that are uncontested, and (2) to facilitate proof on issues that are not eliminated.[31] As noted earlier, even if the petitioner does not meet his or her burden to show that the assessment was too high, the Tribunal must make an independent determination of the property's true cash value.[32]

In this case, the Tribunal found that the Country Club's request for a hearing was not frivolous, even after its admissions, because the admissions did not establish the property's true cash value. The Tribunal deemed that the Country Club admitted that the property was "properly assessed or assessed at below market value." The Country Club's admission does not specify what the true cash value of the property was and it is inherently self-contradictory—the property was either properly assessed or it was assessed below market value, but it cannot be both at the same time. We conclude that the Tribunal did not err when it determined that a hearing was still required for it to fulfill its statutory duty to determine the property's true cash value.

But even had the Tribunal erred when ruling in June 2006 that a hearing was still necessary to resolve the disputed factual issues in this case, we fail to see why *the Country Club* should be held accountable for the "unnecessary" hearing. Simply because the Tribunal ultimately rejected the Country Club's facts and legal

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[30] *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 419-420; 551 NW2d 698 (1996).

[31] *Id*. at 420.

[32] MCL 205.737(1); *President Inn Props*, 291 Mich App at 640; *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 389.

arguments does not mean that the Country Club did not have a good faith basis to advance those facts and arguments.[33] In light of the Tribunal's rulings denying the parties' motions for summary disposition, the Country Club had a good faith basis to believe that the hearing was necessary to resolve disputed facts.

The Township argues that this case is analogous to our decision in *DeWald v Isola*.[34] In *DeWald*, the plaintiff attempted to enforce an alleged oral promise to sell an interest in property.[35] But since 1872, it has been settled law in Michigan that an oral promise to sell land is unenforceable under the statute of frauds.[36] This Court concluded that the trial court should have sanctioned the plaintiff because its claim was devoid of arguable legal merit.[37] We reasoned that the party's mistakes involved a matter that was "basic, longstanding, and unmistakably evident in statutory and common law . . . ."[38] We simply do not think that *DeWald* is analogous to the facts here because the Country Club did not make an obvious and basic mistake of law.

We conclude that, in light of the Tribunal's ruling that a hearing was necessary, the record supports its finding that the Country Club's hearing was not frivolous. We affirm that finding under the standards of review applicable to the Tribunal's decisions.

We affirm.

JANSEN, P.J., and WHITBECK and BORRELLO, JJ., concurred.

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[33] See *Kitchen*, 465 Mich at 662.

[34] *DeWald v Isola*, 180 Mich App 129; 446 NW2d 620 (1989).

[35] *Id*. at 131.

[36] *Id*. at 135.

[37] *Id*. at 137.

[38] *Id*. at 136.

MICHIGAN HEAD & SPINE INSTITUTE, PC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 307253. Submitted February 5, 2013, at Detroit. Decided February 12, 2013, at 9:05 a.m.

Michigan Head & Spine Institute, P.C., brought an action in the 46th District Court against State Farm Mutual Automobile Insurance Company, seeking payment of medical expenses under the no-fault act, MCL 500.3101 *et seq*. Pellumbesha Biba was injured in an automobile accident. At the time of the accident, she was insured under a no-fault policy issued by State Farm. Approximately a year and a half after the accident, Biba executed a release in settlement of ongoing litigation with State Farm in exchange for $35,000. The release stated that it generally released and discharged State Farm from any and all claims and demands for no-fault insurance benefits, including expenses incurred to the date the release was executed and expenses incurred at any time in the future that arose out of the accident. More than six months after signing the release, Biba began treatment with Michigan Head & Spine because of injuries that she sustained in the accident. State Farm, relying on the release, refused to pay Michigan Head & Spine for that treatment, and Michigan Head & Spine brought suit. The parties both moved for summary disposition. The court, William J. Richards, J., granted Michigan Head & Spine's motion and denied State Farm's motion, concluding that Michigan Head & Spine had an independent cause of action against State Farm under MCL 500.3112 and that the release did not waive that separate cause of action. The court entered judgment in favor of Michigan Head & Spine for $12,450, including costs and attorney fees, plus interest. On appeal, the Oakland Circuit Court, Shalina D. Kumar, J., affirmed. State Farm appealed by leave granted.

The Court of Appeals *held*:

Under MCL 500.3112, personal protection insurance benefits are payable to or for the benefit of an injured person. The statutory language contemplates the payment of benefits to someone other than the injured person. An injured person may waive his or her entitlement to no-fault benefits and release an insurer from payment of future benefits in exchange for a settlement. The scope of a release

is governed by the intent of the parties as it is expressed in the release. In this case, the plain language of the release demonstrated that, in exchange for the payment of $35,000, the parties intended to discharge State Farm's liability altogether, including its liability for future medical services. The fact that the parties included a narrow exception in the release for accident-related care provided by the University of Michigan Health System for approximately one year after the release was executed was immaterial to Michigan Head & Spine's claim because treatment at Michigan Head & Spine's facility did not fall under the unambiguous language of the narrowly crafted exception.

Reversed and remanded for entry of summary disposition in favor of State Farm.

INSURANCE — NO-FAULT — LIABILITY — RELEASE — INDEPENDENT CAUSE OF ACTION.

An injured person may execute a release with an insurer that discharges the insurer's liability under the no-fault automobile insurance act, MCL 500.3101 *et seq*., for future medical services; the scope of a release is governed by the intent of the parties as it is expressed in the release; a medical treatment provider may not maintain an independent cause of action against an insurer to recover payment for medical services provided after the execution of a release by the injured party and the insurer when the scope of the release discharged the insurer's liability for those services (MCL 500.3112).

Miller & Tischler, P.C. (by *Alicia M. Oaks*), for Michigan Head & Spine Institute, P.C.

James C. Rabaut & Associates (by *Walter H. Smith, Jr.*) and *Gross & Nemeth, P.L.C.* (by *James G. Gross*), for State Farm Mutual Automobile Insurance Company.

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

DONOFRIO, J. Defendant appeals by leave granted the trial court's order granting partial summary disposition in favor of plaintiff in this action for payment of medical expenses under the no-fault act, MCL 500.3101 *et seq*. Because defendant's insured executed a release that barred plaintiff's claim for payment from defendant, we

reverse and remand for entry of summary disposition in favor of defendant.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case stems from a motor vehicle accident that occurred on January 20, 2008. Pellumbesha Biba, who was insured under a no-fault policy that defendant had issued, was injured in the accident. On July 30, 2009, in exchange for $35,000 and in settlement of ongoing litigation with defendant, Biba executed a release, which stated in pertinent part:

> For the sole consideration of the amount of $35,000.00, Pellumbesha Biba . . . does hereby release and discharge [defendant] . . . from any and all claims and demands for no-fault insurance benefits, of any kind whatsoever, for any and all expenses incurred to date and/or which may be incurred at any time in the future by or on behalf of Pellumbesha Biba arising out of [the] accident . . . including but not necessarily limited to:
>
> 1. Other than explained in the paragraph below, any and all allowable expenses of any kind whatsoever for reasonably necessary products, services, and accommodations for [Biba's] care, recovery, or rehabilitation, including, but not limited to, medical, psychiatric, psychological, counseling, dental, chiropractic, medication, mileage, caretaking, attendant care, skilled nursing care, assistant care and/or skilled care from the date of the above accident through the present and/or which may be incurred at any time in the future.
>
> 2. Any and all lost wages that have been incurred from the time of the above accident to the present and/or which may be incurred at any time in the future which may be caused by or related to the injuries claimed to have been sustained by the undersigned in the subject accident.
>
> 3. Any and all interest charges which would have been owed or owing pursuant to [MCL 500.3142(3)] of the Michigan No-Fault Act for no-fault benefits released herein.

> 4. Any and all attorney fees paid and/or payable as a result of the representation of [Biba] in seeking and/or obtaining no-fault benefits released herein.
>
> 5. Any and all expenses incurred in obtaining ordinary and necessary services from the time of the above accident to the present and/or which may be incurred at any time in the future for services which may have been paid or payable at the maximum rate of $20 per day pursuant to the Michigan No-Fault Act.
>
> Notwithstanding any other provision in this document, [Biba] is permitted to seek and make a claim for expenses for accident-related medical care provided by the University of Michigan Health System, if that care is provided prior to July 6, 2010. Any expenses incurred after July 6, 2010 by [Biba] and related to the above-described accident will not be considered and [Biba] is forever barred from making claims for such expenses.
>
> [Biba], in further consideration of the aforementioned settlement amount, hereby releases and discharges [defendant] . . . from any and all claims of any kind whatsoever, for any and all damages, whether exemplary, compensatory or punitive, for bad faith, intentional or negligent infliction of emotional distress, mental anguish, defamation, and/or intentional or negligent release of allegedly confidential information arising out of the handling of the claim for no-fault benefits for expenses incurred by and/or on behalf of [Biba] arising out of the above-mentioned accident.

On February 26, 2010, more than six months after signing the release, Biba began treatment with plaintiff because of injuries that she sustained in the accident. Relying on the release, defendant refused to pay plaintiff for its treatment of Biba. On December 17, 2010, plaintiff filed a complaint against defendant in the 46th District Court seeking payment under the no-fault act for the services and accommodations it had rendered to Biba as well as penalty interest, attorney fees, and a judgment declaring that defendant is liable for no-fault

benefits payable to plaintiff for the services and accommodations it provided for Biba's benefit.

Plaintiff moved for partial summary disposition under MCR 2.116(C)(10), arguing that the release did not bar its independent cause of action against defendant for the recoupment of no-fault benefits pursuant to MCL 500.3112. In response, defendant moved for summary disposition under MCR 2.116(C)(7) and (I)(2), maintaining that the release barred plaintiff's claim. The district court granted plaintiff's motion and denied defendant's motion on the basis that plaintiff had an independent cause of action against defendant and the release executed by Biba did not waive plaintiff's separate cause of action. The district court entered a judgment in plaintiff's favor in the amount of $12,450, inclusive of costs and attorney fees, plus interest in the amount of $1,623.60. On appeal, the circuit court affirmed the district court's ruling using the same reasoning.

II. STANDARD OF REVIEW

We review de novo a lower court's decision on a motion for summary disposition. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and is properly granted if the evidence in support of the motion fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion pursuant to MCR 2.116(C)(7) is properly granted when a claim is barred because of a release. *Rinke v Auto Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). "When reviewing a motion under MCR 2.116(C)(7), a reviewing court must con-

sider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party." *Anzaldua*, 292 Mich App at 629. Summary disposition under MCR 2.116(I)(2) is appropriate "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ." Further, the interpretation of a release is a question of law, *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000), that this Court reviews de novo, *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

III. LEGAL ANALYSIS

MCL 500.3112 provides, in relevant part:

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person.

This Court has recognized that the language in MCL 500.3112 "specifically contemplates the payment of benefits to someone other than the injured person . . . ." *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 39; 645 NW2d 59 (2002). "As a result, it is common practice for insurers to directly reimburse health care providers for services rendered to their insureds." *Id*. It is well established that an injured person entitled to no-fault benefits may waive that entitlement and release an insurer from payment of future benefits in exchange for a settlement. *Lewis v Aetna Cas & Surety Co*, 109 Mich App 136, 140; 311

NW2d 317 (1981). The issue presented in this case is whether an insured's release bars a healthcare provider's claim for payment for medical services rendered to the insured after the release was executed.

Courts generally apply principles of contract law to disputes involving the terms of a release. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). "The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." *Cole*, 241 Mich App at 13.

The plain language of the release in this case states that "[f]or the sole consideration of the amount of $35,000.00," Biba "does hereby release and discharge" defendant "from any and all claims and demands for no-fault insurance benefits, of any kind whatsoever, for any and all expenses incurred to date *and/or which may be incurred at any time in the future by or on behalf of*" Biba arising out of the accident, including

> any and all allowable expenses of any kind whatsoever for reasonably necessary products, services, and accommodations for [Biba's] care, recovery, or rehabilitation, including, but not limited to, medical, . . . medication, . . . skilled nursing care, . . . and/or skilled care from the date of the above accident through the present *and/or which may be incurred at any time in the future*. [Emphasis added.]

Thus, the plain language demonstrates that, in exchange for defendant's payment of $35,000, the parties intended to discharge defendant's liability altogether, including its liability for future medical services.[1] The

[1] We note that the language "or on behalf of" in the release is similar to the phrase "or for the benefit of" in MCL 500.3112, which this Court has recognized creates an independent cause of action for healthcare providers. *Lakeland Neurocare*, 250 Mich App at 39. Therefore, the use of

language of the release is clear and unambiguous, and the parties' intent, expressed in the release, governs its scope. *Cole*, 241 Mich App at 13.

Plaintiff's argument that there is no evidence that any additional money was paid to cover future medical treatment is without merit. The language of the release plainly includes expenses related to future medical treatment in exchange for defendant's payment of $35,000. Plaintiff also argues that by including in the release the provision allowing Biba to make a claim for expenses for accident-related care provided by the University of Michigan Health System, defendant preauthorized accident-related treatment up to July 6, 2010, nearly one year after the release was executed. Again, plaintiff's argument is without merit. The parties to the release bargained for a narrow exception to the bar on future benefits, and treatment at plaintiff's facility does not fall under the exception. There is nothing ambiguous about the provision, which is limited to "accident-related medical care provided by the University of Michigan Health System . . . prior to July 6, 2010." Because the provision is unambiguous, this Court cannot read anything additional into it. "If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." *Cole*, 241 Mich App at 13.

We note that plaintiff is not without a remedy. Although Biba provided her insurance claim number on plaintiff's intake form and indicated that bills should be sent to defendant, she also signed a form that stated, "I agree to pay in full any and all charges for medical services provided to me by [plaintiff] not otherwise

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the phrase "or on behalf of" in the release is indicative of the parties' intent that the release include healthcare providers' claims for reimbursement.

covered by my Medicare, insurance company or carrier, or other payor." Thus, Biba agreed to be responsible for charges that defendant did not pay. Further, Biba checked "Yes" on the intake form after the question "[i]s there a lawsuit involved?" Directly beneath the question, however, she stated, "it is over (Done)." Therefore, plaintiff was on notice that the lawsuit had concluded and could have inquired into the terms of the settlement before treating Biba. At a minimum, plaintiff could have contacted defendant to verify Biba's assertion that defendant would cover her medical expenses. Biba even provided the insurance adjuster's name and telephone number on the intake form. Accordingly, plaintiff could have verified Biba's claimed entitlement to no-fault benefits, but failed to do so. Moreover, upholding the lower courts' decisions would have a chilling effect on settlements of claims involving future no-fault benefits because the decisions effectively nullify Biba and defendant's settlement. The parties did not intend that result considering the clear language of the release.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

MURPHY, C.J., and GLEICHER, J., concurred with DONOFRIO, J.

PEOPLE v LOPER

Docket No. 308026. Submitted February 5, 2013, at Grand Rapids. Decided February 14, 2013, at 9:00 a.m.

Richard Allen Loper pleaded guilty in the St. Joseph Circuit Court to one count each of possessing child sexually abusive material, MCL 750.145c(4)(a), and using a computer to commit a crime, MCL 752.796. He was sentenced by the court, Paul E. Stutesman, J., to 23 months to 7 years in prison on the conviction for the use of a computer to commit a crime and 357 days in jail on the conviction for the possession of child sexually abusive material. Defendant appealed.

The Court of Appeals *held*:

1. A statute might be unconstitutionally vague if it fails to provide fair notice of the conduct proscribed, or it is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred. A vagueness challenge must be examined on the basis of the facts at hand when a First Amendment freedom is not involved; child pornography is not protected by the First Amendment. A defendant may not raise a vagueness challenge when his or her own conduct is fairly within the constitutional scope of the statute. The fact that a hypothetical may be posed that would cast doubt on the statute does not render it constitutionally vague. Rather, the test is whether the statute, as applied to the defendant's conduct, is constitutional. MCL 750.145c(4) is not unconstitutionally vague as applied to defendant through the scoring of the sentencing guidelines. Offense variable (OV) 12 (contemporaneous felonious acts), MCL 777.42, should be scored 25 points when three or more contemporaneous felonious criminal acts involving a crime against a person are involved. OV 13 (continuing pattern of criminal behavior), MCL 777.43, should be scored 25 points when the sentencing offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. All crimes within a five-year period, including the sentencing offense are counted when assessing points regardless of whether the offense resulted in a conviction. Even though MCL 750.145c(4) might prohibit both a single image of child sexually abusive material and a collection of images

of such material, resulting in a variance in the number of criminal charges that could be brought in cases in which there was a collection of separate images of child sexually abusive material, such a distinction was irrelevant to the facts of this case. Defendant had more than 100 individual images of child sexually abusive material in his possession and 4 computer disks containing the images; the numerical quantity of individual images and computer disks containing the illegal images were independently sufficient to support the trial court scoring OV 12 at 25 points, and OV 13 at 25 points if the trial court had assessed such points. Accordingly, MCL 750.145c(4) was not unconstitutional as applied to defendant.

2. Under MCL 750.145c(4), a person who knowingly possesses any child sexually abusive material has both actual and constructive possession. Constructive possession, which may take place over an extended period of time, occurs when an individual knowingly has the power and the intention at a given time to exercise dominion or control over contraband either directly or through another person or persons. The trial court properly assessed defendant 25 points for OV 12 because there was evidence to support a finding of three or more contemporaneous acts of possession of child sexually abusive material; the trial court could reasonably infer that defendant had possessed the four disks of child sexually abusive material beginning in 2007 or before and that he had possessed all four disks within 24 hours of the offense date.

3. Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole. Defendant was punished for two separate crimes; MCL 750.145c(4) and MCL 752.796 are not *in pari materia* because they do not address the same subject or share a common purpose. The subject of MCL 750.145c(4) is the possession of child sexually abusive material and its purpose is to criminalize the possession of that material in a variety of formats. MCL 752.796, however, plainly addresses the use of a computer to commit a crime and its purpose is to criminalize such use. Defendant was punished under MCL 750.145c(4) for possession of child sexually abusive material, as accomplished by downloading the material with a computer. Defendant's use of a computer to download the material was separately criminalized by MCL 752.796(1). The Legislature knowingly criminalized the possession of the materials, as well as the use of a particular instrumentality to accomplish that illegal possession.

4. The Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24, provides that no law shall embrace more than one object, which shall be expressed in its title. The purpose of the clause it to ensure that laws are fully understood, that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge. A statute may be challenged under the Title-Object Clause on the basis of (1) a title-body challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge. The test for a title-body violation is whether the title gives fair notice to the legislators and the public of the challenged provision. The fair notice aspect has been violated only when an act's subjects are so diverse in nature that they have no necessary connection. Provisions in the body of the act not directly mentioned in the title must be germane, auxiliary, or incidental to the general purpose of the title of the act. MCL 752.796(1), as amended by 1996 PA 326, does not violate the Title-Object Clause. The purpose of the 1996 PA 326 title was to amend 1979 PA 53, and the body of 1996 PA 326 accomplished that purpose by altering MCL 752.796. The 1996 PA 326 title gave legislators and the public fair notice of the act's purpose and the challenged portion of the body of 1996 PA 326 was at least germane, auxiliary, or incidental to the general purpose of the 1996 PA 326 title because it amended 1979 PA 53.

5. Defendant waived his challenge to the scoring of prior record variable 6 because he agreed at sentencing with the trial court's assessment of points.

Affirmed.

1. STATUTES — *IN PARI MATERIA* — POSSESSION OF CHILD SEXUALLY ABUSIVE MATERIALS — USE OF COMPUTERS TO COMMIT CRIMES.

MCL 750.145c(4), which criminalizes the possession of child sexually abusive material in a variety of formats, and MCL 752.796, which addresses and criminalizes the use of a computer to commit a crime, are not *in pari materia* because they do not address the same subject or share a common purpose; the Legislature knowingly criminalized the possession of such materials, as well as the use of a particular instrumentality to accomplish that illegal possession; they are two separate crimes that can be charged separately.

2. CONSTITUTIONAL LAW — TITLE-OBJECT CLAUSE — TITLE-BODY CHALLENGE — POSSESSION OF CHILD SEXUALLY ABUSIVE MATERIALS.

MCL 752.796(1), as amended by 1996 PA 326, does not violate the Title-Object Clause of the Michigan Constitution (Const 1963, art 4, § 24).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Laura A. Cook*, Assistant Attorney General, for the people.

Julianne Meyer-Sorek for defendant.

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM. Defendant pleaded guilty to one count of possessing child sexually abusive material, MCL 750.145c(4)(a), and to one count of using a computer to commit a crime, MCL 752.796. Defendant was sentenced to 23 months to 7 years' imprisonment for the use of a computer to commit a crime, and to 357 days in jail for the possession of child sexually abusive material. Defendant appeals by leave granted. We affirm.

I. FACTS

In late October, 2008, defendant's ex-wife, Melissa, contacted Three Rivers Police Sergeant Karl Huhnke and gave him eight computer disks. Huhnke reviewed the disks and discovered that some contained hundreds of pornographic images of young girls. Three Rivers Police Sergeant Mike Mohney examined the disks and determined that four disks contained images of prepubescent children posing without clothing on or performing sexual acts on animals or people. Mohney estimated that there were at least 100 distinct images of child pornography contained in the four disks. Mohney testified at defendant's preliminary examination that the images were likely downloaded to the disks around May, 2007. However, because of the duplicative nature of the images,

Mohney believed that the images were actually downloaded to defendant's computer at a date prior to May, 2007.

At defendant's preliminary examination, Mohney testified that he had interviewed defendant on March 8, 2010. During that interview, Mohney showed defendant six images contained on the disks, and defendant admitted to downloading those images to his computer, and then onto a disk. During the preliminary examination, defendant stipulated that four disks contained images of naked children in sexual poses. The district court concluded that "one count can encompass all of the material," and bound defendant over to the circuit court on one count of possession of child sexually abusive material, and one count of using a computer to commit a crime.

On March 25, 2011, the circuit court held a hearing at which defendant pleaded guilty to one count of possession of child sexually abusive material and to one count of using a computer to commit that crime. Defendant admitted that between 2007 and 2008, he had used a computer to obtain the images from the internet. He admitted that the images were of minors under the age of 15 years old involved in sexual acts and that he had known that the images were of minors involved in sexual acts at the time he obtained them.

II. SENTENCING

Defendant challenges his sentence on constitutional and nonconstitutional grounds. Defendant's constitutional challenge is that the statute governing possession of child sexually abusive material, MCL 750.145c, is unconstitutionally vague. Due to that statute's vagueness, defendant argues, the trial court erred by assessing 25 points for offense variable (OV) 12, MCL 777.42

(contemporaneous felonious acts). He also argues that the court would have erred had it assessed 25 points for OV 13, MCL 777.43 (continuing pattern of criminal behavior).[1] We disagree, and conclude that MCL 750.145c is not unconstitutionally vague when applied to defendant's conduct in the instant case.

With regard to his nonconstitutional challenge, defendant argues that the trial court erred by assessing 25 points for OV 12 because the additional felonious acts that justified the score were not "contemporaneous" within the meaning of the sentencing statute. Again, we disagree.

A. ISSUE PRESERVATION AND STANDARDS OF REVIEW

A challenge to a sentence that is within the guidelines sentence range is preserved when it is raised at sentencing, in a motion for resentencing, or in a motion to remand filed in the Court of Appeals. MCL 769.34(10). Defendant argued in the lower court that MCL 750.145c should not apply to individual images of child sexually abusive material, but did not raise the specific guideline scoring arguments he presents on appeal. Accordingly, these issues on appeal are unpreserved.

[1] The trial court did not score OV 13 because it had scored OV 12, and, generally, both cannot be scored on the basis of the same conduct. MCL 777.43(2)(c). Defendant nonetheless argues that OV 13 could not have been scored under any circumstances. In making this argument, defendant presumably anticipated the prosecution's argument that even if the trial court erred with regard to OV 12, that error does not justify resentencing because OV 13 could have been scored and defendant's minimum guidelines range would not have changed. Indeed, the prosecution raised this very argument. Accordingly, we will consider defendant's challenge regarding whether OV 13 could have been scored, as doing so informs our ultimate task of determining whether to remand for resentencing.

Even though defendant did not preserve this issue for appeal, this Court may review an unpreserved scoring issue for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). To avoid forfeiture of the issue under the plain error rule, the defendant bears the burden to show that "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted). Moreover, even if a defendant successfully demonstrates a plain error affecting his substantial rights, the reviewing court still has "discretion in deciding whether to reverse. Reversal is warranted only when the plain . . . error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks and citation omitted). Appellate courts review de novo the constitutionality of a statute. *People v Nichols*, 262 Mich App 408, 409; 686 NW2d 502 (2004).

B. VAGUENESS

Defendant argues that the trial court erred with regard to OV 12 (and would have erred with regard to OV 13 had it been scored), because MCL 750.145c is unconstitutionally vague. We disagree.

"The 'void for vagueness' doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property, without due process of law." *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011) (quotation marks and cita-

tion omitted); US Const, Am XIV; Const 1963, art 1, § 17. "A statute might be unconstitutionally vague if, among other reasons, it fails to provide fair notice of the conduct proscribed or is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred." *People v Lockett*, 295 Mich App 165, 174; 814 NW2d 295 (2012) (quotation marks and citation omitted). "Statutes are presumed to be constitutional," and to overcome that presumption, the unconstitutionality must be readily apparent. *People v Malone*, 287 Mich App 648, 658; 792 NW2d 7 (2010). The party challenging a statute's constitutionality has the burden of proving its invalidity. *Id*.

When a vagueness challenge does not involve First Amendment freedoms it must be examined on the basis of the facts in the case at hand. *Nichols*, 262 Mich App at 410. It is well-established that child pornography does not implicate the First Amendment. *New York v Ferber*, 458 US 747, 764; 102 S Ct 3348; 73 L Ed 2d 1113 (1982); *Roberts*, 292 Mich App at 501. Accordingly, this Court has held:

> A defendant may not challenge a statute as unconstitutionally vague when the defendant's own conduct is fairly within the constitutional scope of the statute. The fact that a hypothetical may be posed that would cast doubt upon the statute does not render it unconstitutionally vague. Rather, the analysis must center on whether the statute, *as applied to the actions of the individual defendant*, is constitutional. [*Malone*, 287 Mich App at 658-659 (citations omitted and emphasis added).]

In other words, when a defendant brings an as-applied vagueness challenge to a statute, the defendant is confined to the facts of the case at bar. See also *People v Newton*, 257 Mich App 61, 66; 665 NW2d 504 (2003) ("The proper inquiry is not whether the statute may be

susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case.") (quotation marks and citation omitted).

MCL 750.145c(4) provides:

> A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

In turn, MCL 750.145c(1)(m) defines "child sexually abusive material" as:

> [A]ny depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording.

A "child" means a person who is less than 18 years old. MCL 750.145c(1)(b). A "listed sexual act" is defined as "sexual intercourse, erotic fondling, sado-

masochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(h).

Defendant argues in this case that MCL 750.145c(4) is unconstitutionally vague because both a single image of child sexually abusive material and a collection of images of child sexually abusive material are prohibited, resulting in a variance in the number of criminal charges that could be brought by prosecutors in cases in which there is a collection of separate images of child sexually abusive material. Defendant argues that because of this ambiguity, the trial court improperly assessed 25 points for OV 12 (and would have improperly scored OV 13 had points been assigned), despite the fact that he was bound over on only one count.

OV 12 should be scored at 25 points when "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(a). A felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act "has not and will not result in a separate conviction." MCL 777.42(2)(a). "Crimes against a person" for the purpose of scoring OV 12 are those crimes with the offense category designated as "person" under MCL 777.11 to MCL 777.18. *People v Wiggins*, 289 Mich App 126, 131; 795 NW2d 232 (2010). MCL 777.16g(1) designates possession of child sexually abusive material as a crime against a person. "The trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable." *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012).

Under OV 13, the trial court should assign a score of 25 points when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes

against a person." MCL 777.43(1)(c). "[A]ll 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).

Defendant's vagueness argument relies on the distinction between individual images of child sexually abusive material and collections of images of child sexually abusive material (such as the disks in this case). In the instant case, however, defendant's distinction between the number of images and the number of collections of images is irrelevant: the number of images (over 100) or the number of disks (four) were sufficient to find that defendant possessed three or more different child sexually abusive materials, which in turn is enough to satisfy the numerical threshold for both OV 12 and OV 13. MCL 777.42(1)(a) (requiring a 25-point score for "three or more contemporaneous" felonies); MCL 777.43(1)(c) (requiring a 25-point score for "a pattern of felonious activity involving 3 or more crimes against a person"). We therefore conclude that, as applied to defendant's conduct and the sentencing guidelines at issue in the instant case, MCL 777.43(1)(c) is not unconstitutionally vague. We decline to reach his hypothetical vagueness challenge, as doing so would require us to consider facts not at issue in the case at bar. *Malone*, 287 Mich App at 658-659; *Newton*, 257 Mich App at 66.

C. OV 12

Defendant also argues that, even if MCL 750.145c is not unconstitutionally vague, the trial court erred when it assessed 25 points for OV 12 because it relied on prior felonious acts that were not "contemporaneous" within the meaning of MCL 777.42(1)(a). We disagree.

The trial court listed October 23, 2008 as the offense date.[2] The trial court assessed 25 points for OV 12 on the basis that there were three or more contemporaneous acts of possession of child sexually abusive material. At the preliminary examination, Mohney testified that based on his review of the "properties" section of the disks that recorded when they were created, the majority of the child sexually abusive material was downloaded onto the four disks "around May 2007." Defendant argues that the act of possession of the disks began well over a year before the date of the offense, and therefore so did the "three or more . . . felonious acts . . ." that the trial court relied on to justify its score of 25 points for OV 12. MCL 777.42(1)(a).

However, "the phrase '[a] person who knowingly possesses any child sexually abusive material' in MCL 750.145c(4) includes both actual and constructive possession." *People v Flick*, 487 Mich 1, 4; 790 NW2d 295 (2010). "[A] defendant constructively possesses 'any child sexually abusive material' when he knowingly has the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons." *Id*. at 15. Possession of contraband is an ongoing offense that may take place over an extended period. *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000). Accordingly, the facts presented to the trial court form the basis of a reasonable inference that defendant possessed the disks of child sexually abusive material beginning in 2007 or before, and that he possessed all four disks of child sexually abusive material on October 23, 2008. See *Earl*, 297 Mich App at 109. It was reasonable for the trial court to infer that defendant

[2] Melissa gave one computer disk to the police on October 23, 2008; she brought in the remaining seven disks on October 28, 2008.

possessed the images within 24 hours of the offense date. MCL 777.42(2)(a). Thus, there was evidence supporting the trial court's finding that there were three or more contemporaneous acts of possession of child sexually abusive material under MCL 777.42(2)(a), and the trial court did not plainly err by assessing 25 points to OV 12.

Moreover, even if we had concluded that OV 12 was improperly scored, the trial court had a basis to score the same 25 points under OV 13. On the basis of defendant's own admissions, he possessed the disks between 2007 and 2008. The trial court's offense date was October 23, 2008. Thus, there was evidence to support a finding by a preponderance of the evidence that defendant had engaged in a pattern of felonious criminal activity involving a minimum of three possessions of child sexually abusive material. MCL 777.43(1)(c). In either case his OV score and sentence range would have remained the same.

III. STATUTES *IN PARI MATERIA*

Defendant next argues that MCL 750.145c and MCL 752.796 (using a computer to commit a crime) protect against the same wrongful conduct, that they are therefore *in pari materia*, and that the trial court erred by holding otherwise. Defendant argues that when the statutes are read *in pari materia*, they conflict because MCL 752.796 permits a maximum seven-year term of imprisonment, whereas MCL 750.145c permits a maximum four-year term of imprisonment. Defendant argues that this conflict must be resolved in favor of the more specific statute, which he argues is MCL 750.145c. We disagree that the two statutes are *in pari materia*.

This Court reviews de novo issues of statutory construction. *People v Kern*, 288 Mich App 513, 516; 794

NW2d 362 (2010). "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). To the extent that defendant's arguments require the interpretation of MCL 750.145c(4) and MCL 752.796, the primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). "The fair and natural import of the provision governs, considering the subject matter of the entire statute." *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009). The first step in interpreting statutory language is to look at the statutory text. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The Legislature is presumed to have intended the meaning it plainly expressed, and clear statutory language must be enforced as written. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). If the plain and ordinary meaning of the language is clear, judicial construction is not required or permitted. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). However, a statutory provision is ambiguous if it is equally susceptible to more than a single meaning. *Gardner*, 482 Mich at 50 n 12.

MCL 750.145c(4) provides:

> A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

MCL 750.145c(1)(m) defines "child sexually abusive material" as

> any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording. [MCL 750.145c(1)(m).]

Accordingly, read in conjunction with the definition of "child sexually abusive material," MCL 750.145c(4) prohibits the possession of such material in many different media, including a "book, magazine, computer, computer storage device, or other visual or print or printable medium." Thus, by the plain language of the statutory text, the subject of MCL 750.145c(4) is the possession of child sexually abusive material, and its purpose is to criminalize the possession of child sexually abusive material in a variety of formats.

MCL 752.796 provides:

> (1) A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime.
>
> (2) This section does not prohibit a person from being charged with, convicted of, or punished for any other

> violation of law committed by that person while violating or attempting to violate this section, including the underlying offense.
>
> (3) This section applies regardless of whether the person is convicted of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the underlying offense.

The plain language of MCL 752.796(1) reveals that the statute's subject is the use of a computer to commit a crime, and its purpose is to criminalize such use. Sections (2) and (3) are provisions that govern section (1)'s interaction with the underlying offense. Specifically, section (2) clarifies that the legislature did not intend that the criminalization of the use of a computer to commit a crime as provided in section (1) would prevent the application of additional criminal penalties to the underlying offense. The object and purpose of MCL 752.796 is to preclude the use of a computer to commit any crime while the object and purpose of MCL 750.145c(4) is to preclude the possession of child pornographic material regardless of how it is produced. Accordingly, based on their plain language, MCL 750.145c(4) and MCL 752.796 do not address the same subject or share a common purpose.

Defendant nonetheless argues that because MCL 750.145c(4) and MCL 752.796 criminalized the same conduct in the instant case, the doctrine of *in pari materia* necessarily applies. We disagree. Defendant admittedly used a computer to download child sexually abusive material. Defendant argues that this was a single act that was criminalized by both MCL 750.145c(4) and MCL 752.796. However, defendant's *possession* of child sexually abusive material, as accomplished by downloading the material, was criminalized by MCL 750.145c(4). Defendant's *use of a computer* to download the child sexually abusive material was sepa-

rately criminalized by MCL 752.796(1). This is no different than the case where an individual is charged, convicted and sentenced for both a felonious assault and for the use of a firearm to commit the assault under the separate felony-firearm statute. The Legislature knowingly criminalized the possession of the materials and the use of a particular instrumentality to accomplish that illegal possession. Contrary to defendant's argument, there were *two* criminal acts punished in this case, not one.

IV. TITLE–OBJECT CLAUSE

Defendant next argues that his conviction for using a computer to commit a crime should be vacated because it violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24. We disagree.

As a threshold matter, we note that the prosecution argues that defendant's guilty plea waived his right to challenge his conviction. However, defendant did not waive his right to challenge his conviction because he raises a constitutional challenge to the underlying statute, and rights and defenses that "reach beyond the determination of [a] defendant's guilt and implicate the very authority of the state to bring a defendant to trial" are not waived by a guilty plea. *People v New*, 427 Mich 482, 491; 398 NW2d 358 (1986) (quotation marks, citation, and emphasis omitted). However, defendant failed to preserve this issue by raising it in the trial court.

Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. The Title-Object Clause, Const 1963, art 4, § 24, provides that "[n]o law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through

either house so as to change its original purpose as determined by its total content and not alone by its title." The purpose of the Title-Object Clause is to "prevent the Legislature from passing laws not fully understood, to ensure that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge." *People v Cynar*, 252 Mich App 82, 84; 651 NW2d 136 (2002) (quotations marks and citation omitted). There are three different challenges that may be brought against statutes under the Title-Object Clause: a "(1) 'title-body' challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge." *People v Kevorkian*, 447 Mich 436, 453; 527 NW2d 714 (1994).

Defendant argues that a "title-body" violation occurred. In *Cynar*, 252 Mich App at 84-85, this Court explained:

> In regard to a title-body challenge, we have noted that " '[t]he title of an act must express the general purpose or object of the act.' " However, we also recognized that "the title of an act need not be an index to all the provisions of the act." Instead, the test is merely "whether the title gives fair notice to the legislators and the public of the challenged provision." It is only " 'where the subjects are so diverse in nature that they have no necessary connection,' " that we will find the fair notice aspect has been violated. [Citations omitted.]

The constitutional requirement is met when provisions in the body of the act not directly mentioned in the title are " 'germane, auxiliary, or incidental to' " the general purpose of the title of the act. *People v Wade*, 77 Mich App 554, 559; 258 NW2d 750 (1977) (citations omitted). In reviewing a statute under the Title-Object Clause, " 'all possible presumptions should be afforded to find constitutionality.' " *Cynar*, 252 Mich App at 84 (citation omitted).

A. HISTORY OF MCL 752.796

Defendant challenges MCL 752.796(1) as amended. The provision was originally enacted by 1979 PA 53.

The title of 1979 PA 53 stated:

> AN ACT to prohibit access to computers, computer systems, and computer networks for *certain fraudulent purposes*; to prohibit intentional and unauthorized access, alteration, damage, and destruction of computers, computer systems, computer networks, computer software programs, and data; and to prescribe penalties. [Emphasis added.]

The text of MCL 752.796, as originally enacted by 1979 PA 53, provided: "[a] person shall not utilize a computer, computer system, or computer network to commit a violation of [MCL 750.174 (the Michigan embezzlement statute)], [MCL 750.279 (fraudulent disposition of personal property)], [MCL 750.356 (larceny)], or [MCL 750.362 (embezzlement, fraudulent conversion)]." The prohibition of the use of computers for "certain fraudulent purposes" within the title of 1979 PA 53 aptly describes the text of MCL 752.796 as originally enacted by that act. Moreover, each of the statutes listed constitute "crimes" within Michigan law.

In 1996, the original text of MCL 752.796 was amended by 1996 PA 326. The title of 1996 PA 326 was:

> AN ACT to amend sections 2, 3, 4, 5, 6, and 7 of Act No. 53 of the Public Acts of 1979, entitled "An act to prohibit access to computers, computer systems, and computer networks for certain fraudulent purposes; to prohibit intentional and unauthorized access, alteration, damage, and destruction of computers, computer systems, computer networks, computer software programs, and data; and to prescribe penalties," being sections 752.792, 752.793, 752.794, 752.795, 752.796, and 752.797 of the Michigan Compiled Laws.

1996 PA 326 amended the language of MCL 752.796 by adding "computer program" to the list of computer related items that should not be utilized for criminal purposes, and by replacing the references to MCL 750.174, MCL 750.279, MCL 750.356, and MCL 750.362 with a general prohibition on using a computer to commit a "crime."

In 2000, MCL 752.796 was again amended, this time by 2000 PA 179, which provided:

> AN ACT to amend 1979 PA 53, entitled "An act to prohibit access to computers, computer systems, and computer networks for certain fraudulent purposes; to prohibit intentional and unauthorized access, alteration, damage, and destruction of computers, computer systems, computer networks, computer software programs, and data; and to prescribe penalties," by amending section 6 (MCL 752.796), as amended by 1996 PA 326.

2000 PA 179 amended MCL 752.796, in relevant part, by replacing the word "utilize" with "use," and adding prohibitions on attempting, conspiring, and soliciting the use of a computer to commit a crime.

The 1996 PA 326 and 2000 PA 179 amendments of 1979 PA 53 resulted in the current language of MCL 752.796(1): "A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime."

B. DEFENDANT'S TITLE-OBJECT CHALLENGE

On appeal, defendant argues that the current MCL 752.796(1) language that prohibits the use of a computer to "commit a crime" articulates a different purpose or object than those articulated by the 1979 PA 53 title, which referred merely to "certain fraudulent purposes." However, the challenged language was added not by 1979

PA 53, but by 1996 PA 326. Accordingly, in this case we must apply the Title-Object Clause to the title of 1996 PA 326 and to MCL 752.796 as amended by 1996 PA 326. See *Cynar*, 252 Mich App at 84 (analyzing a title-body challenge to an act under the Title-Object Clause by comparing the subject of the title of the act to the subject of the provisions contained within the act itself).

The title of 1996 PA 326 specifically provided that its purpose was to amend 1979 PA 53 by altering statutory provisions enacted by 1979 PA 53, including MCL 752.796. The inclusion of a quotation from the 1979 PA 53 title served to identify which prior act was being amended and to identify the contents of 1979 PA 53 being amended. The body of 1996 PA 326 then amended MCL 752.796 by replacing the original statute's references to MCL 750.174, MCL 750.279, MCL 750.356, and MCL 750.362 with a general prohibition on using a computer to commit a "crime." Thus, the purpose of the 1996 PA 326 title was to amend 1979 PA 53, and the body of 1996 PA 326 accomplished that purpose by altering MCL 752.796. Accordingly, the 1996 PA 326 title gave legislators and the public fair notice of the act's purpose. *Cynar*, 252 Mich App at 84-85. Moreover, the challenged portion of the body of 1996 PA 326 was at least "germane, auxiliary, or incidental" to the general purpose of the 1996 PA 326 title because it amended 1979 PA 53. *Wade*, 77 Mich App at 559. Accordingly, defendant has failed to show that the challenged language in the current MCL 752.796(1) violates the Title-Object Clause, and has therefore failed to show plain error.

V. PRIOR RECORD VARIABLE 6

Finally, defendant challenges the trial court's assessment of five points for prior record variable (PRV) 6. We conclude that defendant waived any challenge to PRV 6.

Waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver requires express approval of the trial court's action. *Id*. at 216. Defendant agreed with the trial court's PRV scoring, and therefore waived this issue. Defendant's waiver extinguished all error for appellate review. *Id*. at 215.

Affirmed.

BECKERING, P.J., and STEPHENS and BOONSTRA, JJ., concurred.

PEOPLE v GIBBS

PEOPLE v HENDERSON

Docket Nos. 306124 and 306127. Submitted February 7, 2013, at Lansing. Decided February 14, 2013, at 9:05 a.m. Leave to appeal sought.

Phillip C. Gibbs and Tyrell Henderson were tried together before separate juries in the Genesee Circuit Court on several counts arising out of an armed robbery at a store during which Henderson struck the owner's head with a gun. One jury convicted Gibbs of two counts of armed robbery, MCL 750.529; one count of unarmed robbery, MCL 750.530; and one count of conspiracy to commit armed robbery, MCL 750.157a and 750.529. The other jury convicted Henderson of three counts of armed robbery; one count of conspiracy to commit armed robbery; one count of assault with intent to rob while armed, MCL 750.89; and two charges related to firearms. The court, Judith A. Fullerton, J., sentenced both defendants, and they appealed separately, each raising constitutional and sentencing issues. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Gibbs was not entitled to automatic reversal and a new trial because the trial court had closed the courtroom during voir dire. Because Gibbs did not object at trial, his claim was subject to review under the plain-error standard applied to forfeited claims of constitutional error. To prevail under that standard, a defendant must establish (1) that the error occurred, (2) that the error was plain, (3) that it affected substantial rights, and (4) that it either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Even if the trial court's closure of the courtroom during jury selection were found to be error, however, Gibbs failed to satisfy the fourth prong of the test because both parties engaged in a vigorous voir dire process, there were no objections to either party's peremptory challenges, and each party expressed satisfaction with the jury chosen. Moreover, the venire itself, consisting of members of the public, was present and guaranteed that the proceedings were subjected to a substantial degree of public review.

2. The prosecutor did not violate Gibbs's Fifth Amendment right to remain silent by using Gibbs's prearrest silence to impeach his testimony and referring to it during closing argument. Generally, a prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact. A prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version were true. If it would not have been natural for the defendant to contact the police (for example, when doing so might have resulted in self-incrimination), the prosecutor cannot properly comment on the defendant's failure. The prosecutor in this case referred only to prearrest silence. Moreover, because Gibbs maintained that he was under duress and that he did not know that Henderson was going to rob the store, it would have been natural for him to have contacted the police.

3. The trial court erred by assessing 2 points for prior record variable (PRV) 5 (prior misdemeanor convictions or misdemeanor juvenile adjudications), MCL 777.55, when it scored the sentencing guidelines for Gibbs. While Gibbs had a juvenile adjudication for a misdemeanor offense that he committed before the sentencing offense, the order of disposition for it was not entered until after he committed the sentencing offense and accordingly the adjudication did not constitute a prior misdemeanor juvenile adjudication under MCL 777.55(3)(b). Resentencing was not required, however, because a reduction of 2 points would not have changed Gibbs's PRV level.

4. The trial court properly assessed 5 points for PRV 6 (relationship to the criminal justice system), MCL 777.56, for Gibbs. Gibbs's prior juvenile adjudication supported the scoring of the variable because the phrase "criminal justice system" is not limited to adversarial criminal proceedings and includes a relationship with the juvenile justice system.

5. The trial court did not err by assessing 25 points for offense variable (OV) 13 (continuing pattern of criminal behavior), MCL 777.43, when it scored the sentencing guidelines for both Gibbs and Henderson. That score is required under MCL 777.43(1)(c) if the offense was part of a pattern of felonious activity involving three or more crimes against a person. Armed robbery and unarmed robbery are both classified in the sentencing guidelines as crimes against a person. Nothing in the statute prohibits a court scoring OV 13 from considering multiple convictions arising from the same incident.

6. Convicting Henderson of both armed robbery and assault with intent to rob while armed violated double jeopardy protections under the Fifth Amendment and Const 1963, art 1 § 15, specifically, the prohibition of multiple punishments for the same offense. Assault with intent to rob while armed is a lesser included offense of armed robbery, that is, a crime for which it is impossible to commit the greater offense without first having committed the lesser offense. Accordingly, it was necessary to vacate Henderson's assault conviction.

7. The trial court properly assessed 10 points for OV 3 (physical injury to a victim), MCL 777.33, for Henderson. That score is required under MCL 777.33(1)(d) and (3) if bodily injury requiring medical treatment occurred to a victim, regardless of the victim's success in obtaining treatment. Bodily injury includes anything that a victim would perceive under the circumstances as some unwanted physically damaging consequence and in this case included the injuries to the victim whom Henderson struck with the gun.

8. The trial court properly assessed 10 points for OV 4 (psychological injury to a victim), MCL 777.34, for Henderson. That score is required under MCL 777.34(1)(a) if serious psychological injury requiring professional treatment occurred to a victim. The fact that treatment had not been sought is not conclusive when determining whether the injury might require treatment. Depression and personality changes are sufficient to uphold the scoring of OV 4. A victim's statements about feeling angry, hurt, violated, and frightened, such as the victims' testimony in this case, support assessing 10 points.

9. The trial court did not err by assessing 10 points for OV 14 (offender's role), MCL 777.44, for Henderson. That score is required under MCL 777.44(1)(a) if the offender was a leader in a multiple-offender situation. The entire criminal transaction should be considered. Only Henderson had a gun, and he did most of the talking and gave orders to Gibbs. The testimony supported a finding that Henderson was the leader.

Conviction for assault with intent to rob while armed vacated in *Henderson*; convictions and sentences otherwise affirmed in *Gibbs* and *Henderson*.

1. CONSTITUTIONAL LAW — RIGHT TO REMAIN SILENT — PREARREST SILENCE — COMMENTS BY PROSECUTING ATTORNEY.

Under the Fifth Amendment, a criminal defendant has a right to remain silent; a prosecutor may not comment on a defendant's silence in the face of accusation, but may without violating the

right comment on silence that occurred before any police contact; a prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version were true, but if it would not have been natural for the defendant to contact the police (for example, when doing so might have resulted in self-incrimination), the prosecutor cannot properly comment on the defendant's failure.

2. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 13 — CONTINUING PATTERN OF CRIMINAL BEHAVIOR — MULTIPLE OFFENSES ARISING FROM SAME INCIDENT.

Offense variable 13 under the sentencing guidelines, MCL 777.43, is scored for a continuing pattern of criminal behavior); under MCL 777.43(1)(c), the sentencing court must assess 25 points if the sentencing offense was part of a pattern of felonious activity involving three or more crimes against a person; the statute does not prohibit consideration of multiple convictions arising from the same incident for scoring the variable.

3. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — LESSER INCLUDED OFFENSES — ARMED ROBBERY — ASSAULT WITH INTENT TO ROB WHILE ARMED.

Assault with intent to rob while armed is a lesser included offense of armed robbery; convicting a defendant of both armed robbery and assault with intent to rob while armed arising out of the same criminal episode violates the double jeopardy prohibition of multiple punishments for the same offense (US Const V; Const 1963, art 1 § 15; MCL 750.89, MCL 750.529).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Vikki Bayeh Haley*, Assistant Prosecuting Attorney, for the people in *Henderson*.

State Appellate Defender (by *Brandy Y. Robinson* and *Randy E. Davidson*) for Phillip C. Gibbs.

Michael A. Faraone P.C. (by *Michael A. Faraone*) for Tyrell Henderson.

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM. In Docket No. 306124, defendant, Phillip Charles Gibbs, was convicted by a jury of two counts of armed robbery, MCL 750.529, one count of unarmed robbery, MCL 750.530, and one count of conspiracy to commit armed robbery, MCL 750.157a and 750.529. Gibbs was sentenced to 17½ to 30 years' imprisonment for each count of armed robbery, 100 months to 15 years' imprisonment for the unarmed robbery conviction, and 17½ to 30 years' imprisonment for the conviction of conspiracy to commit armed robbery.

In Docket No. 306127, defendant, Tyrell Henderson, was convicted by a jury of three counts of armed robbery, MCL 750.529, one count of conspiracy to commit armed robbery, MCL 750.157a and 750.529, one count of assault with intent to rob while armed, MCL 750.89, one count of carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Henderson was sentenced to 225 months to 40 years' imprisonment for each count of armed robbery, 225 months to 40 years' imprisonment for the conviction of conspiracy to commit armed robbery, 225 months to 40 years' imprisonment for the conviction of assault with intent to rob while armed, 24 to 60 months' imprisonment for the conviction of carrying a concealed weapon, and 2 years' imprisonment for the felony-firearm conviction.

Defendants were tried together in front of separate juries. They both appeal as of right.[1] We vacate Henderson's conviction for assault with intent to rob while armed, but otherwise affirm both defendants' convictions and sentences.

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[1] On September 14, 2011, Henderson filed a claim of appeal, and on September 16, 2011, Gibbs filed his claim of appeal. On December 7, 2011, this Court entered an order consolidating the appeals. *People v Gibbs*, unpublished order of the Court of Appeals, entered December 7, 2011 (Docket Nos. 306124 and 306127).

I. BASIC FACTS AND PROCEDURAL HISTORY

A. TRIAL

This case arises from an armed robbery that occurred at a store called Wholesale 4 U in Flint, Michigan, on October 26, 2010. Nancy Anagnostopoulos and her husband, Costas Anagnostopoulos, owned the store and were present at the time of the robbery. Also present was employee Jeremy Kassing. Defendants had been to the store together numerous times that day. Originally, they had hoped to pawn some jewelry. After finding out that the jewelry had no value, Henderson purchased a video game. He later decided to return it. Defendants entered the store and told Costas that the game did not work. As Costas attempted to help determine what was wrong with the game, Henderson struck him in the head with a gun. Gibbs, who was not personally armed during the incident, approached Nancy and removed her necklaces and ring. He took her identification and purse. Gibbs also took an iPod from the store, as well as a number of laptop computers. In the meantime, Henderson took Costas's jewelry, wallet, and money. He ordered Costas to open the store's register and then took Costas to a back room where a safe was kept. Part of Costas's ear was cut off as a result of the blow he received, and he received stitches for the injury. Kassing's wallet was also taken. A subsequent search of the home Gibbs shared with his mother uncovered a sandwich bag containing jewelry, a sandwich bag containing papers and the identifications of the three victims, and several watches identified as those taken from the store.

In separate police interviews, both defendants admitted their involvement. However, Gibbs told the officer that his involvement was involuntary. Gibbs believed

that they were going to the store to return the video game and had no idea that Henderson was planning a robbery. Gibbs stated that Henderson ordered him to take the victims' belongings and other store items. Gibbs testified at trial that he complied only because he did not want anything to happen to him.

The juries convicted defendants and they were sentenced as outlined previously.

B. GIBBS'S MOTION FOR REMAND

On May 23, 2012, Gibbs filed a motion to remand with this Court in order to make two objections to his sentencing, develop his argument that he was denied the right to a public trial, and, alternatively, argue that his counsel was ineffective. We granted Gibbs's motion to remand and remanded for Gibbs to file a motion for resentencing regarding prior record variable (PRV) 5 and PRV 6 and to file a motion for a new trial. *People v Gibbs*, unpublished order of the Court of Appeals, entered June 20, 2012 (Docket No. 306124). We ordered the trial court to hold an evidentiary hearing concerning the closure of the courtroom during voir dire. *Id*.

On remand, Gibbs argued that his right to a public trial was violated by the closing of the courtroom and the exclusion of his family from jury selection. Gibbs also argued that he was entitled to resentencing on the basis of the incorrect scoring on PRV 5 and PRV 6. The trial court declined to conduct a full hearing on the court-closure issue. The trial court admitted that its procedure is that, after jury selection begins, it does not allow people to enter or leave the courtroom. The trial court stated that if individuals came after jury selection started, then they would not have been allowed in the courtroom. The trial court denied the motion for a new trial. The trial court also found that Gibbs had a

relationship to the criminal justice system on the date of the offenses for purposes of scoring PRV 5 and PRV 6 and denied the motion for resentencing.

II. GIBBS'S APPEAL

A. RIGHT TO A PUBLIC TRIAL

Gibbs argues that the trial court violated his right to a public trial and that he is entitled to automatic reversal. We disagree.

Gibbs did not object to the closure at trial. The Michigan Supreme Court recently held that the plain-error standard applies to a defendant's forfeited claim that the trial court violated the defendant's Sixth Amendment right to a public trial. *People v Vaughn*, 491 Mich 642, 664, 674-675; 821 NW2d 288 (2012).

> [I]n order to receive relief on [a] forfeited claim of constitutional error, [a] defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id*. at 664-665.]

The *Vaughn* Court concluded that the first two prongs of the analysis were satisfied because the trial court ordered the courtroom closed before voir dire without advancing "an overriding interest that is likely to be prejudiced" and the error was "clear or obvious" because it was "readily apparent" that the trial court closed the courtroom and it is "well settled" that the right to a public trial extends to voir dire. *Id*. at 665 (citations and quotation marks omitted). The Court also concluded that the third prong was satisfied because the closure of the courtroom was "a plain structural error." *Id*. at 666. However, the Court held that the

fourth prong was not satisfied because "both parties engaged in a vigorous voir dire process," "there were no objections to either party's peremptory challenges of potential jurors," and "each party expressed satisfaction with the ultimate jury chosen." *Id*. at 668-669. Additionally, the Court noted that the presence of the venire—members of the public—lessened the extent to which the closure implicated the defendant's right and guaranteed that the proceedings were subject to a substantial degree of public review. *Id*. at 668. The Court concluded that the defendant was not entitled to a new trial. *Id*. at 669.

In *People v Russell*, 297 Mich App 707, 720; 825 NW2d 263 (2012), this Court stated that "the effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling, reason for the closure is required." The Court concluded that the voir dire proceedings were partially closed because of the limited capacity in the courtroom and that the limited capacity was a substantial reason for the closure. *Id*. Accordingly, the partial closure did not deny the defendant his right to a public trial. *Id*.

Gibbs contends that his family and members of the public were prevented from entering the courtroom during jury selection. The record reveals that before jury selection began, the trial court stated, "And if any spectators would like to come in they're welcome but they do have to sit over here by the law clerk, not in the middle of the pool." Gibbs submitted affidavits indicating that individuals were not allowed to enter the courtroom during jury selection. Even accepting Gibbs's contention as true, we find no error given the trial court's statement. It appears that the courtroom was opened to the public initially, but then closed once jury selection began. On remand, the trial court did not

conduct a full hearing and acknowledged that once jury selection had begun, the courtroom was closed and suggested that it was "too confusing" to allow individuals to come and go during jury selection. Even if we were to find error on the basis of the trial court's admitted refusal to allow individuals to enter once jury selection began, Gibbs is not entitled to a new trial or evidentiary hearing. As in *Vaughn*, both parties engaged in vigorous voir dire, there were no objections to either party's peremptory challenges, and each side expressed satisfaction with the jury. Further, the venire itself was present. Accordingly, Gibbs fails to satisfy the fourth prong as set forth in *Vaughn* and is not entitled to a new trial.

B. PREARREST SILENCE

Gibbs argues that the prosecutor violated his Fifth Amendment right to remain silent by using his prearrest silence to impeach his testimony and by referring to his prearrest silence during closing argument. We disagree.

Gibbs failed to object to the prosecutor's questions during his cross-examination; therefore, the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). To the extent that Gibbs's argument alleges prosecutorial misconduct, because Gibbs did not object to the prosecutor's statements, the issue is also unpreserved. *People v Cain*, 299 Mich App 27, 35; 829 NW2d 37 (2012). "This Court reviews unpreserved constitutional errors for plain error affecting substantial rights." *Id*. at 40. This Court also reviews unpreserved claims of prosecutorial misconduct for plain error. *Id*. at 35.

During Gibbs's testimony, the prosecutor asked Gibbs when he told his mother what had happened and

when he told the police that Henderson made him rob the store. The prosecutor asked Gibbs if he went to the police station on October 26, 2010, or after he talked to his brother the next day. In her closing argument, the prosecutor stated:

> Because remember despite what Phillip Gibbs testified to here in the courtroom about what his knowledge was, what his role or lack thereof was, he doesn't take an opportunity to run out of the store. He doesn't call 911 from inside the store. He doesn't run away separate from Mr. Henderson after this robbery occurred. He doesn't tell his mother. He doesn't go to the police.

The prosecutor again referred during her rebuttal to Gibbs's failure to turn himself in.

Contrary to Gibbs's assertion, the prosecutor did not violate his constitutional right to remain silent by questioning Gibbs about his failure to alert his mother or law enforcement concerning the robbery.

> A defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[2] warnings have been given. A prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact.
>
> "[A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true." [*People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005) (citations omitted).]

However, "[w]here it would not have been natural for the defendant to contact the police—where doing so may have resulted in the defendant incriminating himself—the prosecution cannot properly comment on

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

the defendant's failure to contact the police." *People v Dye*, 431 Mich 58, 80; 427 NW2d 501 (1988).

The prosecutor's comments referred to Gibbs's prearrest silence and, therefore, did not violate his right to remain silent. *McGhee*, 268 Mich App at 634. The prosecutor's comments on Gibbs's failure to report the crime suggested that if Gibbs's testimony were true—that his participation in the robbery was coerced—he would have called 911 or gone to the police immediately. Gibbs, however, claims that it would not have been natural for him to contact the police because he would have believed that Henderson might harm him. We conclude that if Gibbs's version of the events were true—that he did not know Henderson was going to rob the store and he was acting under duress by Henderson—then it would have been natural for him to contact the police. Therefore, the prosecutor's comments were proper and there was no plain error.

C. SENTENCING ERRORS

Finally, Gibbs contends that he is entitled to resentencing because of the erroneous scoring of PRV 5, PRV 6, and offense variable (OV) 13.

> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. [*People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (citations omitted).]

1. PRV 5

"Prior record variable 5 is prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1). The sentencing court must assess 2 points if "[t]he offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication[.]" MCL 777.55(1)(e). The sentencing court must assess zero points if "[t]he offender has no prior misdemeanor convictions or prior misdemeanor juvenile adjudications[.]" MCL 777.55(1)(f). " 'Prior misdemeanor juvenile adjudication' means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States *if the order of disposition was entered before the sentencing offense was committed*." MCL 777.55(3)(b) (emphasis added).

Gibbs's presentence investigation report (PSIR) indicates that he pleaded guilty of illegal entry without the owner's permission, a misdemeanor, on August 3, 2010, and was sentenced to probation for the offense on November 9, 2010. This was a juvenile adjudication. The PSIR indicates that the "Disposition Date" was November 9, 2010. The sentencing offense was committed on October 26, 2010. Accordingly, the order of disposition was not entered before the sentencing offense was committed and Gibbs's juvenile adjudication does not constitute a prior misdemeanor juvenile adjudication for purposes of assessing points under PRV 5. MCL 777.55(3)(b). Therefore, the trial court erred by assessing 2 points under PRV 5. However, because a reduction by 2 points from Gibbs's prior record variable score would not change his PRV level, MCL 777.62, resentencing is not required.

2. PRV 6

"Prior record variable 6 is relationship to the criminal justice system." MCL 777.56(1). The sentencing court must assess 5 points if "[t]he offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor[.]" MCL 777.56(1)(d). The sentencing court must assess zero points if "[t]he offender has no relationship to the criminal justice system[.]" MCL 777.56(1)(e).

As mentioned earlier, Gibbs entered a guilty plea to illegal entry without the owner's permission, a misdemeanor, on August 3, 2010, and was sentenced to probation for the offense on November 9, 2010. This was a juvenile adjudication. This Court has held that a defendant's prior juvenile adjudications supported the scoring of PRV 6. *People v Anderson*, 298 Mich App 178, 182; 825 NW2d 678 (2012) ("The phrase 'criminal justice system' is not limited to adversarial criminal proceedings."). Thus, contrary to Gibbs's assertion, points could be assessed under PRV 6 for his relationship with the juvenile justice system.

There is no evidence that Gibbs was on probation, delayed-sentence status, or bond at the time of the sentencing offense. His PSIR indicates only that he was placed on probation at sentencing or disposition, which took place on November 9, 2010. It appears that Gibbs was, however, awaiting adjudication or sentencing at the time he committed the sentencing offense, given that he had already entered a plea. This Court has stated:

> *Endres* suggests that a five-point score for PRV 6 is not improper when the defendant committed the sentencing offense while awaiting adjudication or sentencing for a misdemeanor, regardless of his or her bond status. The case illustrates this Court's refusal to categorize a defendant as

> having no relationship with the criminal justice system when it is obvious that such a relationship exists. [*People v Johnson*, 293 Mich App 79, 88; 808 NW2d 815 (2011).]

Therefore, the trial court properly assessed 5 points under PRV 6, even if Gibbs was not on bond at the time he committed the sentencing offense.

3. OV 13

"Offense variable 13 is continuing pattern of criminal behavior." MCL 777.43(1). The sentencing court must assess 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" MCL 777.43(1)(c). "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." MCL 777.43(2)(a). The sentencing court must assess zero points if "[n]o pattern of felonious criminal activity existed[.]" MCL 777.43(1)(g).

Gibbs was convicted of two counts of armed robbery and one count of unarmed robbery, which are all classified under the sentencing guidelines as crimes against a person. MCL 777.16y. Gibbs argues that his convictions arose out of one incident and that he could not have 25 points assessed. However, there is nothing in the language of MCL 777.43(1)(c) to support Gibbs's argument that multiple convictions arising from the same incident cannot be considered for scoring OV 13. In *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001), the defendant was convicted of four counts of making child sexually abusive material. He photographed two 15-year-old girls. There were four photos in all—two of each girl, taken on a single date. *Id*. at 524-526. We held that 25 points were properly assessed

under OV 13 because of the "defendant's four concurrent convictions . . . ." *Id*. at 532. Similarly, in this case, while the robberies arose out of a single criminal episode, Gibbs committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity. Additionally, although some subsections of MCL 777.43 contain limitations on a trial court's ability to score for more than one instance arising out of the same criminal episode, subsection (1)(c) contains no such limitation. Accordingly, because multiple concurrent offenses arising from the same incident are properly used in scoring OV 13, the trial court did not err by assessing 25 points for that variable.

III. HENDERSON'S APPEAL

A. DOUBLE JEOPARDY

Henderson contends that his convictions for both assault with intent to rob while armed and armed robbery violate double jeopardy protections. The prosecution concedes error and writes: "Plaintiff agrees that [Henderson's] conviction for assault with intent to rob while armed must be vacated because he is also convicted for [sic] armed robbery involving the same victim during the same criminal episode." We agree that for purposes of the "multiple punishment" analysis under double jeopardy, assault with intent to rob while armed is the "same offense" as armed robbery and that Henderson's conviction for the lesser crime must be vacated.

This Court reviews de novo questions of law, such as a double jeopardy challenge. *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009).

The prohibition against double jeopardy in both the federal and state constitutions protects against (1) a

second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The third of these protections exists to "protect the defendant from being sentenced to more punishment than the Legislature intended." *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). In this case, Henderson claims that he has been punished twice for the same offense.

We have previously held that assault with intent to rob while armed is a lesser included offense of armed robbery. *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003); *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979). A lesser included offense is "a crime for which it is impossible to commit the greater offense without first having committed the lesser." *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005). Stated differently, for an offense "[t]o be a lesser included offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense." *People v Heft*, 299 Mich App 69, 74-75; 829 NW2d 266 (2012). However,

> [i]n *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007), our Supreme Court held that the "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 SCt 180; 76 L Ed 306 (1932), is "the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15." . . . The *Blockburger* test focuses on the statutory elements of the offense, without considering whether a substantial overlap exists in the proofs offered to establish the offense. If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and no double jeopardy violation is involved. [*People v Baker*, 288 Mich App 378, 381-382; 792 NW2d 420 (2010) (citations omitted).]

Accordingly, it is necessary to consider the elements of each offense.

MCL 750.89 is the statute prohibiting assault with intent to rob while armed and provides:

> Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

Therefore, in order to obtain a conviction for assault with intent to rob while armed, a prosecutor must demonstrate "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *Akins*, 259 Mich App at 554 (citation and quotation marks omitted).

The revised armed robbery statute,[3] MCL 750.529, now provides:

> A person who engages in conduct proscribed under [MCL 750.530 (robbery)] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

Therefore, in order to obtain a conviction for armed robbery, a prosecutor must prove that

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a

[3] As amended by 2004 PA 128, effective July 1, 2004.

> larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

We discern no substantive difference between the elements of the two crimes. Because assault with intent to rob while armed is a lesser included offense of armed robbery and neither crime contains an element the other does not, Henderson could not have been convicted of both. Under the same-elements test that is now applicable to the multiple-punishments strand of double jeopardy under *Smith*, his assault conviction must be vacated. *Meshell*, 265 Mich App at 633-634 ("The remedy for conviction of multiple offenses in violation of double jeopardy is to affirm the conviction on the greater charge and to vacate the conviction on the lesser charge.").

B. SENTENCING ERRORS

Henderson also contends that he is entitled to resentencing, in his case because of the erroneous scoring of OV 3, OV 4, OV 13, and OV 14. We disagree.

Henderson preserved his objection to the scoring of OV 13 by objecting at sentencing. Cf. *Endres*, 269 Mich App at 417. Henderson did not preserve his objections to the scoring of OV 3, OV 4, or OV 14. Cf. *id*. at 422. As noted earlier:

> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. A

> sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. [*Id*. at 417 (citations omitted).]

This Court reviews unpreserved claims for plain error affecting a defendant's substantial rights. *Id*. at 422.

1. OV 3

"Offense variable 3 is physical injury to a victim." MCL 777.33(1). The sentencing court must assess 10 points if "[b]odily injury requiring medical treatment occurred to a victim[.]" MCL 777.33(1)(d). "As used in this section, 'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). This Court has stated that " 'bodily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011).

Costas testified that Henderson hit him between his neck and head and on the side of the face. According to Nancy, Costas had blood dripping down his face and neck. Part of Costas's ear was cut off, and he received four stitches at Hurley Medical Hospital. He also sees his physician for frequent headaches. Nancy suffered whiplash and completed seven weeks of physical therapy. Therefore, the trial court properly assessed 10 points for OV 3.

2. OV 4

"Offense variable 4 is psychological injury to a victim." MCL 777.34(1). The sentencing court must assess

10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). The sentencing court must also "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2).

This Court has determined that depression and personality changes are sufficient to uphold the scoring of OV 4. *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010). This Court has also held that a victim's "statements about feeling angry, hurt, violated, and frightened support [the] score under our caselaw." *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

Kassing testified that the experience was traumatic and he had bad dreams about it. At sentencing, Nancy stated, "Not to mention what you took from us psychologically." In Costas's victim impact statement, he indicated that he did not feel safe in his store. These statements support a score of 10 points for OV 4.

3. OV 13

As mentioned in part II(C)(3) of this opinion, because multiple concurrent offenses arising from the same incident are properly used in scoring OV 13, the trial court did not err by assessing 25 points for that variable.

4. OV 14

"Offense variable 14 is the offender's role." MCL 777.44(1). The sentencing court must assess 10 points if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). In scoring this variable,

"[t]he entire criminal transaction should be considered . . . ." MCL 777.44(2)(a); see also *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004) (opinion by GAGE, J.).

There was evidence that Henderson was the only perpetrator with a gun, did most of the talking, gave orders to Gibbs, and checked to make sure Gibbs took everything of value. Kassing specifically testified that he believed Henderson was the leader. Further, Gibbs's testimony supports the finding that Henderson was the leader. While neither Nancy nor Costas believed that either defendant was "the leader," "[s]coring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. Accordingly, the trial court did not err by assessing 10 points for OV 14.

Henderson's conviction of assault with intent to rob while armed vacated. Affirmed in all other respects.

K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ., concurred.

DREW v CASS COUNTY

Docket No. 309557. Submitted February 7, 2013, at Lansing. Decided February 14, 2013, at 9:10 a.m.

Petitioners, Kevin and Arlyn Drew, appealed in the Michigan Tax Tribunal, Small Claims Division, after respondent, Cass County, issued a notice of the denial of a principal-residence exemption from local school district taxes under MCL 211.7cc for tax years 2007 through 2011 with regard to a parcel of residential property in the county owned by petitioners and claimed to be their principal residence. Following a hearing, the hearing referee concluded that petitioners had failed to prove that the property qualified for the exemption. The Tax Tribunal then entered a final opinion and judgment, in which it adopted the hearing referee's proposed opinion and judgment as its final opinion and judgment in the case. Petitioners appealed.

The Court of Appeals *held*:

The Court of Appeals defers to the Tax Tribunal to assess the weight and credibility of the evidence before it. The evidence supported respondent's contention that petitioners used the property as a seasonal home and not as a principal residence (their one true, fixed, and permanent home to which, whenever absent, they intended to return) as defined in MCL 211.7dd(c). Appellate review of a decision by the Tax Tribunal is very limited in the absence of fraud, error of law, or the adoption of wrong legal principles and statutes that exempt persons or property from taxation must be narrowly construed in favor of the taxing authority. The Tax Tribunal did not commit an error of law or adopt a wrong legal principle in this case.

Affirmed.

1. APPEAL — ADMINISTRATIVE LAW — TAX TRIBUNAL.

No appeal may be taken to any court from any final agency provided for the administration of property tax laws with regard to any decision relating to valuation or allocation in the absence of fraud, error of law, or the adoption of wrong legal principles; factual findings by the Tax Tribunal will not be disturbed on appeal as

long as they are supported by competent, material, and substantial evidence on the whole record (Const 1963, art 6, § 28).

2. TAXATION — EXEMPTIONS — STATUTORY CONSTRUCTION.

Statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority.

3. TAXATION — PRINCIPAL-RESIDENCE EXEMPTION — WORDS AND PHRASES — PRINCIPAL RESIDENCE.

A "principal residence" for purposes of the principal-residence exemption from local school district taxes provided in MCL 211.7cc is the one place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established (MCL 211.7dd[c]).

4. ADMINISTRATIVE LAW — EVIDENCE — TAX TRIBUNAL.

The weight and credibility to be accorded to evidence presented in the Tax Tribunal is within the Tax Tribunal's discretion; the Court of Appeals defers to the Tax Tribunal to assess the weight and the credibility of the evidence before it.

Taglia, Dumke, White & Schmidt, P.C. (by *Jeffrey R. Holmstrom*), for petitioners.

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM. Petitioners appeal as of right an order of the Michigan Tax Tribunal (MTT), which affirmed respondent's denial of a principal-residence exemption (PRE) on the subject property during the tax years 2007, 2008, 2009, 2010, and 2011. We affirm because there was substantial evidence to support the MTT's decision and the MTT did not misapply the law or adopt an incorrect principle in arriving at its decision.

I. BASIC FACTS

The subject property (31845 W. Lakeshore Dr.) is a residential property located on an island in a lake in

Dowagiac, Michigan. Petitioners sought a PRE from respondent for the years in question. Respondent denied the PRE on the basis that the property was not petitioners' "principal residence." Petitioners appealed in the Small Claims Division of the MTT and submitted as documentary evidence their driver's licenses, voter registration cards, and tax returns, which all listed 31845 W. Lakeshore Dr. as petitioners' residence. Petitioners claimed to live at 31845 W. Lakeshore Dr. with their six children from April 1 through October 31 each year.

Respondent submitted utility bills for the property, which indicated very little usage. Respondent also presented testimony from an area resident who stated that no one lived on the island. Respondent argued that 31845 W. Lakeshore Dr. was a seasonal home and not petitioners' principal residence. In addition to 31845 W. Lakeshore Dr., petitioners also own residential property located at 8875 Grove Avenue, Berrien Springs, Michigan, and 552 Grant Street, Niles, Michigan. Petitioners' children attend a private school in Berrien Springs that is located less than one minute from petitioners' 8875 Grove Avenue home.

The hearing referee concluded that petitioners failed to prove that the property qualified to receive a PRE under MCL 211.7cc for the tax years at issue. The referee concluded:

> 3. In order for the Petitioner[s] to sustain their burden of proof they must show that this is their true, fixed, and permanent home. Clearly anyone who occupies a home will have utilities which for a family of eight would exceed the amounts shown herein by the parties. The Petitioner's [sic] utility bills which they submitted had the amounts blacked out, Respondents [sic] copies of utility bills showed little or no usage during the time that Petitioners testified this home was being used as their principal residence. Petition-

> ers testified that they own two other residential pieces of real estate, along with other parcels of commercial real estate.
>
> 4. Petitioners have provided us with substantial exhibits attempting to sustain their burden of proof that this is their principal residence, however to be a principal residence you must occupy the home as your true, fixed, and permanent home. To accomplish that task there would be substantial use of utilities, however that was not the case here.

The MTT entered a final opinion and judgment, in which it adopted the referee's proposed opinion and judgment as its final opinion and judgment, noting:

> b. Petitioner has the burden of proving by a preponderance of the evidence and the burden of persuading the Tribunal that he or she owned and occupied as a principle [sic] residence for the tax years at issue. See MCL 211.7cc. Here, Petitioners did prove they owned the residence in question and stated they intend to return to the residence in question each year, April through October. However, Petitioners failed to prove they established occupancy to qualify for the exemption. Petitioners submitted into evidence their driver's licenses, tax statements and other documents stating their address, all of which are evidence of occupancy that met their burden of going forward. As a result, Respondent submitted utility bills which demonstrated little to no usage of the property throughout the years in question. Although Petitioners contend that the utility bills submitted by Respondent were natural gas bills and electric bills for parcels of property owned by Petitioners other than the residence in question, Petitioners did not submit evidence to contradict or correct Respondent's utility bills submission.

Petitioners now appeal as of right.

II. STANDARD OF REVIEW

Review of a decision by the MTT is very limited. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012). "In the absence of fraud, error of law

or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28. "The tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record." *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 490-491; 618 NW2d 917 (2000). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). "The appellant bears the burden of proof in an appeal from an assessment, decision, or order of the Tax Tribunal." *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005).

Additionally, we review de novo issues of statutory construction. *Klooster v Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id*. at 296. The words used by the Legislature in writing a statute provide us with the most reliable evidence of the Legislature's intent. *Id*. While, generally, the interpretation of a statute by an agency charged with its execution is entitled to "the most respectful consideration," an agency's construction of a statute is not binding on the courts and cannot conflict with the Legislature's intent as expressed in clear statutory language. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008) (quotation marks and citation omitted). Moreover, "statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing

authority." *Liberty Hill Housing Corp v Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008).

III. ANALYSIS

Petitioners argue that the MTT erred by concluding that the property was not their principal residence. We disagree.

"Michigan's principal residence exemption, also known as the 'homestead exemption,' is governed by §§ 7cc and 7dd of the General Property Tax Act, MCL 211.7cc and MCL 211.7dd." *EldenBrady v Albion*, 294 Mich App 251, 256; 816 NW2d 449 (2011). 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.

MCL 211.7dd(c) defines "principal residence" as "the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established."

Petitioners do not contest that the utility bills indicate low utility usage, but instead argue that the utility bills were for services provided to a separate, nonresidential property that petitioners owned and that the utility bills, alone, did not constitute competent, material, and substantial evidence. However, petitioners never offered any documentary evidence supporting their claim that the utility bills applied to a separate, nonresidential property; in fact, each bill listed 31845

W. Lakeshore Dr. as the mailing address and classified the "account type" as "residential." Moreover, as the MTT noted, petitioners never offered any evidence contradicting respondent's utility bill evidence or otherwise establishing the usage of utilities on the property for the relevant years. Rather, petitioners redacted the "amount due" information from all the utility bills that they submitted. Thus, petitioners have not provided us with any reason to disturb the MTT's factual finding regarding the usage of utilities on the property.

Although petitioners presented their driver's licenses, voter registration cards, and tax returns, such evidence was not conclusive proof of petitioners' principal residence; instead, the items were merely evidence to be considered by the MTT for purposes of determining petitioners' principal residence. "The weight to be accorded to the evidence is within the Tax Tribunal's discretion." *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 404; 576 NW2d 667 (1998). Additionally, this Court may not second-guess the MTT's discretionary decisions regarding the weight to assign to the evidence:

> [I]f the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence. A reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by evidence on the record or because the court might have reached a different result. [*Dep't of Community Health v Risch*, 274 Mich App 365, 372-373; 733 NW2d 403 (2007) (citations omitted).]

In the context of criminal and civil cases, appellate courts have frequently noted the deference due the trier of fact on issues of witness credibility and the weight to

accord the evidence.[1] Here, the fact-finder was the MTT. We take this opportunity to stress that, just as we defer to the trier of fact in criminal cases and civil cases, we must likewise defer to the MTT to assess the weight and credibility of the evidence before it. Therefore, we see no reason to disturb the MTT's conclusion that the driver's licenses, voter registration cards, and tax returns were not dispositive for purposes of determining petitioners' principal residence.

Respondent presented evidence supporting its position that 31845 W. Lakeshore Dr. was not petitioners' principal residence, but instead was utilized as a summer or seasonal home. The record established that the property was inaccessible by road and the home was less than 600 square feet in size. Respondent submitted utility bills for the property from 2009 and 2010 that indicated low utility usage. A longtime resident of the area testified that no one lived permanently on the island where the property was located. In addition to 31845 W. Lakeshore Dr., petitioners owned multiple other residential properties, including 8875 Grove Avenue, which was located within one minute of the children's school. Petitioners testified at the October 24, 2011, hearing that they had slept at the 8875 Grove Avenue home the previous night. The foregoing evidence supported respondent's contention that petition-

[1] See, e.g., *People v Ericksen*, 288 Mich App 192, 197; 793 NW2d 120 (2010) ("this Court scrupulously leave[s] questions of credibility to the trier of fact to resolve"); *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003) ("This Court will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses."); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999) ("Questions of credibility are left to the trier of fact and will not be resolved anew by this Court."); *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006) ("If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses.").

ers used the property as a seasonal home, rather than their one "true, fixed, and permanent home to which, whenever absent, [they] intend[ed] to return . . . ." MCL 211.7dd(c).

Given that our ability to review decisions of the MTT is very limited and that statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority, we do not find that the MTT committed an error of law or adopted a wrong legal principle.

Affirmed.

K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ., concurred.

GMOSER'S SEPTIC SERVICE, LLC v EAST BAY CHARTER TOWNSHIP

Docket No. 309999. Submitted February 12, 2013, at Lansing. Decided February 19, 2013, at 9:00 a.m.

Gmoser's Septic Service, LLC and Whitney Blakeslee filed an action against East Bay Township, Grand Traverse County, and the Grand Traverse County Board of Public Works in the Grand Traverse Circuit Court, seeking a determination that the township's septage control ordinance, which required septage haulers to transport all septage taken from tanks located within a certain area to the Grand Traverse County Septage Treatment Facility, was invalid and unenforceable. The Michigan Septic Tank Association intervened and moved for partial summary disposition, arguing that the ordinance was invalid because it was preempted by MCL 324.11709. The court, Philip E. Rodgers, J., rejected the association's preemption claim, denied its motion, and granted partial summary disposition in favor of defendants on the preemption claim. The association appealed.

The Court of Appeals *held*:

A local government cannot enact an ordinance that is in direct conflict with a state statutory scheme. Const 1963, art 7, § 22. A state statutory scheme preempts local regulation in that same field when the Legislature enacts a statutory scheme with the intent to entirely occupy the regulatory field. The Legislature intends to preempt local regulation when it expressly provides for preemption. In the absence of an express statement of such intent, courts will infer that the Legislature intended to preempt local regulation when the state scheme occupies the field of regulation to the exclusion of the ordinance. Preemption may be implied (1) from the statutory scheme's legislative history, (2) from the pervasiveness of the state regulatory scheme, or (3) from the nature of the regulated subject matter which necessitates exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. The trial court properly granted partial summary disposition in favor of defendants on the preemption claim. By enacting part 117 of the Natural Resources and Environmental Protection Act, MCL 324.11701 *et seq*., the Legislature clearly intended to enact a compre-

hensive statutory scheme for the regulation of septage services and septage disposal with the goal of limiting land application as a disposal method in favor of treatment at a receiving facility In this case the septage ordinance regulated septage servicers and septage disposal by banning the use of land application to dispose of septic waste when a real property owner serviced his or her own septic tank. The septage ordinance properly required all septage haulers collecting septage or holding-tank waste within the township to transport that waste to the Grand Traverse facility and to pay treatment charges. Although the Legislature enacted a comprehensive and statewide scheme for the regulation of septage servicers and the disposal of septage, it specifically limited the preemptive effect of its statutory scheme; under MCL 324.11715(1), a local ordinance that conflicts with the statutory scheme will not be preempted if it is a qualified ban on land application or if it imposes more strict requirements on septage disposal than that expressed in the statutory scheme. Under MCL 324.11715(1), the septage ordinance's requirement that servicers always use a receiving facility and always use a specified facility are not preempted by part 117 of the Natural Resources and Environmental Protection Act because they are more strict than those specified by the Legislature.

Affirmed.

MUNICIPAL CORPORATIONS — SEPTAGE DISPOSAL ORDINANCES — STATUTES — PREEMPTION.

A local government cannot enact an ordinance that is in direct conflict with a state statutory scheme; a state statutory scheme preempts local regulation in that same field when the Legislature enacts a statutory scheme with the intent to entirely occupy the regulatory field; the Legislature intends to preempt local regulation when it expressly provides for preemption; in the absence of an express statement of such intent, courts will infer that the Legislature intended to preempt local regulation when the state scheme occupies the field of regulation to the exclusion of the ordinance; the Legislature did not preempt local governmental authority to regulate septage disposal; MCL 324.11715(1) grants local governments the authority to regulate septage disposal as long as any ordinance is more strict than those requirements provided by the Legislature in part 117 of the Natural Resources and Environmental Protection Act, MCL 324.11701 *et seq*.

Kuhn, Darling, Boyd & Quandt, *PLC* (by *Joseph E. Quandt* and *Gina Bozzer*), for the Michigan Septic Tank Association.

Olson, Bzdok & Howard, P.C. (by *Scott W. Howard* and *Ross A. Hammersley*), for East Bay Charter Township, Grand Traverse County, and Grand Traverse County Board of Public Works.

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM. In this dispute over the local regulation of septage waste, intervening plaintiff, Michigan Septic Tank Association, appeals by right the trial court's order dismissing the association's claim that Part 117 of the Natural Resources and Environmental Protection Act, MCL 324.11701 *et seq*., preempts defendant, East Bay Charter Township's, ordinance requiring septage service providers to deliver all septic-tank waste collected from within the township for treatment at the Grand Traverse County Septage Treatment Facility (the Grand Traverse facility), which is operated by defendant, Grand Traverse County, through defendant, Grand Traverse County Board of Public Works. On appeal, the association argues that the trial court erred when it determined that the township's ordinance was specifically authorized under MCL 324.11715(1) and, therefore not preempted under Part 117. Because we conclude that the trial court properly determined that the township's ordinance constituted a stricter requirement for purposes of MCL 324.11715(1) and for that reason was not preempted, we affirm.

I. BASIC FACTS

Beginning in 1989, septic waste haulers began to express concern to the board of public works and public officials about the continuing viability of land application for the disposal of septage within Grand Traverse

County. Because of these concerns, the board of public works undertook to build the Grand Traverse facility in 2005. To help finance the Grand Traverse facility, to ensure that it maintained optimal operational performance, and to ensure that septage was properly treated, the board of public works drafted a uniform septage ordinance for those communities that wished to participate in the plan. The ordinance required septage haulers to transport all septage taken from tanks located within the participating communities to the facility for treatment. The township adopted the uniform ordinance in November 2004.[1]

Defendant, Whitney Blakeslee, owns and works for Gmoser's Septic Service, LLC. Gmoser's Septic provides septage removal services for customers in the township and other nearby communities. Blakeslee stated in his affidavit that he is the coowner of Bullseye Receiving, LLC, which is a septage disposal facility in Antrim County. Blakeslee also averred that—while working for Gmoser's Septic—he serviced septic tanks in the township and would sometimes haul the waste to the Grand Traverse facility, but on other occasions would haul the waste to Bullseye's facility.

In February 2011, the township's lawyer sent a letter to Blakeslee and Gmoser's Septic warning them of an ordinance violation. The township's lawyer noted that there was information that Gmoser's Septic had pumped and hauled septic-tank waste from a residence located in the township, but did not deliver the waste to the facility. The township's lawyer explained that under the township's Uniform Septage Control Ordinance of 2004 (septic ordinance), Gmoser's Septic had to haul

[1] We have taken these background facts from the affidavit by K. Ross Childs, who served as a public official in Grand Traverse County from 1976 to 2011.

any septic-tank waste that it collected from a customer in the township to the facility. He wrote that Gmoser's Septic was liable for the 12-cents-per-gallon fee that would have been assessed had it properly delivered the waste to the facility in addition to a $100 fine, for a total of $220. The township's lawyer also threatened further action if Gmoser's Septic failed to comply with the ordinance in the future.

Later that same month, Gmoser's Septic and Blakeslee sued the township and Grand Traverse County for declaratory relief; they asked the trial court to declare that the township's ordinance was invalid and unenforceable on a variety of grounds.

In June 2011, the association moved for permission to intervene on behalf of its members. Specifically, the association wanted to protect its members from local ordinances such as the township's that require its members to use the Grand Traverse facility. After the trial court granted the motion, the association filed its own complaint alleging that the township's ordinance was invalid.

The association moved for partial summary disposition in September 2011. In its motion, the association argued that the township's ordinance was preempted by MCL 324.11708.

The trial court disagreed that MCL 324.11708 preempted the township's ordinance. Instead, it concluded that the Legislature had specifically authorized local governments to impose stricter requirements on the disposal of septage, such as the township's requirement that all septage taken from within the township be processed at the Grand Traverse facility. Accordingly, it concluded that the association's preemption claim failed as a matter of law. For that reason it denied the association's motion and granted partial summary disposition in defendants' favor

on the preemption claim. See MCR 2.116(I)(2). The trial court entered an order dismissing the association's preemption claim in October 2011 and, in December 2011, the association stipulated to the dismissal of its remaining claims with prejudice.

In January 2012, the trial court entered an order dismissing Gmoser's Septic and Blakeslee's claims and granting summary disposition in defendants' favor on their counter-claims. And, in April 2012, the trial court entered an order compelling Gmoser's Septic to comply with the ordinance and pay $19,500 in fines and fees.[2]

The association now appeals the trial court's decision to dismiss its preemption claim.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

On appeal the association argues that the trial court erred when it denied the association's motion for summary disposition of its claim that state law preempted the township's ordinance. Specifically, the association argues that the township's ordinance is invalid because it directly conflicts with the state statutory scheme for the handling of septage or, in the alternative, that the state statutory scheme is so comprehensive that it occupies the field and preempts the township's ordinance. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes and ordinances. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

[2] These orders are not at issue in this appeal.

B. ORDINANCE PREEMPTION

A local government's power to enact ordinances is subject to the constitution and law. *People v Llewellyn*, 401 Mich 314, 321; 257 NW2d 902 (1977); Const 1963, art 7, § 22. As such, a local government cannot enact an ordinance that is in direct conflict with a state statutory scheme. *Llewellyn*, 401 Mich at 322. In addition, when the Legislature enacts a statutory scheme with the intent to entirely occupy the regulatory field, that statutory scheme will preempt any local regulations in that same field. *Id*. In every case, however, whether an ordinance is preempted by a statutory scheme is a matter of determining the Legislature's intent from the statutory language. *Shelby Twp v Papesh*, 267 Mich App 92, 98; 704 NW2d 92 (2005). There is no doubt that the Legislature intends to preempt local regulation when it expressly provides for preemption. *Llewellyn*, 401 Mich at 323. Even in the absence of an express statement of intent, however, courts will infer that the Legislature intended to preempt local regulation when the state scheme occupies the field of regulation "to the exclusion of the ordinance." *Id*. at 322. Such preemption may be implied from the statutory scheme's "legislative history," from the "pervasiveness of the state regulatory scheme," or from the "nature of the regulated subject matter," which necessitates "exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id*. at 323-324.

With Part 117, the Michigan Legislature provided for the regulation of septic-waste services, including the "cleaning, removing, transporting, or disposing, by application to land or otherwise, of septage waste." MCL 324.11701(z). A septage-waste servicer cannot "engage in servicing or contract to engage in servicing" except as authorized by a septage-waste servicing license and a

septage-waste vehicle license issued by the Department of Environmental Quality. MCL 324.11702(1). In addition to the licensing requirements, the Legislature regulated the ways in which a waste servicer may lawfully dispose of septage.

The Legislature provided that a servicer may dispose of its septage through land application, but only when authorized by a site permit. MCL 324.11709; see also MCL 324.11710 (stating the minimum requirements for site permits). Moreover, even if a servicer is authorized under a permit to use land application to dispose of septage, the Legislature limited the use of land application to those circumstances in which the servicer does not have ready access to a receiving facility: "if a person is engaged in servicing in a receiving facility service area, that person shall dispose of the septage waste at that receiving facility or any other receiving facility within whose service area the person is engaged in servicing." MCL 324.11708(3). That is, if the servicer engages in the provision of septage services within a specified distance of a receiving facility that is capable of taking and treating the septage, see MCL 324.11701(s) (defining receiving facility service area), the servicer cannot use land application to dispose of the septage; instead, the servicer must deliver the waste to that receiving facility or to any other receiving facility within whose servicing area the person is engaged in servicing. MCL 324.11708(3).

Notwithstanding the requirement that a servicer dispose of septage at a receiving facility when such a facility is available, the Legislature elected to soften the hardship occasioned by this statute for servicers who had invested in land application before a receiving facility became readily available:

> If a person engaged in servicing owns a storage facility with a capacity of 50,000 gallons or more and the storage facility was constructed, or authorized by the [Department of Environmental Quality] to be constructed, before the location where the person is engaged in servicing was included in a receiving facility service area under an operating plan approved under [MCL 324.11715b], [MCL 374.11708(3)] does not apply to that person before the 2025 state fiscal year. [MCL 324.11708(4).]

Examining Part 117 as a whole, it is clear that the Legislature intended to enact a comprehensive statutory scheme for the regulation of septage servicers and septage disposal with the goal of limiting land application as a method for disposing of septage in favor of treatment at a receiving facility.

With the enactment of the septage ordinance the township also entered the field of regulating septage servicers and septage disposal. The township banned the use of land application to dispose of septic waste, except for an owner of real property "who services his or her own septic tank . . . ." The township also designated the Grand Traverse facility as the receiving facility "for deposit and treatment of all septage and holding tank waste collected within the Township." The township required all septage haulers "collecting septage or holding tank waste within the Township [to] transport that waste to the [Grand Traverse facility] and pay the treatment charges therefor in accordance with the rules and regulations of the [Grand Traverse facility]." *Id*.

These septage ordinance provisions directly conflict with the Legislature's statutory scheme in several respects. See *Llewellyn*, 401 Mich at 322 n 4 ("A direct conflict exists . . . when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits."). The septage ordinance bans the commercial disposal of septage through land applica-

tion in the township, even though the statutory scheme permits land application through 2025 for persons who owned a 50,000 gallon storage facility before the availability of a receiving facility, MCL 324.11708(4). Further, the septage ordinance requires all septage servicers to haul septage taken from within the township to the Grand Traverse facility, even though the statutory scheme allows a servicer, who otherwise does not qualify under the exception stated under MCL 324.11708(4), to dispose of his or her septage at any facility within whose service area the person is engaged in servicing, MCL 324.11708(3). As such, courts would typically infer that the Legislature had intended to preempt the township's septage ordinance. *Llewellyn*, 401 Mich at 322. However, this is not a typical case.

Although the Legislature enacted a comprehensive and statewide scheme for the regulation of septage servicers and the disposal of septage, it also specifically limited the preemptive effect of its statutory scheme. The Legislature provided that Part 117 does "*not preempt* an ordinance of a governmental unit that prohibits the application of septage waste to land within that governmental unit or otherwise imposes *stricter* requirements than this part." MCL 324.11715(1) (emphasis added). Thus, the Legislature expressed a clear policy choice on the question of preemption: if a local government adopts an ordinance that conflicts with the Legislature's statutory scheme, that ordinance will not be preempted if it is a qualified ban on land application or if it imposes stricter requirements on septage disposal than that stated under the statutory scheme.

In its brief on appeal, the association explains at length how the township's septage ordinance directly conflicts with Part 117, how Part 117 represents a comprehensive statutory scheme for the regulation of

septage that completely occupies the field of regulation, and explains how Part 117 fills the need for a uniform, statewide regulation governing septage disposal. It engages in the analysis of these areas to demonstrate that the Legislature intended to preempt the local regulation of septage disposal. And we agree that these are tools that courts commonly use to determine whether and to what extent the Legislature intended to preempt local regulation through its statutory scheme.[3] See *Llewellyn*, 401 Mich at 322-324. But this Court is not at liberty to infer that the Legislature intended to preempt local regulation in direct contravention of the Legislature's express provision to the contrary. Rather, when the Legislature unambiguously states its intent to permit local regulations within certain parameters, we must enforce that intent. *Johnson v Recca*, 492 Mich 169, 175; 821 NW2d 520 (2012).

Under the Legislature's statutory scheme, the township could lawfully ban the use of land application for the disposal of septage within its boundaries, even though the Legislature provided a limited exception for servicers who own a qualifying storage facility. See MCL 324.11715(1); MCL 324.11715(2). Similarly, the township could lawfully impose stricter requirements on the method for the disposal of septage. The Legislature provided that a servicer must dispose of septage waste at a treatment facility if the servicer engages in servicing within the service area of a receiving facility—that is, the servicer's duty to dispose of septage at a facility is triggered by the existence of a nearby receiving facility. MCL 324.11708(3). The Legislature further provided that a servicer must satisfy its duty to dispose

[3] We note that preemption and conflict are distinct doctrines upon which an ordinance may be found to be invalid. *Detroit v Recorder's Court Judge*, 104 Mich App 214, 231; 304 NW2d 829 (1981).

of septage at a receiving facility by taking the septage to the facility that triggered the duty or by taking it to another facility within whose service area the servicer engages in the provision of septic services. *Id*. In contrast, under the township's ordinance, the servicer's duty to dispose of septage at a receiving facility is triggered whenever the servicer takes septage from *any* location within the township. And, under the township's ordinance, the servicer can only satisfy its duty by hauling the septage to a specific receiving facility: the Grand Traverse facility. *Id*. These limitations on the disposal of septage do not permit a servicer to avoid disposing of septage at a receiving facility when the servicer would otherwise be required to do so by MCL 324.11708(3). Stated another way, the septage ordinance does not lessen the duty imposed by the state regulatory scheme. Instead, the septage ordinance requires servicers to *always* use a receiving facility and to use the *specific* receiving facility designated by the township. These requirements are plainly more strict than those imposed by the Legislature in Part 117—the requirements have a more strict trigger for the duty to use a receiving facility and a more strict method for complying with that duty. Consequently, these requirements are not preempted by Part 117. See MCL 324.11715(1).

III. CONCLUSION

Although the Legislature can expressly or impliedly preempt local regulations through a regulatory scheme, in this case, the Legislature declined to exercise that power. Instead, the Legislature determined that local governments should have the authority to regulate septage disposal to the extent that the local government's ordinances provide more strict requirements

than that provided in Part 117. Because the septage ordinance in this case imposes stricter requirements on the disposal of septage taken from within the township, it is not preempted by Part 117. Therefore, the trial court did not err when it determined that Part 117 did not preempt the township's ordinance governing the disposal of septage taken from within its borders and did not err when it granted summary disposition in defendants' favor on the association's preemption claim.

Affirmed. As the prevailing parties, defendants may tax their costs. MCR 7.219(A).

FITZGERALD, P.J., and METER and M. J. KELLY, JJ., concurred.

CITIZENS BANK v BOGGS

Docket No. 310195. Submitted February 5, 2013, at Lansing. Decided February 19, 2013, at 9:05 a.m. Leave to appeal denied, 494 Mich ___.

Plaintiff, Citizens Bank, foreclosed on property by advertisement after the mortgagor of the property, Houghton Lake Lodging Investments Limited Partnership (HLL), defaulted on its mortgage from plaintiff. At the foreclosure sale, plaintiff made a successful bid sufficient to satisfy HLL's outstanding principal and interest, plus the foreclosure costs. Plaintiff then sued defendants, Louis E. and Jennifer L. Boggs, the guarantors of HLL's loan obligations, for unpaid taxes incurred and insurance premiums it paid up to the date of the foreclosure sale. Plaintiff admitted that it did not actually pay the taxes on the property until after the foreclosure sale but presented evidence showing that it paid at least some of the insurance premiums before the foreclosure sale. The court, Michael J. Baumgartner, J., granted summary disposition in favor of defendants, ruling that plaintiff's bid was a "full credit bid" that extinguished HLL's obligations under the note and mortgage and, therefore, defendants could not be held responsible for repaying HLL's satisfied obligations. Plaintiff appealed.

The Court of Appeals *held*:

1. A lender is not required to pay cash when it bids at a foreclosure sale. It is permitted to make a credit bid because any cash tendered would be returned to it. If the credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure, it is known as a "full credit bid." When a mortgagee makes a full credit bid, the mortgage debt is satisfied and the mortgage is extinguished. Plaintiff's bid was a full credit bid.

2. Upon foreclosure by advertisement and expiration of the redemption period without redemption by the mortgagor, the mortgagor cannot be held liable in a deficiency action for interest, taxes, or insurance costs accruing after the foreclosure sale. By implication, a mortgagor remains liable for such costs paid before the foreclosure sale.

3. Because plaintiff did not pay the taxes before the foreclosure sale, defendants' liability for the taxes was extinguished by the foreclosure sale. Summary disposition was properly granted in

favor of defendants with respect to the unpaid taxes. That part of the order of summary disposition was affirmed.

4. Summary disposition was prematurely granted in favor of defendants with regard to the issues concerning the insurance premium payments and whether plaintiff followed adequate procedures to collect this amount from defendants because there may be genuine issues of material fact remaining regarding the total amount of plaintiff's preforeclosure insurance premium payments as well as whether plaintiff followed adequate procedures to collect this amount from defendants. This part of the order of summary disposition was reversed and the matter was remanded for further proceedings.

5. Even if the contractual language in a guaranty to pay all the mortgagor's obligations broadly extends to all the mortgagor's liability and debts, a guarantor cannot be held liable for obligations of the mortgagor that were either satisfied or never incurred by the mortgagor. To the extent that HLL's liabilities were extinguished by the foreclosure sale, defendants cannot be held independently liable for these extinguished debts.

Affirmed in part, reversed in part, and remanded.

1. MORTGAGES — MORTGAGEES — CREDIT BIDS — WORDS AND PHRASES — FULL CREDIT BID.

A mortgagee is not required to pay cash when it bids at a foreclosure sale because any cash tendered would be returned to it as the mortgagee; a mortgagee's credit bid equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure is a "full credit bid"; the mortgage debt is satisfied and the mortgage is extinguished when a mortgagee makes a full credit bid.

2. MORTGAGES — FORECLOSURES — DEFICIENCY ACTIONS.

A mortgagor, upon foreclosure by advertisement and expiration of the redemption period without redemption by the mortgagor, cannot be held liable in a deficiency action for interest, taxes, or insurance costs that accrue after the foreclosure sale; by implication, a mortgagor may remain liable for such costs that are paid by the mortgagee before the foreclosure sale.

3. MORTGAGES — GUARANTORS — MORTGAGORS — FORECLOSURE SALES.

A guarantor of the liability and debts of a mortgagor cannot be held liable for obligations of the mortgagor that were either satisfied or were never incurred by the mortgagor; a guarantor is not independently liable for its mortgagor's liabilities that are extinguished by a foreclosure sale of the mortgaged property.

Braun Kendrick Finkbeiner P.L.C. (by *Jamie Hecht Nisidis* and *Craig W. Horn*) for plaintiff.

Clark Hill PLC (by *Jay M. Berger* and *Brandon J. Muller*) for defendants.

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM. In this action to recover a purported deficiency consisting of amounts not included in a full credit bid at a foreclosure sale, plaintiff appeals by right the circuit court's order granting defendants' motion to dismiss.[1] The alleged deficiency is comprised of unpaid taxes and insurance premiums that the mortgagor, Houghton Lake Lodging Investments Limited Partnership (HLL), failed to pay into escrow as required by the note. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

After HLL defaulted, plaintiff foreclosed on the property by advertisement and made a successful bid sufficient to fully satisfy HLL's outstanding principal and interest, plus the foreclosure costs. Plaintiff then sued defendants, the guarantors of HLL's loan obligations, for unpaid taxes and insurance premiums.[2] Plaintiff admits that it did not actually pay the taxes on the property until well after the foreclosure sale, when it

[1] Defendants' motion to dismiss was, in reality, a motion for summary disposition. The circuit court did not identify the subrule under which it was granting the motion. But because the court considered evidence outside the pleadings, we review its decision as having been made under MCR 2.116(C)(10). See *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010).

[2] Plaintiff initially sought to recover unpaid taxes and insurance premiums that accrued up to the date of the resale of the property to a third party. But plaintiff has modified its request and now seeks only to recover the unpaid taxes incurred and insurance premiums it paid up to the date of the foreclosure sale.

resold the property to a third party. However, plaintiff presented evidence in the circuit court to establish that it paid at least some of the insurance premiums before the foreclosure sale.

The circuit court granted summary disposition in favor of defendants, ruling that plaintiff's bid was a "full credit bid" that completely extinguished HLL's obligations under the note and mortgage. Accordingly, the court ruled, defendants could not be held responsible for repaying HLL's satisfied obligations. The court also briefly mentioned that plaintiff did not provide any notice of deficiency to HLL or defendants, even though neither party had raised this issue.

We review de novo the circuit court's grant of summary disposition. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). A motion for summary disposition made under MCR 2.116(C)(10) tests the factual support for a claim. *Id*. Summary disposition is properly granted pursuant to MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes a question on which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

As this Court stated in *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 68; 761 NW2d 832 (2008):

> When a lender bids at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it. If this credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure, this

> is known as a "full credit bid." When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished. [Citations omitted.]

"The power to render a deficiency decree in foreclosure proceedings is entirely statutory." *Bank of Three Oaks v Lakefront Props*, 178 Mich App 551, 555; 444 NW2d 217 (1989).[3] MCL 600.3280 creates a defense to any deficiency action if the mortgagor can prove that

> the property sold [by advertisement] was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such [a] showing shall constitute a defense to such action and shall defeat the deficiency judgment . . . either in whole or in part to such extent.

Interpreting our Supreme Court's decision in *New York Life Ins Co v Erb*, 276 Mich 610, 615; 268 NW 754 (1936), this Court has held that "upon foreclosure by advertisement and expiration of the redemption period without redemption by the mortgagor, the mortgagor cannot be held liable in a deficiency action for interest, taxes, or insurance costs accruing after the foreclosure sale." *Bank of Three Oaks*, 178 Mich App at 557.[4] The obvious implication of this statement is that a mortgagor remains liable for such costs paid before the foreclosure sale.

Plaintiff argues that defendants remain liable under the note and mortgage for HLL's liabilities because

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[3] Because *Lakefront Props* was decided before November 1, 1990, it is not binding on this Court. MCR 7.215(J)(1); *People v Cooke*, 194 Mich App 534, 537; 487 NW2d 497 (1992). However, we believe that it was correctly decided.

[4] There is an exception that requires a mortgagor to pay for interest, taxes, and insurance premiums that accrue between the date of the foreclosure sale and the expiration of the redemption period when the mortgagor exercises its right of redemption. MCL 600.3240(1) and (2); *Bank of Three Oaks*, 178 Mich App at 555. However, HLL did not exercise this right, so the exception does not apply.

plaintiff's final bid was not a "full credit bid" since it did not include the unpaid taxes, insurance premiums, and escrow amounts. It is undisputed that plaintiff's bid included all the outstanding principal balance, as well as all accrued interest and foreclosure costs. This meets the quintessential definition of a full credit bid. *New Freedom Mtg Corp*, 281 Mich App at 68. However, as noted previously, our courts have recognized that a mortgagor may remain liable for taxes and insurance premiums paid by the mortgagee before the foreclosure sale. *Bank of Three Oaks*, 178 Mich App at 557.

Plaintiff contends that defendants are liable for the unpaid taxes that became due before the foreclosure sale, notwithstanding the fact that plaintiff did not actually pay these taxes until it sold the property to a third party. Although HLL's property taxes were to be paid regularly and held in escrow, plaintiff concedes that it did not actually incur these costs until it sold the property to a third party, well after the foreclosure sale was completed. As our Supreme Court noted in *Erb*, 276 Mich at 614, "where taxes are paid by the mortgagee or purchaser after the foreclosure sale, a bill in equity will not lie to reforeclose the mortgage for the taxes nor to impress and enforce a lien for them against the property." In *Erb*, the Supreme Court specifically noted that the taxes, which were paid by the mortgagee after the foreclosure was begun in 1933 and before the foreclosure sale, were due for tax years 1931 and 1932. *Id*. Nonetheless, the taxes were not collectable through a postforeclosure deficiency judgment because the mortgagee should have taken into account the amount of the taxes when placing its bid at the foreclosure sale. See *id*.; see also *Wood v Button*, 205 Mich 692, 705-706; 172 NW 422 (1919). Because plaintiff did not pay the taxes before the date of the foreclosure sale, this liability was extinguished by the foreclosure sale. The trial court

properly granted summary disposition in favor of defendants with respect to the unpaid taxes.

Plaintiff next argues that defendants remain liable for the insurance premium payments that it made before the foreclosure sale. We agree that, under the abovementioned authorities, plaintiff should ordinarily be permitted to recover by way of a deficiency judgment for the insurance premiums that it actually paid before the foreclosure sale. However, defendants raise an alternative ground for affirmance. Specifically, they claim that plaintiff cannot recover for the preforeclosure insurance premium payments because it failed to follow the contractual notice requirements before seeking a deficiency judgment.

Although the parties did not raise this issue in the circuit court, the court spontaneously stated at oral argument that plaintiff had failed to provide notice of the deficiency. Because this matter was never properly raised in the circuit court, the record does not contain sufficient evidence to determine whether plaintiff actually provided notice of the deficiency to HLL or defendants.[5] Because there may be genuine issues of material fact regarding the total amount of plaintiff's preforeclosure insurance premium payments,[6] as well as whether plaintiff followed adequate procedures to collect this

[5] Defendants suggest that plaintiff failed to sufficiently plead that it provided adequate notice of the deficiency. But defendants offer no legal support to establish that plaintiff was required to plead such a fact. To the contrary, if plaintiff provided inadequate notice under the agreements to recover a deficiency, this is a defense that defendants were required to plead and prove. See MCR 2.111(B) and (F).

[6] Plaintiff contends that it made $11,724.41 in insurance premium payments before the foreclosure sale. However, according to defendants, the insurance payment printout indicates that plaintiff may have actually paid less than this amount before the sale. Factual development concerning this matter will be required on remand.

amount from defendants, the grant of summary disposition for defendants on this issue was premature.

Finally, plaintiff argues that defendants remain liable for all taxes, insurance premiums, and escrow amounts, regardless of whether HLL remained liable, because the guaranties contained broad language requiring defendants to repay all of HLL's obligations, even those that had been discharged. However, even if the contractual language in a guaranty broadly extends to all of a mortgagor's liabilities and debts, a guarantor cannot be held liable for obligations that were either satisfied or never incurred by the mortgagor. *Bank of Three Oaks*, 178 Mich App at 558-559. To the extent that HLL's liabilities were extinguished by the foreclosure sale, defendants cannot be held independently liable for these extinguished debts. *Id*.

We affirm the circuit court's determination that defendants are not liable for the unpaid taxes paid by plaintiff after the foreclosure sale. However, we reverse the circuit court's determination that defendants are not liable for any of the insurance premium payments made by plaintiff before the foreclosure sale. We remand for further proceedings with respect to this question.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

JANSEN, P.J., and WHITBECK and BORRELLO, JJ., concurred.

In re MILLER OSBORNE PERRY TRUST

Docket No. 309725. Submitted February 13, 2013, at Lansing. Decided February 19, 2013, at 9:10 a.m. Leave to appeal sought.

Miller O. Perry established a trust in 1993 and amended it in 2006 to provide that a majority of his estate, 75 percent, would go to Susan Perry, Miller Perry's daughter, 12.5 percent would go to Mark Perry, a nephew of Susan Perry, and 12.5 percent would go to Debra C. Pinedo, Mark Perry's half-sister. Miller Perry also added a no-contest clause that provided essentially that if a beneficiary of the trust, with or without court approval, challenged or contested the admission of the trust to probate or any portion of the trust, the beneficiary would receive nothing from the trust. The provision also provided that it is not a challenge or contest if the personal representative, trustee, or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in the trust. After Miller Perry died in 2010, Mark Perry petitioned in the Ingham County Probate Court, seeking a determination whether he had probable cause to challenge the amendment under MCL 700.7113, which provides that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust. Mark Perry stated in his petition that his petition should not be construed as one contesting the validity of the trust but as one seeking a declaratory judgment, pursuant to MCR 2.605, regarding the existence of probable cause if he were to bring such an action. In response to the petition, Susan Perry, acting as the trustee for the trust, denied that she had had an undue influence on Miller Perry and asked the probate court to hold that Mark Perry's request for declaratory relief constituted a "contest" of the trust, thus triggering the no-contest clause. The probate court, Richard J. Garcia, J., denied Mark Perry's request for a declaratory ruling, determining that there was no probable cause to support the allegation that the amendment of the trust had resulted from undue influence. The probate court also determined that Mark

Perry's petition was not a challenge or contest to the trust sufficient to invoke the no-contest clause. Susan Perry, trustee for the trust, appealed.

The Court of Appeals *held*:

1. Susan Perry has a sufficient pecuniary interest to meet the requirements pertaining to an appeal as of right stated in MCR 7.203(A), because she has a duty to ensure that the trust is properly administered and may be liable if she fails to protect the trust's assets.

2. Mark Perry's petition did not constitute a challenge to the trust under the no-contest clause.

3. No-contest clauses generally are valid and enforceable, however, courts construe such clauses strictly. The no-contest clause in this case did not provide that a beneficiary would forfeit rights under the trust if the beneficiary filed "any" legal action, however tangentially related to the trust. It provided for forfeiture only if a beneficiary contested or challenged the trust's admission to probate or a provision of the trust. Mark Perry was not challenging the trust itself, did not ask the probate court to pass judgment on any term within the trust, did not allege that the no-contest clause was itself invalid, and did not seek monetary relief. The request by Mark Perry that the probate court order that "the existence of probable cause renders unenforceable the [no-contest] clause" was relief that the probate court did not have the authority to grant because Mark Perry stated in his petition that he was not actually challenging the trust—and the no-contest clause is a provision of the trust. Such request did not transform Mark Perry's petition into a legal challenge to the trust. The petition, when read as a whole, did not actually challenge the trust in any of the ways specified under the no-contest clause. The probate court did not err when it denied Susan Perry's request to have Mark Perry's interest in the trust forfeited.

Affirmed.

TRUSTS — NO-CONTEST CLAUSES — PROBABLE CAUSE EXCEPTION.

A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust, otherwise known as a no-contest clause, is generally valid and enforceable, however, such a provision may not be given effect if probable cause exists for the person's instituting a proceeding contesting the trust or another proceeding relating to the trust; courts construe no-contest clauses strictly and may order a forfeiture under such a clause only if the interested

person's actions come strictly within the express terms of the no-contest clause (MCL 700.7113).

Chalgian & Tripp Law Offices, PLLC (by *Douglas G. Chalgian*), for Susan Perry.

Foster, Swift, Collins & Smith, P.C. (by *Douglas A. Mielock*), for Mark Perry.

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM. Susan Perry, acting as the trustee for the Miller Osborne Perry Trust (the "Trust"), appeals as of right the probate court's finding that Mark D. Perry's suit for declaratory relief did not constitute a challenge to the Trust within the meaning of the Trust's forfeiture clause—otherwise known as a no-contest clause. On appeal, Susan Perry argues that the probate court clearly erred because, after it found that Mark Perry would not have had probable cause to challenge the Trust within the meaning of MCL 700.7113, it had to find that his suit triggered the no-contest clause. As such, she further maintains, the probate court should have determined that Mark Perry forfeited his distributions under the Trust. Because we conclude that Mark Perry's suit for declaratory relief did not constitute a challenge to the Trust as stated in the Trust's no-contest clause, we affirm.

I. BASIC FACTS

Miller Osborne Perry established the Trust in January 1993. Susan Perry is Miller Perry's daughter and Mark Perry's aunt.

In November 2006, Miller Perry amended the Trust to give the majority of his estate to Susan Perry; he

established that 75 percent would go to Susan Perry, 12.5 percent to Mark Perry, and the remaining 12.5 percent would go to Mark Perry's half-sister, Debra C. Pinedo. He also added § 4.4, which provided that any beneficiary who challenges the admission of the Trust to probate or any of the Trust's provisions would forfeit his or her benefits under the Trust:

> If any beneficiary under this trust or any heir of mine, or any person acting, with or without court approval, on behalf of a beneficiary or heir, shall challenge or contest the admission of this trust to probate, or challenge or contest any provision of this trust, the beneficiary or heir shall receive no portion of my estate, nor any benefits under this trust. However, it will not be a "challenge or contest" if my personal representative, trustee or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in this trust.

Miller Perry died in March 2010, at 102 years of age.

After discovering evidence that his aunt may have had a questionable influence over Miller Perry during his final years, Mark Perry petitioned in the probate court for declaratory relief. Specifically, he asked the court to determine whether he had "probable cause" to challenge the Trust's 2006 amendments under MCL 700.7113. In his petition, Mark Perry stated that his petition should "not . . . be construed as contesting the validity of the trust, but rather only seeks a declaratory judgment pursuant to MCR 2.605 on the existence of probable cause if [he] *were* to bring such an action." (Italics added.)

In response to Mark Perry's petition, Susan Perry denied that she had had an undue influence on her father. She also asked the probate court to hold that Mark Perry's request for declaratory relief constituted a "contest" of the Trust under § 4.4, thus triggering the

no-contest clause. After a hearing on the issue, the probate court denied Mark Perry's request for a declaratory judgment, but also determined that his petition was not a contest or challenge under § 4.4.

II. JURISDICTION

As a preliminary matter, we note that Mark Perry argues on appeal that Susan Perry is not an aggrieved party under MCR 7.203(A) because she appealed as the Trust's trustee and, in that capacity, she did not suffer a concrete or particularized injury. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-291; 715 NW2d 846 (2006). For that reason, he maintains that this Court lacks jurisdiction to hear her appeal. It is not clear that Susan Perry appealed solely as the Trust's trustee and not also in her personal capacity. In any event, because Susan Perry has a duty to ensure that the Trust is properly administered according to its terms and for the benefit of all its beneficiaries and she may be liable if she fails to protect the Trust's assets, including as provided under the no-contest clause, MCL 700.7801, MCL 700.7812, MCL 700.7901, MCL 700.7902, we conclude that she has a sufficient pecuniary interest to meet the requirements stated under MCR 7.203(A).

III. THE NO-CONTEST CLAUSE

A. STANDARD OF REVIEW

This Court reviews de novo the proper interpretation of both statutes and trusts. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). However, this Court reviews a trial court's factual findings underlying its conclusions of law for clear error. MCR 2.613(C).

B. ANALYSIS

No-contest clauses, such as that found under the Trust's § 4.4, are generally valid and enforceable. See *Farr v Whitefield*, 322 Mich 275, 280; 33 NW2d 791 (1948). However, the Legislature in 2009 PA 46, effective April 1, 2010, amended the Michigan Trust Code to limit the scope of no-contest clauses: "A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust." MCL 700.7113. The probate court found that Mark Perry would not have probable cause under that statute to challenge the validity of the Trust's amendments. Accordingly, if Mark Perry's request for declaratory relief constituted a challenge to the Trust, as defined under § 4.4, then Mark Perry forfeited his interest under the Trust by challenging it without probable cause to do so. However, we do not agree that his petition for declaratory relief constituted a challenge to the Trust under § 4.4.

When interpreting the meaning of a trust, this Court must ascertain and abide by the intent of the settlor. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). We must look to the words of the trust itself. *Id*. Courts must, however, construe no-contest clauses strictly. See *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962). Thus, this Court may forfeit Mark Perry's distributions only if his actions "come strictly within the express terms" of the no-contest clause at issue. *Id*. (quotation marks, citation, and emphasis omitted).

Under § 4.4, Miller Perry did not provide that a beneficiary would forfeit his or her rights under the Trust if the beneficiary filed *any* legal action—however

tangentially related to the Trust. Instead, he provided that only a beneficiary who contests or challenges the Trust's *admission* to probate or who challenges a *provision* will forfeit his or her rights under the Trust.

In his suit, Mark Perry stated that he was not challenging the Trust itself. Moreover, in his allegations, he did not ask the probate court to pass judgment on any term within the Trust, did not allege that the no-contest clause was actually invalid, and did not seek monetary relief. He did, however, ask the probate court in his prayer for relief to order that "the existence of probable cause renders unenforceable the [no-contest] clause." Because he stated in the body of his petition that he was not actually challenging the trust—and the no-contest clause is a provision in the trust—the probate court would have no authority to grant the requested relief. Thus, this request did not transform his petition into a legal challenge to the Trust.

When the petition is examined as a whole, it is clear that Mark Perry asked the probate court to examine his evidence and determine whether that evidence *would* give him probable cause—as that phrase is understood under MCL 700.7113—if he *were* to challenge the Trust. That is, he essentially posed a hypothetical scenario to the probate court and asked it to advise him about the probable application of a statute—MCL 700.7113—to his proposed scenario. For that reason, Mark Perry likely failed to allege a justiciable controversy. See *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978) (stating that courts should not decide hypothetical issues; rather, declaratory relief is only appropriate where the plaintiff has sufficiently alleged an actual justiciable controversy).[1]

[1] MCL 700.7113 nullifies the operation of a no-contest clause ("shall not be given effect") with regard to challenges for which there was

Nevertheless, whether the probate court had the authority to make the probable cause determination is not now before us. The only question is whether the probate court properly found that Mark Perry's petition did not amount to a challenge that would trigger the no-contest clause. When his petition is read as a whole, it is clear that Mark Perry did not actually challenge the Trust in any of the ways specified under the no-contest clause. Therefore, the probate court did not err when it denied Susan Perry's request to have Mark Perry's interest forfeited.

Affirmed.

FITZGERALD, P.J., and METER and M. J. KELLY, JJ., concurred.

"probable cause" for "instituting" the challenge. Hence, MCL 700.7113 does not operate to nullify a no-contest clause's operation until there is an actual challenge and then only if there was probable cause to bring the challenge. Because the issue whether probable cause existed necessarily turns on the evidence that the challenging party had at the time he or she instituted the challenge, a trial court cannot properly make a probable cause determination until after the challenge has been made.

LEAR CORPORATION v DEPARTMENT OF TREASURY

Docket No. 309445. Submitted January 16, 2013, at Lansing. Decided February 21, 2013, at 9:00 a.m. Leave to appeal sought.

Lear Corporation brought an action in the Court of Claims against the Department of Treasury after its request for a tax refund was denied. Plaintiff had incurred $205,000,000 of deductible expenditures for research and experimentation (R&E), which it elected to amortize over a period of 10 years pursuant to 26 USC 59(e). Plaintiff had initially used identical calculations to prepare its state and federal tax returns for the years at issue, but after the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., was repealed effective December 31, 2007, plaintiff sought to amend its single business tax returns to deduct the entire $205,000,000 in the year the expenditures were incurred. The Court of Claims, Rosemarie E. Aquilina, J., granted plaintiff's motion for summary disposition under MCR 2.116(C)(10) and ordered defendant to refund plaintiff $1,585,041 plus statutory interest. Defendant appealed.

The Court of Appeals *held*:

1. The trial court erred by granting plaintiff's motion for summary disposition, because the SBTA required plaintiff to determine its tax base using the amortized amount it reported on its federal taxes for each year at issue. Although the SBTA was silent with regard to whether a C corporation was required to report its R&E expenditures in the same manner as it did on its federal returns, the SBTA clearly and unambiguously defined "tax base" as "business income" and "business income" as "federal taxable income." Accordingly, plaintiff's SBT tax base was required to reflect its federal taxable income, including its election to amortize its R&E expenditures under 26 USC 59(e).

2. Plaintiff failed to show that defendant violated its constitutional right to equal protection and uniform taxation because, given that the isolated cases plaintiff identified involved different circumstances and decisions made by different entities, plaintiff failed to carry its burden of establishing that defendant failed to treat similarly situated enterprises equally and that its failure to do so was intentional and knowing rather than mistaken or the result of inadvertence.

Reversed and remanded for entry of an order denying plaintiff's motion for summary disposition.

1. TAXATION — STATUTES — SINGLE BUSINESS TAX ACT — TAX BASE — AMORTIZATION OF EXPENDITURES UNDER FEDERAL TAX CODE.

Under the Single Business Tax Act, MCL 208.1 *et seq*., repealed effective December 31, 2007, a C corporation's tax base for each year was required to reflect its federal taxable income, including its election to amortize its expenditures for research and experimentation under 26 USC 59(e).

2. TAXATION — CONSTITUTIONAL LAW — EQUAL PROTECTION — UNIFORM TAXATION.

To establish that the Department of Treasury violated the constitutional right to equal protection and uniform taxation, a plaintiff must show that defendant failed to treat similarly situated enterprises equally and that its failure to do so was intentional and knowing rather than mistaken or the result of inadvertence (US Const, Am XIV; Const 1963, art 9, § 3).

Honigman Miller Schwartz and Cohn LLP (by *Alan M. Valade* and *June Summers Haas*) for plaintiff.

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: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM. Defendant appeals by right a Court of Claims order granting plaintiff's motion for summary disposition under MCR 2.116(C)(10) and closing the case pursuant to MCR 2.602(A)(3) in this tax dispute involving the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., repealed by 2006 PA 325 effective December 31, 2007. We reverse and remand.

Plaintiff is a Delaware manufacturing corporation with its principal office located in Southfield, Michigan. Plaintiff manufactures and sells systems for automotive

seating, interiors, and electrical power management. As a result, plaintiff incurs research and experimental (R&E) expenditures related to that business.

Plaintiff incurred $205,000,000 of deductible R&E expenditures, which it elected to amortize over a period of 10 years pursuant to § 59(e) of the Internal Revenue Code, 26 USC 59(e). In other words, plaintiff deducted only a portion of the total amount in the years at issue in this case. Because Michigan's SBTA did not have a provision equivalent to § 59(e), plaintiff used identical calculations to prepare its single business tax (SBT) and its federal tax returns for the years at issue. Plaintiff continued to use a ratable deduction for its federal tax returns. But after the SBTA was repealed, plaintiff sought to go back and amend its SBT returns, deducting the entire $205,000,000 in the year in which the R&E expenditures were incurred.

On only two prior occasions had defendant dealt with corporations that reported discrepant income between their SBT returns and federal returns. Defendant's first encounter was with General Motors Corporation (GM). After GM, defendant adopted an internal policy that prohibited a taxpayer from calculating its business income by taking an immediate deduction of R&E for the tax year if that taxpayer had also made a § 59(e) election for federal tax purposes. The second occasion involved Delphi Corporation (Delphi). In that case, a federal bankruptcy court independently allowed Delphi to treat its SBT returns differently from its federal returns.

Plaintiff sought, through its amended SBT returns, a refund, which defendant denied. Plaintiff subsequently filed a motion for summary disposition under MCR 2.116(C)(10), which was granted by the Court of Claims. A final order was issued by the Court of Claims

directing defendant to refund plaintiff $1,585,041 plus statutory interest. This appeal followed.

For the first time, a Michigan court is being asked to consider whether a C corporation can elect to amortize R&E expenditures over 10 years under § 59(e), while at the same time deducting the entire amount for the year in which it was incurred for purposes of the SBT. Defendant's argument on appeal is twofold. First, defendant maintains that plaintiff must report the same taxable income for both its SBT returns and its federal returns. Because plaintiff's SBT returns and federal returns do not match, plaintiff is not entitled to a refund for the R&E expenditures it incurred. Second, defendant maintains that disparate federal and SBT returns due to a § 59(e) election have occurred in only two prior cases. Those cases were isolated and involved circumstances not analogous to plaintiff's circumstances here. Therefore, defendant argues, it did not violate plaintiff's constitutional rights when it denied plaintiff's refund.

This Court reviews de novo decisions regarding summary disposition and issues of statutory interpretation. *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 337; 793 NW2d 246 (2010), citing *Herald Wholesale, Inc v Dep't of Treasury*, 262 Mich App 688, 693; 687 NW2d 172 (2004). Under MCR 2.116(C)(10), a motion for summary disposition tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party has the initial burden of specifying which factual issues are undisputed and to support those specifications by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The nonmoving party then has the burden of showing, by offering evidentiary proof, that a genuine issue of

material fact exists. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. The moving party is entitled to judgment as a matter of law under MCR 2.116(C)(10) if the nonmoving party fails to establish that a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when, viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on an issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Issues of statutory interpretation are questions of law that this Court reviews de novo. *Sturrus v Dep't of Treasury*, 292 Mich App 639, 646; 809 NW2d 208 (2011). In the absence of ambiguities, "judicial construction is neither necessary nor permitted." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). When ambiguities exist, tax laws are generally construed in favor of the taxpayer. *Int'l Business Machines v Dep't of Treasury*, 220 Mich App 83, 86; 558 NW2d 456 (1996).

The SBTA contained no ambiguities regarding whether a C corporation was required to report its R&E expenditures in the same manner as they were on its federal returns. Rather, it was silent on this issue. The SBTA unambiguously stated that "[tax base] means business income" and "[business income] means federal taxable income." MCL 208.9(1); MCL 208.3(3). Because the SBTA used clear and unambiguous language, plaintiff's tax base must reflect its federal taxable income, including its election to amortize its R&E expenditures under § 59(e). Therefore, plaintiff should have used the amortized amount as a starting point to determine its SBT tax base for each year in issue.

Plaintiff erroneously relies on three cases from this Court to argue that it is acceptable for its amended SBT

returns to differ from its federal returns. In *Sturrus*, 292 Mich App at 650, this Court held that the SBTA required a plaintiff to use its federal taxable income as a starting point to determine its tax base for its SBT returns. This Court did not hold that a plaintiff could completely disregard its federal tax returns in calculating its tax base. Moreover, as plaintiff is undisputedly a C corporation, any discussion regarding the characterization of different tax entities as it relates to this issue is not applicable here. See *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647; 770 NW2d 915 (2009); *Alliance Obstetrics & Gynecology, PLC v Dep't of Treasury*, 285 Mich App 284; 776 NW2d 160 (2009).

In response to plaintiff's argument that it suffered disparate treatment as compared to GM and Delphi, defendant maintains that its denial of plaintiff's refund was not a violation of plaintiff's constitutional rights because GM and Delphi were isolated cases, involving different circumstances than in the case at bar.

To comply with the Equal Protection Clause of the United States Constitution, US Const, Am XIV, and the Uniformity of Taxation Clause of the Michigan Constitution, Const 1963, art 9, § 3, defendant is required to exercise "equal treatment of similarly situated taxpayers." *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984). But plaintiff has the burden of establishing that defendant failed to treat similarly situated enterprises equally and "that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence." *MCI Telecom Corp v Dep't of Treasury*, 136 Mich App 28, 36-37; 355 NW2d 627 (1984). Defendant, on the other hand, is only required to show a rational basis for its decision. *Armco*, 419 Mich at 592. Moreover, defendant's showing of a rational basis does not mean that

every mathematical inequity between taxpayers will be rendered invalid. *St Louis v Mich Underground Storage Tank Fin Assurance Policy Bd*, 215 Mich App 69, 73; 544 NW2d 705 (1996).

Plaintiff fails to show that defendant's disparate treatment of GM and Delphi was intentional and knowing. In Delphi's case, specifically, the decision to allow disparate treatment was made by the bankruptcy court, not by defendant. See *In re Delphi Corp*, Case No. 05-44481, 2008 WL 3486615 (Bankr SD NY, 2008), mod 2008 WL 5155561 and 5146952. Furthermore, defendant's internal policy indicates that if the decision in *Delphi* had been defendant's decision to make, defendant would have treated Delphi in the same manner it now wishes to treat plaintiff. In the case of GM, the decision to allow disparate treatment was made decades ago by administrators who are no longer working for defendant. Furthermore, the record lacks any evidence showing that defendant knowingly and intentionally treated plaintiff less favorably than GM. More importantly, defendant misinterpreted the statute when it allowed the disparate treatment of GM's returns. Plaintiff is not entitled to the continuation of that misinterpretation. *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 293; 590 NW2d 612 (1998).

In short, plaintiff made the choice to amortize its R&E expenditures on both its federal returns and its SBT returns. When it did this, plaintiff was not guaranteed that it would realize its full deduction under the SBTA. The SBTA required plaintiff to use its federal taxable income as a starting point to determine its tax base for its SBT returns. While the SBTA may have authorized or required adjustments to be made, the only adjustments that can be made are those that were authorized or required by the SBTA. Because the SBTA

did not authorize the specific adjustments sought by plaintiff, plaintiff is not entitled to make that adjustment.

We conclude that plaintiff has failed to establish that no genuine issue of material fact exists as to (1) the proper treatment of its R&E expenditures for purposes of the SBT and (2) the alleged disparate treatment by defendant in violation of plaintiff's constitutional rights.

Reversed and remanded for entry of an order denying plaintiff's motion for summary disposition. We do not retain jurisdiction. Defendant may tax costs.

SAWYER, P.J., and MARKEY and M. J. KELLY, JJ., concurred.

PEOPLE v LEMONS

Docket No. 308565. Submitted February 12, 2013, at Detroit. Decided February 21, 2012, at 9:05 a.m. Leave to appeal sought.

Cory Dereail Lemons was charged in the Wayne Circuit Court with possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*), and possession with intent to deliver less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*), as a fourth-offense habitual offender, MCL 769.12. Defendant's neighbor reported to the police on a weekday afternoon that the front door of defendant's condominium was wide open, swinging back and forth. The police confirmed this information, which was consistent with a breaking and entering, received no response to repeated knocking, and then entered the residence to ascertain if anyone was inside who needed assistance and to secure the home. The police found marijuana residue on the kitchen counter and two large bags of suspected marijuana in plain view in the basement; no one was found in the house and the police sought a search warrant on the basis of the drugs which had been found. The court, Margie R. Braxton, J., granted defendant's motion to quash, concluding that the drug evidence was seized as a result of an illegal search, and dismissed the charges. The prosecution appealed.

The Court of Appeals *held*:

1. In general, a search conducted without a warrant is unconstitutional under both the United States and Michigan Constitutions. The emergency-aid exception to the warrant requirement allows the police to enter a dwelling without a warrant under circumstances in which they reasonably believe, based on specific, articulable facts, that some person within is in need of immediate aid. After entering the dwelling the police may seize any evidence that is in plain view during the course of their legitimate emergency-aid activities. The entry must be limited to determining whether emergency aid is needed and the police may not do more than is reasonably necessary to determine whether a person is in need of any assistance, and to provide that assistance. In this case, because the warrantless

search of defendant's home was justified under the emergency-aid exception, the trial court improperly granted defendant's motion to quash. The front door of the residence was wide open, swinging in the wind, which was consistent with a suspected break in and home invasion, and there was no evidence that anyone was home. On these facts it was reasonable for the police to enter the residence to search for any victims who may have needed aid and to search for suspects; the police did not enter the house because they thought they would find drugs. The needs of law enforcement and the demands of public safety would not have been met in this case if the police officers had been required to walk away from defendant's residence without further investigation.

2. Even if the police search was not justified under the emergency-aid exception to the warrant requirement, exclusion of the evidence was not required because the police were acting in good faith when they entered the residence to administer emergency aid; the exclusionary rule does not apply to nonculpable, innocent police conduct.

Orders granting defendant's motions to quash and for dismissal reversed and case remanded for further proceedings.

SEARCHES AND SEIZURES — WARRANTLESS SEARCHES — EMERGENCY-AID EXCEPTION — REASONABLENESS OF ENTRY.

The emergency-aid exception to the warrant requirement allows the police to enter a dwelling without a warrant under circumstances in which they reasonably believe, based on specific, articulable facts, that some person within is in need of immediate aid; after entering the dwelling the police may seize any evidence that is in plain view during the course of their legitimate emergency-aid activities; the entry must be limited to determining whether emergency aid is needed and the police may not do more than is reasonably necessary to determine whether a person is in need of any assistance, and to provide that assistance.

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

Gerald M. Lorence for defendant.

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

RIORDAN, P.J. The prosecution appeals as of right the trial court's order granting defendant's motion to quash and order of dismissal. Defendant was charged as a fourth-offense habitual offender, MCL 769.12, with possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*), and possession with intent to deliver less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*). The trial court concluded that the drug evidence was seized as a result of an illegal search, granted defendant's motion to quash, and dismissed the case. We reverse the trial court's order granting defendant's motion to quash and the order of dismissal.

I. FACTUAL BACKGROUND

Van Buren Township police officer Derek Perez and another officer were dispatched to defendant's condominium on Friday, November 13, 2011, at about noon, to respond to a report that the front door was open and blowing in the wind; the officers arrived at the residence and confirmed that the door indeed was open and blowing in the wind. There was no observable damage to the door. The officers announced their presence, knocked on the door several times, and rang the doorbell, but no one came to the door.

Because the door to the residence was open, the officers suspected that there might have been a recent home invasion. Officer Perez testified that an open door was consistent with a breaking and entering and that there is not always damage to a door in a breaking and entering. He testified that he would not leave a resi-

dence with the door open for fear there was someone inside. Thus, the officers entered the residence to ascertain if anyone was inside the condominium and to secure the residence.

As soon as the officers entered the kitchen, they smelled a strong odor of marijuana and observed marijuana residue on the counter. Officer Perez testified that they continued to search the house looking for persons and to ensure that the house was secure. He said they were not in the condo to search for evidence of a crime. When the officers proceeded to the basement, they found two large bags of suspected marijuana in plain view. They did not locate anyone in the residence. The police then sought a search warrant.

Detective Christopher Valinski and Detective Michael Rini arrived at the residence and executed the search warrant. They seized cocaine, marijuana, clear plastic bags, a scale, and paperwork from the kitchen. They also discovered cocaine in one of the bedrooms and marijuana from the basement. Detective Valinski located a DTE energy bill with defendant's name on it. Thus, when defendant drove near the residence, the police executed a stop on the vehicle. While defendant admitted that the marijuana belonged to him, he disavowed any knowledge of the cocaine.

Defendant filed a motion to quash and dismiss, arguing that the search was illegal because the police entered the condominium without a search warrant and without proper justification. Despite the prosecution's arguments to the contrary, the trial court agreed with defendant. The trial court ruled that the responding officers lacked articulable reasons for entering the residence without a warrant. The court granted defendant's motion to quash and dismissed the case. The prosecution now appeals.

II. SEARCH AND SEIZURE

A. STANDARD OF REVIEW

"This Court reviews a trial court's decision on a motion to quash the information for an abuse of discretion." *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010). However, "[t]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Id*.

B. EMERGENCY-AID EXCEPTION

Our state and federal constitutions guarantee the right against unreasonable searches and seizures. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). The Fourth Amendment of the United States Constitution is generally understood to provide the same protections as article 1, § 11 of the Michigan Constitution. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011). As we have repeatedly recognized, the "touchstone of the Fourth Amendment is reasonableness." *People v Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005), quoting *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417; 136 L Ed 2d 347 (1996) (quotation marks omitted). Thus, the reasonableness of a search and seizure is analyzed on the basis of the facts and circumstances of each case. *Brzezinski*, 243 Mich App at 433.

"Generally a search conducted without a warrant is unreasonable[.]" *Id*. However, there are numerous exceptions to this general precept. One such exception is the emergency-aid exception. "[T]he emergency-aid exception to the warrant requirement allows police officers to enter a dwelling without a warrant under circumstances in which they reason-

ably believe, based on specific, articulable facts, that some person within is in need of immediate aid." *People v Tierney*, 266 Mich App 687, 704; 703 NW2d 204 (2005); see also *Brigham City, Utah v Stuart*, 547 US 398, 403; 126 S Ct 1943; 164 L Ed 2d 650 (2006) ("[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.").[1] After entering the dwelling, "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." *Mincey v Arizona*, 437 US 385, 393; 98 S Ct 2408; 57 L Ed 2d 290 (1978). However, "the entry must be limited to the justification therefor, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance." *People v Davis*, 442 Mich 1, 26; 497 NW2d 910 (1993).

In the instant case, two officers were dispatched to defendant's condominium because an anonymous individual reported that the door to the residence was open and blowing in the wind at midday on Friday, November 13, 2011. When the police officers arrived at the location, they confirmed that the door was open and blowing in the wind. Officer Perez specifically testified that they suspected a home invasion had occurred. He also clarified that in his experience, an open door was consistent with a breaking and entering and that there is not always damage to a door as a result of a breaking

[1] Although such behavior could conceivably be construed as a community caretaking function, the Michigan Supreme Court has held that "when the police are investigating a situation in which they reasonably believe someone is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities." *People v Davis*, 442 Mich 1, 25; 497 NW2d 910 (1993).

and entering. Further, the police officer would not leave a residence with a door swinging open for fear someone may be inside.

The officers knocked on the door, rang the doorbell, and repeatedly announced their presence. No one came to the open door. When asked why he would not simply shut the door and leave the residence, Officer Perez responded: "Possible sus--victim inside, suspects inside." Hence, suspecting a home invasion, to secure the premises and locate any individuals inside, the officers entered the home and found the marijuana.

The officers' behavior in the instant case was justified under the emergency-aid exception to the warrant requirement. This is not a case in which the officers suspected drug activity. Instead, the officers were specifically dispatched to the residence on a report of an open door to a residence blowing in the wind. An open door to a residence was particularly unusual considering that it was noon, on a weekday afternoon in November in Michigan. The fact that there was no damage to the door was of little significance, as it was consistent with the officers' experience that home invasions occurred without damage to the door. Furthermore, Officer Perez steadfastly maintained that they entered the condominium because they feared that a home invasion had occurred and that there could be victims or suspects inside, not because they thought they would find drugs. As the United States Supreme Court has recognized, "the role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." *Michigan v Fisher*, 558 US 45; 130 S Ct 546, 549; 175 L Ed 2d 410 (2009) (quotation marks, citation, and brackets omitted). The officers' behavior in this case was consistent with this role.

In *State v Alexander*, 124 Md App 258, 262; 721 A2d 275 (1998), the police were dispatched to a residence because an anonymous individual had reported that he believed his neighbor was not home and that the basement door was wide open. When the police arrived, they observed no signs of forced entry. *Id*. at 263. After announcing their presence, the officers entered the home and discovered marijuana. *Id*. at 263-264. The Court of Special Appeals of Maryland upheld the search, finding that the police officers were justified in entering the home. *Id*. at 280-281. The court determined that the officers acted reasonably because there was a "real possibility that the homeowners . . . had been injured by intruders or were at that very moment in some sort of distress." *Id*. at 282. As in this case, the officers were responding to a phone call about an open door of a residence, during the day in November. Also similar, there was no damage to the door and no one answered when the officers repeatedly announced their presence.

Johnson v City of Memphis, 617 F3d 864, 869 (CA 6, 2010) also is analogous. That case involved a 911 hang-up call, an unanswered return call, a house with an open door, and no response when the police announced their presence. The court found that the police were justified in "entering the home to sweep for a person in need of immediate assistance under the emergency aid exception." *Id*. at 870. Similarly, the police in this case were alerted by a phone call that something may have been amiss in defendant's home, as the door was wide open and blowing in the wind. When the police arrived, no one responded to their knocks and the door was still blowing in the wind. It was reasonable for the police officers, when confronted with these facts, to enter the home to ensure that anyone in need of emergency aid would receive assistance. As the United States Supreme Court has held,

"[o]fficers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception." *Fisher*, 130 S Ct at 549 (quotation marks and citation omitted). The emergency-aid exception is not an inquiry into hindsight. *Id*. "[T]he needs of law enforcement or the demands of public safety" would not be met in this case if we were "to require officers to walk away from a situation like the one they encountered here." *Id*. Therefore, we hold that the emergency-aid exception applies and justified the officers' behavior.[2]

Furthermore, there was a very real possibility that someone could have been inside who needed police assistance. In such a scenario, there would be consternation in the community if the officers turned and left the residence without further investigation. In such a situation, the criticism of the officers would be justified, as the public relies on the police to help in emergencies. Outrage with such a scenario would be further proof that the police officers acted reasonably in entering the condominium in this case.

Moreover, even if the officers' behavior fell short of satisfying the criteria set forth in the emergency-aid exception, the exclusionary rule is not the remedy here. As this Court recently recognized in *People v Hill*, 299 Mich App 402, 411; 829 NW2d 908 (2013), "there is no

[2] Alternatively, police also could be exercising their community caretaking function when securing a house whose door was wide open and blowing in the wind. As stated earlier, such circumstances are unusual during a November weekday afternoon in Michigan. "Although there were no signs of forced entry or sounds of someone in distress, the circumstances were such that an officer could reasonably conclude that defendant may be in need of aid or assistance." *People v Hill*, 299 Mich App 402, 409; 829 NW2d 908 (2013). Accordingly, "the community caretaking exception to the warrant requirement was implicated" and the "warrantless entry into defendant's home by police did not violate the protections against unreasonable searches and seizures[.]" *Id*. at 405.

need to invoke the exclusionary rule, because the good-faith exception to the rule has gradually been extended by the courts to situations outside its traditional or historical contexts, and the police officers in this case were clearly acting in good faith." Similarly, in *Davis v United States*, 564 US ___; 131 S Ct 2419, 2426-2427; 180 L Ed 2d 285 (2011), the United States Supreme Court recognized that "[w]here suppression fails to yield appreciable deterrence, exclusion is clearly . . . unwarranted." (Quotation marks and citation omitted).

In this case, the police officers entered the residence because they believed people could be inside and were in need of immediate aid. This is not the type of police conduct that should be deterred. The police officers were acting in good faith when they entered the residence to administer emergency aid and the exclusionary rule should not be applied to this the type of "nonculpable, innocent police conduct." *Id*. at ___; 131 S Ct at 2429 (quotation marks and citation omitted). Rather than deterring misconduct, applying the exclusionary rule in this case "would only deprive citizens of helpful and beneficial police action." *Hill*, 299 Mich App at 414. Therefore, even if we were to agree that the police officers' conduct failed to satisfy constitutional mandates, the remedy would not be suppression of the evidence.

III. CONCLUSION

The officers behaved reasonably when entering defendant's residence pursuant to the emergency-aid exception to the warrant requirement of the Fourth Amendment. Furthermore, even if we were to construe the officer's behavior as a constitutional violation, this is not a case in which the exclusionary rule is applicable because the officers were acting in good faith when they

attempted to render emergency aid to members of the community. We reverse the lower court orders and remand for further proceedings.

HOEKSTRA and O'CONNELL, JJ., concurred with RIORDAN, P.J.

PEOPLE v BOWLING

Docket No. 307658. Submitted February 13, 2013, at Detroit. Decided February 21, 2013, at 9:10 a.m. Leave to appeal denied, 494 Mich ___.

Terry N. Bowling pleaded *nolo contendere* in the Oakland Circuit Court, Michael D. Warren Jr., J., to charges of first-degree home invasion, resisting and obstructing a police officer, and the second-degree murder of a police officer. Defendant was sentenced, as a fourth-offense habitual offender, to concurrent sentences of 50 to 100 years for the home invasion conviction, 3 to 15 years for the resisting and obstructing conviction, and 100 to 150 years for the second-degree murder conviction, and he was ordered to pay restitution. The Court of Appeals granted defendant's delayed application for leave to appeal that claimed that defendant's sentences constituted cruel or unusual punishment, his sentencing guidelines range was calculated incorrectly, and he was improperly ordered to pay restitution.

The Court of Appeals *held*:

1. Defendant's sentences for the convictions of first-degree home invasion and second-degree murder were not excessive and did not constitute cruel or unusual punishment. Defendant's 100-year minimum sentence for the second-degree murder conviction was within the sentencing guidelines range of 365 to 1,200 months or life. A sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual. Defendant failed to present evidence to overcome the presumptive proportionality of his sentence. Defendant failed to demonstrate that his sentences are cruel or unusual in comparison to the penalties imposed for other crimes in this state or for the same crimes in other states.

2. The trial court correctly scored 50 points under offense variable 6, MCL 777.36(1)(a), the offender's intent to kill or injure another individual, because the killing was committed in the course of a second-degree home invasion, an enumerated offense. In addition, the scoring of 50 points was appropriate under offense variable 6 because the killing was the murder of a peace officer.

3. Even if the trial court erred by scoring 10 points under

offense variable 9, MCL 777.39, the number of victims, a 10 point reduction in the scoring would not alter defendant's sentencing guidelines range. Resentencing is not required when a scoring error does not alter the appropriate guidelines range.

4. The trial court, in determining the amount of restitution, was entitled to rely on the accuracy of the claimed amount that the incident cost the homeowner as stated in the presentence investigation report because defendant failed to make a proper objection or request an evidentiary hearing regarding the amount of the homeowner's costs. However, the trial court erred by 10 cents in its calculation and the matter was remanded for the correction of the amount of restitution from $5,890.33 to $5,890.23. Although it has no effect on the sentence imposed, the case was also remanded for the administrative task of correcting defendant's judgment of sentence to reflect a sentence of 3 to 15 years for the resisting and obstructing conviction instead of the 50 to 100 year sentence erroneously stated in the judgment of sentence.

Affirmed and remanded.

1. CONSTITUTIONAL LAW — CRUEL OR UNUSUAL PUNISHMENT.

The Court of Appeals, in determining whether punishment is cruel or unusual, considers the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state as well as the penalty imposed for the same crime in other states.

2. SENTENCES — CONSTITUTIONAL LAW — SENTENCING GUIDELINES — PROPORTIONATE SENTENCES.

A sentence within the sentencing guidelines range is presumptively proportionate; a proportionate sentence is not cruel or unusual punishment; a defendant must present unusual circumstances that would render a presumptively proportionate sentence disproportionate in order to overcome the presumption.

3. CRIMINAL LAW — RESTITUTION — CRIME VICTIM'S RIGHTS ACT.

The Crime Victim's Rights Act mandates that a defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate; a trial court must order the defendant to pay restitution and the amount must fully compensate the defendant's victims (MCL 780.766[2]).

4. SENTENCES — PRESENTENCE INVESTIGATION REPORTS — PRESUMPTION OF ACCURACY.

A sentencing court may treat the contents of a defendant's presentence investigation report as presumptively accurate and rely on the report unless the defendant effectively challenges an adverse factual allegation in the report.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appeallate Division, and *Danielle Walton*, Assistant Prosecuting Attorney, for the people.

Arthur H. Landau for defendant.

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

RIORDAN, P.J. We granted defendant's delayed application for leave to appeal his convictions of first-degree home invasion, MCL 750.110a(2), resisting and obstructing a police officer, MCL 750.81d(1), and the second-degree murder of Livonia Police Officer Larry Nehasil, MCL 750.317. These convictions were a result of defendant's plea of *nolo contendere* to each of the charges. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent sentences of 50 to 100 years for the first-degree home invasion conviction, 3 to 15 years for the resisting and obstructing conviction,[1] and 100 to 150 years for the second-degree murder conviction. Defendant now argues that his sentences constitute cruel or unusual punishment, his sentencing guidelines range was calcu-

[1] The judgment of sentence erroneously states that defendant was sentenced to 50 to 100 years for the resisting and obstructing conviction. We will remand to the trial court for the administrative task of correcting defendant's judgment of sentence to reflect the sentence of 3 to 15 years for the resisting and obstructing conviction.

lated incorrectly, and he was improperly ordered to pay restitution. We affirm defendant's convictions and sentences but remand for the administrative task of correcting his judgment of sentence and the amount of restitution ordered.

I. FACTUAL BACKGROUND

Livonia police officers received a tip that defendant, his wife, and his brother were involved in a series of unsolved home invasions. On January 17, 2011, after surveilling defendant's behavior for a time, police officers watched him and his brother drive to a house on Glenwood Drive in Walled Lake. Before they had arrived on Glenwood, defendant and his brother had agreed to a plan whereby they would enter the house and steal various items such as guns and cash, as had been their practice in their previous home invasions. After they reached the residence, defendant's brother stepped out of the car and approached the house. Defendant remained in the car and drove it a short distance away. Defendant then returned to the house with the car and parked. When entering the Glenwood house, defendant and his brother broke one window and damaged another; they also damaged a sliding door and a garage door. In addition, they damaged the wood floors and parts of the drywall during their time inside the house.

After finding a safe, defendant left the house and went to get the vehicle. He intended to move it closer to the house so that it would be easier for him and his brother to load the safe they planned to steal. The police officers watching the front of the Glenwood house saw defendant enter the vehicle and decided the time had come to apprehend him.

Officer Nehasil was positioned in the back of the Glenwood house so he could arrest anyone who ran out

from that direction. Police officers approached defendant's vehicle on the street in front of the house and he tried to drive it around them. While he was attempting to flee, the police used one of their own cars to hit defendant's vehicle and force it into a snowbank. In an apparent last-ditch effort to avoid arrest, defendant got out of the vehicle and ran. Despite repeated commands to stop, he continued to flee until the police physically stopped him.

While the police in the front of the Glenwood house were occupied with trying to arrest defendant, a series of rapid gunshots rang out. Officers ran to the back of the house where they discovered Officer Nehasil's body lying on the ground. Defendant's brother was lying on top of the police officer. Both men were dead. Two guns were found at the scene, one belonging to Officer Nehasil and the other belonging to the owner of the Glenwood house. Defendant claimed that he did not see his brother with a gun before or during the home invasion. However, defendant stated that he and his brother had committed numerous home invasions in the past and it had been their practice to steal guns during these excursions. Defendant said that after stealing the guns he and his brother would sometimes sell them to drug dealers.

In exchange for dismissing a charge of first-degree murder, defendant pleaded *nolo contendere* to charges of first-degree home invasion, resisting and obstructing, and second-degree murder. Defendant was sentenced to 50 to 100 years for the first-degree home invasion conviction, 3 to 15 years for the resisting and obstructing conviction, and 100 to 150 years for the second-degree murder conviction.[2] Defendant now appeals.

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[2] The habitual offender statute allows a trial court to "impose a maximum sentence beyond the statutory maximum upon a determina-

II. CRUEL OR UNUSUAL PUNISHMENT

A. PRESERVATION AND STANDARD OF REVIEW

Defendant did not advance a claim below that his sentences were unconstitutionally cruel or unusual, so this issue is unpreserved. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Our review is therefore limited to plain error affecting defendant's substantial rights. *Id*.

B. ANALYSIS

Defendant first argues that his sentences for the convictions of first-degree home invasion and second-degree murder are excessive and constitute cruel or unusual punishment as prohibited by state and federal constitutions.[3] We disagree. The protection afforded by the Eighth Amendment is the protection from "inherently barbaric punishments under all circumstances." *Graham v Florida*, 560 US ___, ___; 130 S Ct 2011, 2021; 176 L Ed 2d 825, 835 (2010). As the United States Supreme Court has recognized, "the essential principle" at issue is that "the State must respect the human attributes even of those who have committed serious crimes." *Id*., 560 US at ___; 130 S Ct at 2021; 176 L Ed 2d at 835. "In deciding if punishment is cruel

tion that the defendant 'has been convicted of any combination of 3 or more felonies or attempts to commit felonies . . . .' " *People v Drohan*, 475 Mich 140, 161 n 13; 715 NW2d 778 (2006), quoting MCL 769.12(1).

[3] Defendant correctly notes that "the Michigan provision prohibits 'cruel *or* unusual' punishments, while the Eighth Amendment bars only punishments that are both 'cruel *and* unusual[,]' " *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). Defendant has failed to demonstrate error requiring reversal under either provision. See also *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011) ("If a punishment 'passes muster under the state constitution, then it necessarily passes muster under the federal constitution.' ") (citation omitted).

or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011).

Defendant's 100-year minimum sentence for his second-degree murder conviction is within his sentencing guidelines range of 365 to 1,200 months or life. A sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Defendant contends that his sentences are cruel or unusual because of his age, 49 years old, which effectively means he will spend the remainder of his life in jail. Yet, defendant incorrectly assumes that he is entitled to parole. That assumption is not supported by Michigan law. See *People v Merriweather*, 447 Mich 799, 809; 527 NW2d 460 (1994) (concluding there was no legislative intent that all defendants must be eligible for parole); see also *People v Carp*, 298 Mich App 472, 533 n 185; 828 NW2d 685 (2012), quoting *Crump v Lafler*, 657 F3d 393, 404 (CA 6, 2011) ("There is no legitimate claim of entitlement to parole [in Michigan], and thus no liberty interest in parole.") (quotation marks and citation omitted).

Furthermore, defendant's age is insufficient to overcome the presumptive proportionality of his sentences, especially considering his lengthy criminal record and

the gravity of his offenses. At the plea hearing, the trial court noted that defendant was charged as a fourth-offense habitual offender and that the crimes subjected him to a potential life sentence. Defendant had seven prior felonies and nine prior misdemeanors, and during the week of his sentencing he pleaded guilty in another matter to charges of home invasion and receiving and concealing a stolen firearm.

Defendant's extensive criminal record establishes a pattern of violence and disregard for others. The evidence indicates that the instant crimes were part of a string of recent home invasions in which defendant, his wife, and his brother planned and participated. Defendant admitted that they were looking for money, jewelry, and guns and that in the recent home invasions he had taken two or three guns and sold them for drugs. While defendant claims that he had no knowledge that his brother had a gun in his possession during the home invasion in which Officer Nehasil was murdered, his admission that they were looking for guns to sell and the inherently dangerous nature of a home invasion belies his claimed naiveté that violence would likely occur.

Defendant also has failed to demonstrate that his sentences are cruel or unusual in comparison to the penalties imposed for other crimes in this state or for the same crimes in other states. *Brown*, 294 Mich App at 390. Defendant offers no argument or evidence that, in relation to other crimes and other states, his sentences were somehow abnormally harsh. As we have repeatedly stated, an appellant may not simply "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." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (quotation marks and citation omitted).

Thus, in light of the egregious nature of his offenses and the comparable sentences imposed on others, defendant has failed to demonstrate that his sentences were cruel or unusual and that there was any error requiring reversal.

III. SCORING OF SENTENCING GUIDELINES

A. STANDARD OF REVIEW

Defendant next claims that he is entitled to resentencing because the trial court incorrectly scored offense variables (OVs) 6, MCL 777.36, and 9, MCL 777.39.

"The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). We also review for clear error the trial court's findings of fact at sentencing. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). We will affirm a minimum sentence that is within the guidelines sentence range unless the trial court erred in the scoring of the sentencing guidelines or relied on inaccurate information. MCL 769.34(10).

B. ANALYSIS

"A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *Osantowski*, 481 Mich at 111. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (quotation marks

and citation omitted). Further, the goal in construing a statute "is to ascertain and give effect to the intent of the Legislature." *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

In regard to OV 6, MCL 777.36 states, in relevant part:

> (1) Offense variable 6 is the offender's intent to kill or injure another individual. Score offense variable 6 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:
>
> (a) The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer ..... 50 points

Defendant argues that the trial court erred by scoring 50 points under OV 6 because he did not have the requisite intent to kill since he was merely an accomplice to his brother and his brother did the shooting. Contrary to defendant's assertion, his intent to kill and whether he pulled the trigger are irrelevant when a killing occurs under particular circumstances. According to the plain language of the statute, the scoring of 50 points is appropriate when the offender has the premeditated intent to kill *or* the killing was committed in the course of the commission of one of the enumerated offenses. MCL 777.36. Defendant pleaded *nolo*

contendere to the charge of first-degree home invasion, an enumerated offense. During the home invasion, Officer Nehasil was shot and killed. Thus, a score of 50 points was appropriate because a killing was committed in the course of an enumerated felony. Alternatively, the scoring of 50 points is appropriate when "the killing was the murder of a peace officer[.]" MCL 777.36(1)(a). Defendant pleaded *nolo contendere* to a charge of second-degree murder, and the record supports the court's conclusion that the murder occurred during the course of a home invasion and that the victim was a peace officer. Therefore, defendant's participation in the first-degree home invasion was sufficient to support a score of 50 points under the plain language of the statute.

Defendant also challenges the scoring of OV 9, MCL 777.39. OV 9 requires the scoring of 10 points where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss[.]" MCL 777.39(1)(c). The sentencing court must "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a).[4] Defendant argues that the trial court erred by scoring 10 points for OV 9 because there was only one person placed in danger of physical injury or death, Police Officer Nehasil. However, defendant's brother fired multiple shots in a residential neighborhood. There also was at least one resident present in the area, who was referred to in the presentence report and who witnessed defendant's brother fleeing out of the back of the garage moments

[4] The Michigan Supreme Court has held that it is error to consider "the entire criminal transaction" when scoring OV 9. *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). Thus, it "must be scored giving consideration to the sentencing offense alone[.]" *Id*.

before the shooting. Furthermore, even if the trial court erred by scoring 10 points under OV 9, a 10-point reduction in the scoring would not alter defendant's sentencing guidelines range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Hence, defendant has failed to demonstrate that he is entitled to resentencing on the basis of errors in calculating OV 6 and OV 9.

IV. RESTITUTION

A. PRESERVATION AND STANDARD OF REVIEW

Lastly, defendant contends that the trial court erred by ordering him to pay restitution in the amount of $5,890.33. Because defendant raised this issue for the first time on appeal, we review his claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. ANALYSIS

Section 16(2) of the Crime Victim's Rights Act, MCL 780.766(2), mandates that a defendant "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." This is not discretionary, because a trial court "must order the defendant to pay restitution and the amount must fully compensate the defendant's victims." *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2012). Also, at sentencing the trial court may treat the contents of the presentence investigation report as presumptively accurate. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). The trial court is entitled to rely on the report

unless the defendant effectively challenges an adverse factual allegation in the report. *Id*.

In the instant case, the presentence investigation report contained information regarding the costs of this incident to the homeowner. The homeowner indicated that he and his family received professional counseling after the home invasion, costing $880. He also requested $1,000 reimbursement for the insurance deductible he paid relating to the damage caused during the home invasion and $1,131.46 for carpet replacement, which his insurance did not cover. In addition, his insurance company incurred $2,878.77 in costs paid to the homeowner. Although there was ample opportunity, defendant never challenged these factual assertions in the report. Thus, the trial court was entitled to rely on the accuracy of the amounts provided in the presentence investigation report. While defendant now requests a remand for an evidentiary hearing, it was "incumbent on the defendant to make a proper objection and request an evidentiary hearing. Absent such objection, the court is not required to order, *sua sponte*, an evidentiary proceeding to determine the proper amount of restitution due." *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997). Accordingly, we decline to remand this matter for such an evidentiary hearing. However, we note that the total restitution amount indicated in the presentence investigation report was $5,890.23, not the $5,890.33 ordered by the trial court. The trial court's calculation was inaccurate by 10 cents. This should be administratively corrected on remand.

V. CONCLUSION

Defendant has failed to demonstrate that his sentences constitute cruel or unusual punishment, that he

is entitled to resentencing on the basis of errors in calculating OV 6 and OV 9, and that the trial court erred by ordering him to pay restitution. We affirm defendant's convictions and sentences, although we remand for the administrative task of correcting the restitution amount of $5,890.33, by 10 cents to $5,890.23. Although it has no effect on the sentence imposed by the trial court, we also remand for the administrative task of correcting defendant's judgment of sentence to reflect the trial court's imposition of a sentence of 3 to 15 years for the resisting and obstructing conviction. We do not retain jurisdiction.

HOEKSTRA and O'CONNELL, JJ., concurred with RIORDAN, P.J.

MAGEN v DEPARTMENT OF TREASURY

Docket No. 302771. Submitted March 13, 2012, at Lansing. Decided February 21, 2013, at 9:15 a.m.

Ruth Magen brought an action in the Court of Claims against the Department of Treasury, appealing its assessment of tax deficiencies resulting from its determination that the distributions from her late husband's private individual retirement account (IRA), which had been rolled over from a 403(b) public retirement account and deducted from the couple's annual gross income on their joint tax returns in 2005 through 2007, were not fully tax-deductible under the Income Tax Act, MCL 206.1 *et seq*. The court, James R. Giddings, J., granted plaintiff's motion for summary disposition, vacated the assessments, and awarded plaintiff her claimed tax refunds plus interest and costs. Clinton Canady III, J., denied defendant's motion for reconsideration. Defendant appealed.

The Court of Appeals *held*:

The Court of Claims properly concluded that plaintiff's IRA distributions were not subject to Michigan income tax. Under the Income Tax Act, an individual's taxable income is equal to that person's adjusted gross income as defined by federal tax law, subject to certain additions and deductions. MCL 206.30(1)(f)(*i*) directs taxpayers to deduct from their adjusted gross income any retirement or pension benefits received from a public retirement system of or created by the state or its political subdivisions. MCL 206.30(1)(f)(*iii*) provides that "retirement or pension benefits" generally includes distributions from 403(b) accounts. By contrast, MCL 206.30(8)(d)(*i*) provides that retirement and pension benefits do not include amounts received from a plan that allows the employee to set the amount of compensation to be deferred and does not prescribe retirement age or years of service. Normally, a private IRA would fall under MCL 206.30(8)(d) and would not be tax-free. However, given that 403(b) benefits received as a lump-sum payment and deposited in a bank or investment account are not taxed upon withdrawal, harmonizing the statutes by allowing deductions such as those at issue was fully consistent with the Legislature's intent to excuse from state income tax those sums earned by state employees and placed, until their retirement, in a 403(b) account.

Affirmed.

Judge WILDER, dissenting, would have reversed and remanded for entry of summary disposition in defendant's favor, noting that, contrary to the Court of Claims' ruling, the benefits at issue were statutorily defined exclusively as distributions and that distributions from private IRAs are not one of the enumerated distributions eligible as deductions to taxable income under MCL 206.30. He further noted that the Legislature's decision to treat public retirement accounts more favorably for taxation purposes was not absurd in light of their lower potential for return on investment than riskier private IRAs.

TAXATION — RETIREMENT AND PENSION BENEFITS — INDIVIDUAL RETIREMENT ACCOUNTS — 403(b) PUBLIC RETIREMENT ACCOUNTS — ROLLOVERS — DISTRIBUTIONS.

Distributions from a private individual retirement account (IRA) are fully deductible from state income taxes if the principal of the IRA wholly originated in a nontaxable 403(b) public retirement account (MCL 206.30).

Lowe Law Firm, P.C. (by *Richard C. Lowe* and *Paul J. Cervenak*), and *Michael Flintoff* for plaintiff.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Heidi L. Johnson-Mehney*, Assistant Attorney General, for defendant.

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

SHAPIRO, J. Defendant, the Department of Treasury, appeals as of right an order granting summary disposition in favor of plaintiff, Ruth Magen, regarding the taxability of distributions from a private individual retirement account (IRA) whose principal wholly originated in a nontaxable 403(b) retirement account. We affirm because placing otherwise tax-free money into an IRA does not create an obligation to pay taxes on that money.

Plaintiff's now-deceased husband, Myron Magen,[1] was formerly employed by Michigan State University.

[1] All references to "Magen" are to the decedent.

While employed, Magen contributed to a 403(b) retirement account sponsored by MSU. Upon his retirement, Magen transferred the 403(b) monies to a private IRA. The entire principal amount in the IRA had previously been held in the MSU 403(b) account. Later, Magen received distributions from the IRA and, in tax years 2005 through 2007, deducted the sums from the state income tax returns he filed jointly with plaintiff.

Defendant disagreed with the Magens' deductions, asserting that the sums were not deductible, and assessed the Magens for the income tax deficiency. Plaintiff appealed in the Court of Claims, which granted summary disposition to plaintiff and vacated the assessments. Defendant appealed in this Court.

Resolution of this case requires that we interpret two provisions of the Income Tax Act, MCL 206.1 *et seq*. One defines certain retirement accounts as not subject to state income tax. A second defines certain retirement accounts that are subject to state income tax. In reaching a conclusion, our primary goal must be to give effect to the intent of the Legislature. *Kessler v Kessler*, 295 Mich App 54, 60; 811 NW2d 39 (2011). The intent of the statutes must be determined from an examination of their language and from an examination of the statute within the structure of the act as a whole. See *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).[2]

In 1967, the Legislature passed the Income Tax Act, under which an individual's taxable income is equal to that person's adjusted gross income as defined by federal tax law, subject to certain additions and deduc-

[2] "When interpreting a court rule or statute, we must be mindful of 'the surrounding body of law into which the provision must be integrated . . . .' " *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005), quoting *Green v Bock Laundry Machine Co*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring).

tions. MCL 206.30(1). Currently, as during the tax years at issue, MCL 206.30(1)(f)(*i*) calls for taxpayers to deduct from their adjusted gross income any "[r]etirement or pension benefits received from a federal public retirement system or from a public retirement system of or created by this state or a political subdivision of this state."

> As used in [MCL 206.30(1)(f)], "retirement or pension benefits" means distributions from all of the following:
>
> (a) Except as provided in subdivision (d), qualified pension trusts and annuity plans that qualify under section 401(a) of the internal revenue code, including all of the following:
>
> * * *
>
> (*iii*) Employee annuities or tax-sheltered annuities purchased under section 403(b) of the internal revenue code by organizations exempt under section 501(c)(3) of the internal revenue code, or by public school systems.
>
> * * *
>
> (d) Retirement and pension benefits do not include:
>
> (*i*) Amounts received from a plan that allows the employee to set the amount of compensation to be deferred and does not prescribe retirement age or years of service. [MCL 206.30(8)].

The parties agree that the 403(b) account in which plaintiff's money originated constituted the type of plan protected by MCL 206.30(8)(a)(*iii*). It is also undisputed that a private IRA would normally fall under MCL 206.30(8)(d), and would not be tax-free. Defendant argues that because the distributions came directly from the private IRA, they must be taxed regardless of the fact that the principal in the IRA originally came from a tax-free retirement plan.

It is not disputed that a state retiree may receive those tax-free benefits in the form of periodic annuity payments

or in the form of a single lump-sum payment at the time of his or her retirement. It is also agreed that if a retiree opts for the lump-sum payment and places that sum in a bank account or an ordinary investment account, the amount deposited is not subject to Michigan income tax when withdrawn. The interest earned on those monies is taxable, but the principal composed of Michigan state pension benefits is not taxed upon withdrawal from the account or sale of the investment purchased.

The state, however, now asserts that if the lump-sum payment is placed into an IRA, the entire principal, i.e. all the pension income, is subject to Michigan income tax, not merely the interest or other gains based on that principal. The state bases this argument on the fact that MCL 206.30(8)(d) provides for taxation of withdrawals from IRAs. However, we cannot simply select one statute to follow and ignore the other. It is instead our responsibility to harmonize them. And in this case, harmonizing the statutes is fully consistent with the Legislature's intent to excuse from state income tax those sums earned by state employees and placed, until their retirement, in a 403(b) account.

IRA withdrawals are fully taxable because the monies normally deposited in such accounts are "tax deferred." Indeed, providing a mechanism for tax deferral of otherwise taxable income is the very reason for the creation of IRAs. Placement of the pension payment in an IRA provides tax *deferral* of federal income tax otherwise due upon receipt.[3] Michigan's Income Tax Act was written to operate the same way. Instead of being taxed at the time that the money is earned, the tax is not applied until the funds are distributed from the IRA. MCL 206.30.

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[3] Michigan has no authority to declare its pension benefits not subject to federal taxes.

However, in this case the income placed into the IRA was not state-*tax-deferred* income; it was state-*nontaxable* income. Obtaining deferral on applicable taxes by rolling those monies over into an IRA does not create a deferred obligation to pay Michigan income tax on monies that were not subject to state income tax to begin with. Moreover, it would be an absurd construction of the statute to conclude that the Michigan Legislature intended to make pension benefits nontaxable unless they were placed in an IRA. We can conceive of no rational basis to make such benefits taxable if placed in an IRA, but not if placed in an ordinary investment account or a bank or in a mattress. The Department of Treasury argues that Magen still got the benefit of his 403(b) account status when he rolled the funds into the IRA, but this is incorrect. The money would not have been taxed going *into* the IRA under any circumstances.

An IRA is a vehicle to defer taxes due, not to create taxes where none exist. The trial court thus properly concluded that plaintiff's IRA distributions were not subject to Michigan income tax.[4]

Affirmed.

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

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[4] Our dissenting colleague fairly observes that if one looks solely at the language of MCL 206.30(8)(d), the Department of Treasury should prevail. What the dissent fails to take into account, however, is that there are *two* statutes at issue here; the Legislature passed them both and it is not for us as judges to simply select one to apply and one to ignore. Rather, it is our role to give effect to each of them and to harmonize them consistently with their language and purpose. Moreover, we cannot, as the dissent wishes to do, resolve this case on the basis of federal income tax law since the whole point of this case is that the applicable *Michigan* tax law, quite unlike the *federal* law, does not defer state income tax on state pensions, but rather eliminates it. Lastly, we reject the dissent's suggestion that we have reached our conclusion because we "perceive a contrary result to be absurd." Our opinion makes no such statement and

WILDER, J. (*dissenting*). I respectfully dissent. I would reverse and remand for entry of summary disposition in favor of defendant because plaintiff was not entitled to deduct from her income any funds distributed from her traditional IRA.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001). This issue also involves the interpretation of a statute, which is a question of law that this Court reviews de novo. *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 493; 791 NW2d 853 (2010).

The primary goal of judicial interpretation is to ascertain and give effect to the intent of the legislative body that created the language. See *Kessler v Kessler*, 295 Mich App 54, 60; 811 NW2d 39 (2011). The first factor in determining legislative intent is the specific language of the legislation. *Capitol Props Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 434; 770 NW2d 105 (2009). "The language of a statute must be accorded its plain and ordinary meaning." *Kessler*, 295 Mich App at 59-60. Furthermore, "[w]hen a statute's language is clear and unambiguous, judicial construction or interpretation is not necessary or permissible." *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 408; 809 NW2d 669 (2011).

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that is not our view. The outcome suggested by the Department of Treasury and the dissent is not absurd. It is, however, based on a flawed analysis given its premise that a statute passed by the Legislature that limits the state's authority to tax its citizens' income can simply be ignored.

Generally, Michigan's income tax liability is derived from a taxpayer's federal adjusted gross income. However, during the tax years relevant in the instant case, Michigan tax law provided: "Deduct the following to the extent included in adjusted gross income: (*i*) Retirement or pension benefits received from a federal public retirement system or from a public retirement system of or created by this state or a political subdivision of this state." MCL 206.30(1)(f)(*i*).[1] Further, during the relevant tax years, MCL 206.30(8) defined "retirement or pension benefits" as "distributions from all of the following:"

> (a) Except as provided in subdivision (d), qualified pension trusts and annuity plans that qualify under section 401(a) of the internal revenue code, including all of the following:
>
> * * *
>
> (*iii*) Employee annuities or tax-sheltered annuities purchased under section 403(b) of the internal revenue code by organizations exempt under section 501(c)(3) of the internal revenue code, or by public school systems.
>
> * * *
>
> (d) Retirement and pension benefits do not include:
>
> (*i*) Amounts received from a plan that allows the employee to set the amount of compensation to be deferred and does not prescribe retirement age or years of service. These plans include, but are not limited to, all of the following:
>
> (A) Deferred compensation plans under section 457 of the internal revenue code.
>
> (B) Distributions from plans under section 401(k) of the internal revenue code other than plans described in subdivision (a)(*iv*).

[1] This provision has since been amended. See 2011 PA 38.

> (C) Distributions from plans under section 403(b) of the internal revenue code other than plans described in subdivision (a)(*iii*).

In ruling in favor of plaintiff, the trial court concluded that "[b]y moving his retirement account, [Magen] did nothing to change [the monies'] character as 'benefits.' They were still 'benefits' realized from his retirement plan because of his MSU employment." The trial court further stated:

> Treasury's mistake is its focus on the word "distribution." The statute does not use the word "distribution"—but rather uses the word "benefits." Presumably, the legislature used the word "benefit" for a purpose. It appears that their intention was to permit public employees, such as Dr. Magen, to receive a full deduction for retirement "benefits" as long as such benefits were accrued and received because of their public service. It is inconsistent with that policy to impose a tax on such benefits simply because the retiree decides, after retirement, to move his/her account to a private IRA.

The trial court's view that the statute does not use the word "distribution"—but rather uses the word "benefits"—was plainly incorrect. The statute precisely defines "retirement or pension benefits" as "distributions" from certain sources. MCL 206.30(8). Thus, contrary to the trial court's interpretation, the benefits at issue are defined *exclusively as distributions*.

There is no dispute that the distributions at issue were from a private IRA. Distributions from private IRAs are not one of the enumerated distributions eligible as deductions to taxable income. While plaintiff argues, and the majority agrees, that there is no public-policy basis to treat as taxable income funds distributed from a private IRA that originated in a tax-free 403(b) account, the plain language of the

statute demonstrates clearly the Legislature's intent to distinguish between distributions from "public" retirement accounts and "private" retirement accounts. Moreover, the statutory scheme makes no room for inquiry into the original source of the funds being distributed. Thus, while plaintiff, the trial court, and the majority may disagree with this policy, the Legislature has clearly chosen to give preferential treatment to distributions from public retirement accounts by limiting the designation of funds eligible for deduction to public rather than private accounts.

In support of its analysis affirming the result reached by the trial court, the majority notes that 403(b) funds deposited into, and then distributed from, a bank account or an ordinary investment account would not be taxable when distributed, and then argues by analogy that 403(b) funds deposited into an IRA should similarly not be taxable when those funds are later distributed from the IRA. However, the reason withdrawals from a bank account or an investment account are not subject to income tax upon distribution is that the distribution of funds from these types of accounts would not be considered income. As noted previously, for state income tax purposes, a taxpayer's income is derived from the taxpayer's federal adjusted gross income. The IRS defines "gross income" as "all income from whatever source derived." 26 USC 61(a); see also *Knight v Internal Revenue Comm'r*, 552 US 181, 184; 128 S Ct 782; 169 L Ed 2d 652 (2008). "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets . . . ." *Eisner v Macomber*, 252 US 189, 207; 40 S Ct 189; 64 L Ed 521 (1920) (citations and quotation marks omitted). A person withdrawing money from

an investment account or bank account is moving assets already earned and not necessarily deriving "gain" or "wealth" by the withdrawal of those assets.[2]

In contrast, withdrawals and disbursements from traditional IRAs are specifically considered income subject to taxation under the Internal Revenue Code. See 26 USC 408(d)(1) ("[A]ny amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee . . . ."); *Taproot Admin Servs, Inc v Internal Revenue Comm'r*, 679 F3d 1109, 1112 n 4 (CA 9, 2012) (noting that one of the hallmark traits of a traditional IRA is "the inclusion of distributions in gross income"). Hence, there is no question that the disbursements from the IRA are to be included in the taxpayer's gross income.

The majority concedes that IRA withdrawals are generally taxable, but it concludes that such withdrawals are taxable only on the basis that funds deposited into an IRA become "tax deferred" until such time as the funds are withdrawn. The majority then reasons that the monies at issue here, which were unquestionably distributed from plaintiff's IRA, should not be taxed because the monies deposited into plaintiff's traditional IRA were regarded as state-nontaxable income in the first instance. I disagree with this analysis. While the deposits of funds into traditional IRAs may have a certain "tax deferral" *effect*, the statutory scheme actually refers, not to tax *deferral*, but to *contributions* and *deductions* instead. Thus, taxpayers can deduct *contributions* to a traditional IRA from their income, *Rousey v Jacoway*, 544 US 320, 323; 125 S Ct

[2] Interest earned on funds held in an investment account or a bank account constitutes an addition to wealth and, as such, *is* considered income. 26 USC 61(a)(4).

1561; 161 L Ed 2d 563 (2005), citing 26 USC 219(a), and upon *distribution* from the IRA, these same funds are then taxable as income.[3]

As is clear from the language of MCL 206.30(1)(f), the Legislature recognized that public retirement monies, such as those from 403(b) accounts, are treated as part of annual gross income under the Internal Revenue Code, but it then allowed for the distribution of these monies to be *deducted* from annual gross income, thereby creating a nontaxable *effect*. Because the Legislature provided no such deduction for distributions from a traditional IRA, the majority here sanctions a deductible event not contemplated by the plain language of the statute, for the reason that it perceives a contrary result to be absurd. It is not for this Court to judge the wisdom or desirability of legislative policy; instead, our role simply is to interpret and give effect to the words in the statute. *Calovecchi v Michigan*, 461 Mich 616, 624; 611 NW2d 300 (2000). In any event, I perceive no absurd result in a legislative determination to treat retirement accounts available only to public employees more favorably than private, traditional retirement accounts. For one thing, the investment risk associated with public retirement accounts could plausibly be much less than the level of risk associated with private, traditional IRAs. Given the variable levels of risk that might be available under each vehicle, a private IRA might render a higher investment return, even after tax, than would a less risky public retirement account, and it would not be irrational, and is certainly within its prerogative, for the

[3] Note also that a taxpayer can contribute previously taxed income into a Roth IRA, and deduct income distributions from the Roth. See *Taproot Admin Servs*, 679 F3d at 1112 n 4.

Legislature to provide more favorable tax treatment to the less lucrative retirement vehicle available to public employees.

For the above reasons, I respectfully dissent.

PEOPLE v DUNIGAN

Docket No. 306654. Submitted February 7, 2013, at Detroit. Decided February 26, 2013, at 9:00 a.m. Leave to appeal denied, 494 Mich 870.

An Oakland Circuit Court jury, Leo Bowman, J., convicted Antonio Dunigan of second-degree home invasion, MCL 750.110a(3), for the theft of a cashbox from his girlfriend's home. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 750.110a(3), second-degree home invasion requires proof that the defendant entered a dwelling by breaking or without the permission of any person in ownership or lawful possession or control of the dwelling and did so with the intent to commit a felony, larceny, or assault therein or committed a felony, larceny, or assault while entering, present in, or exiting the dwelling. There is no breaking if the defendant had the right to enter the building, which defendant argued he had. The fact that a person is in a dating relationship, however, does not entitle that person to be present in his or her partner's dwelling at will. The victim had affirmatively refused defendant's requests for a key, a garage door opener, and alarm access codes for her house. The record overwhelmingly showed that defendant had no right to be in the house at the time of the invasion.

2. Defendant also argued that there was insufficient evidence to prove that he was the perpetrator. While there was a dearth of direct evidence that he committed the crime, the circumstantial evidence was substantial, including the victim's testimony about defendant's actions and his returning stolen items from the cashbox, shoe prints that matched defendant's shoes, and testimony that defendant spent the night of the home invasion gambling using $100 bills, the denomination of approximately 100 of the bills in the cashbox. Viewed in the light most favorable to the prosecution, there was sufficient evidence for the jury to conclude beyond a reasonable doubt that defendant entered his girlfriend's home without permission and with the intent to commit a larceny in it.

3. Defendant was not denied the right to a fair trial because, from a review of the entire record, one juror was observed sleeping during the first day of testimony. Juror misconduct will not warrant a new

trial unless the party seeking the new trial can show that the misconduct affected the impartiality of the jury or disqualified the jurors from exercising the powers of reason and judgment. The record does not reveal egregiousness of that sort. The trial court properly admonished the juror, and there is no indication of what, if any, testimony the juror missed. Defendant failed to articulate how he was prejudiced and made only the bare assertion that the juror could not fairly and competently consider the charges against him and therefore was not qualified to give a verdict.

4. Defendant similarly failed to support his contention that his trial counsel was ineffective for failing to seek the exclusion of the juror or jurors allegedly sleeping. A defendant must at a minimum establish that any mistake made by counsel prejudiced him or her, meaning that there was a reasonable probability that the proceedings would have had a different outcome if counsel had not made the alleged error. Defendant did not show that the sleeping juror affected the outcome of the proceedings. Furthermore, assuming that the juror missed any testimony, it would have been testimony from the prosecution's witnesses, and defense counsel could reasonably have made a strategic decision to assume that the juror's missing that testimony would have helped the defense. A reviewing court will not substitute its judgment for that of counsel regarding matters of trial strategy.

5. Defendant argued that he was denied his right of self-representation under the Sixth Amendment, Const 1963, art 1, § 13, and MCL 763.1. To invoke the right of self-representation, (1) a defendant must make an unequivocal request to represent himself or herself, (2) the trial court must determine that the choice to proceed without counsel is knowing, intelligent, and voluntary, and (3) the trial court must determine that the defendant's acting as his or her own counsel will not disrupt, unduly inconvenience, or burden the court and the administration of the court's business. Defendant did not provide a transcript on appeal, and the record did not show an unequivocal request to represent himself.

6. The prosecutor's comments during closing argument that the victim's testimony was uncontroverted were proper argument. Defendant argued that the comments constituted prosecutorial misconduct because only he could have contradicted the testimony, so the comments interfered with his right against self-incrimination. The constitutional privilege against self-incrimination and the right to due process restrict the use of a defendant's silence in a criminal trial. However, the prosecutor may fairly respond to defense arguments. The comments were a

proper response to defendant's arguments and theory of the case that the entire case against him rested on the victim's testimony. The trial court gave clear instructions that the attorneys' arguments were not evidence and on the burden of proof and defendant's right to not testify. Defense counsel was not ineffective for failing to raise a meritless objection to the comments.

7. Defense counsel was also not ineffective for failing to obtain casino records that defendant maintained were exculpatory or provided impeachment evidence. Decisions regarding what evidence to present are presumed to be matters of trial strategy, and a reviewing court will not second-guess them. The records did not provide an alibi and might have suggested to the jury a motive for defendant to commit the crime.

Affirmed.

1. BURGLARY — SECOND-DEGREE HOME INVASION — ENTERING A DWELLING WITHOUT PERMISSION — RIGHT TO BE PRESENT IN BUILDING — DATING RELATIONSHIPS.

Second-degree home invasion requires proof that the defendant entered a dwelling by breaking or without the permission of any person in ownership or lawful possession or control of the dwelling and did so with the intent to commit a felony, larceny, or assault therein or committed a felony, larceny, or assault while entering, present in, or exiting the dwelling; there is no breaking if the defendant had the right to enter the building, but the fact that a person is in a dating relationship does not entitle that person to be present in his or her partner's dwelling at will (MCL 750.110a[3]).

2. CONSTITUTIONAL LAW — SELF-REPRESENTATION — REQUESTS.

To invoke the right of self-representation, (1) a defendant must make an unequivocal request to represent himself or herself, (2) the trial court must determine that the choice to proceed without counsel is knowing, intelligent, and voluntary, and (3) the trial court must determine that the defendant's acting as his or her own counsel will not disrupt, unduly inconvenience, or burden the court and the administration of the court's business (US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1).

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.

State Appellate Defender (by *Chari K. Grove*) for defendant.

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant appeals as of right his jury trial conviction of second-degree home invasion, MCL 750.110a(3). He was sentenced to 5 to 40 years' imprisonment. We affirm.

Second-degree home invasion requires proof that the defendant entered a dwelling by breaking or without the permission of any person in ownership or lawful possession or control of the dwelling and did so with the intent to commit a felony, larceny, or assault therein or committed a felony, larceny, or assault while entering, present in, or exiting the dwelling. MCL 750.110a. "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). We do not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), and the elements of an offense may be established on the basis of circumstantial evidence and reasonable inferences from the evidence, *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). It is the jury's duty to determine the weight to be accorded any inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant first asserts that the evidence at trial was insufficient to support his conviction. Defendant argues that there was insufficient evidence to establish that he

was the person who committed the home invasion; he also argues that he had a right to be in the dwelling, so he could not properly be convicted of home invasion of that building. We disagree with both contentions.

In reverse order, defendant's contention that he could not be convicted of home invasion because he had a right to be in the dwelling turns on the fact that the dwelling belonged to his girlfriend. "There is no breaking if the defendant had the right to enter the building." *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441(1998). However, the fact that a person is in a dating relationship in no way entitles that person to be present in his or her partner's dwelling at will. The fact that defendant spent some nights at the house is immaterial. In any event, even if we were to presume that defendant had some right to be in the house—which he did not—it is possible to "break and enter" one's own home if one has lost the legal right to be present in that home, for example, by operation of a court order. *People v Szpara*, 196 Mich App 270, 272-274; 492 NW2d 804 (1992). In this case, not only did defendant's relationship not confer any rights upon him, his girlfriend had affirmatively refused his repeated requests for a key, a garage door opener, and alarm access codes for the house. The record overwhelmingly shows, and the jury would have properly concluded, that defendant had no right to be in the house at the time of the invasion.

Moreover, defendant's theory of his defense was that he was not the perpetrator, not that it was technically impossible for him to have committed his charged offense. There would have been no reason for defense counsel to request a jury instruction specifying that the jury must find that defendant could not break into a home that he had a right to enter. Indeed, that instruction would have been inconsistent with, and potentially

detrimental to, defendant's theory that he was not the perpetrator and had been falsely accused by the victim. Failing to request a particular jury instruction can be a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). Trial counsel has "wide discretion in matters of trial strategy . . . ." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Because requesting an instruction about permission to enter could have confused the jury by suggesting that defendant might have been the perpetrator, we conclude that trial counsel's failure to request the instruction has not been shown to be unsound strategy or ineffective assistance.

Defendant also contends, consistently with his theory at trial, that the evidence did not show him to have been the individual who committed the breaking and entering and theft of his girlfriend's cashbox. However, there was only a dearth of *direct* evidence that he committed the crime. The circumstantial evidence was substantial. The victim testified that defendant was the only person who knew where she kept the missing cashbox in her desk drawer and that he had seen the contents—including more than $10,000 in $100 bills—recently when she told him that she had won jackpots at the casino. She testified that defendant remained behind her and walked out of the house that morning after her, which was unusual. Positioning himself to leave the house last allowed defendant the opportunity to leave the kitchen door unlocked and unlock the pedestrian door to the garage as he walked to his car, which was parked at the street. The victim also recognized shoe prints left in the kitchen after the break-in as matching defendant's work shoes. Notably, there was no sign of a forced entry, the footprints in the house matched defendant's work boots, and nothing in the house was disturbed other than the cashbox, about which only defendant knew.

Additionally, the victim suspected defendant almost immediately given defendant's unusual behavior when the victim noticed that her cashbox was missing. When she questioned defendant the next day, defendant admitted that he had stolen the cashbox, which also contained a flash drive and paperwork. Defendant returned the flash drive to her and explained that he had used some of the money to repair his car and gambled away the rest. Defendant also explained that he had bound the paperwork with a rubber band and dropped it into a mailbox. He accompanied her to the mailbox and then to the post office in an attempt to retrieve the bundle. The post office window supervisor confirmed the visit and testified that the rubber-banded paperwork bundle turned up at the post office the next day. A private investigator hired by the victim had observed defendant on the night of the home invasion gambling heavily using $100 bills. The prosecutor also established that defendant had a motive to steal because he had been unemployed for many months and had a gambling problem.

In summary, the evidence, when viewed in the light most favorable to the prosecution, strongly supported the conclusion that defendant entered the victim's home without permission and with the intent to commit a larceny therein. Therefore, the prosecutor presented sufficient evidence to conclude that the elements of second-degree home invasion were proved beyond a reasonable doubt.

Defendant next contends that he was denied his right to a fair trial because two jurors were noticed to be sleeping during the first day of testimony. Defendant further contends that trial counsel was ineffective for failing to seek the jurors' exclusion. We disagree with both contentions.

An allegation of juror misconduct, even if the alleged misconduct did actually occur, will not warrant a new trial unless the party seeking the new trial can show " 'that the misconduct [was] such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment.' " *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960) (citation omitted). Simply put, the record does not reveal any such egregiousness. Indeed, the record reveals, contrary to defendant's assertion, that only one juror had been observed to be sleeping. The trial court properly admonished the juror, but there is no indication of what, if any, testimony the juror missed. More importantly, defendant fails to articulate how he was prejudiced. He only makes the bare assertion that the juror could not fairly and competently consider the charges against him and therefore was not qualified to give a verdict. Based on the entire record of this trial, defendant fails to demonstrate that this assertion has any basis in fact.

Defendant sought a remand for an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), concerning his counsel's ineffectiveness; however, because this Court denied defendant's motion, review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Among other things, a defendant must at a minimum establish that any mistake made by counsel prejudiced the defendant, meaning there is a reasonable probability that the proceedings would have had a different outcome if counsel had not made the alleged error. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Once again, defendant has not shown that the sleeping juror affected the outcome of the proceedings. Furthermore, assuming the juror missed any testimony, it would have been testimony from the prosecution's witnesses; defense counsel could reason-

ably have made a strategic decision to assume that the juror's missing that testimony would have helped the defense. This Court will "neither substitute[] its judgment for that of counsel regarding matters of trial strategy, nor make[] an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Accordingly, defendant was not denied effective assistance of counsel when defense counsel did not move for the exclusion of Juror No. 119 from the jury.

Defendant next argues that he was denied his constitutional right to represent himself at trial. We disagree.

The right of self-representation is secured by both the Michigan Constitution, Const 1963, art 1, § 13, and by statute, MCL 763.1. The right of self-representation is also implicitly guaranteed by the Sixth Amendment of the United States Constitution. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). To invoke the right of self-representation: (1) a defendant must make an unequivocal request to represent himself, (2) the trial court must determine that the choice to proceed without counsel is knowing, intelligent, and voluntary, and (3) the trial court must "determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id*. at 367-368.

Apparently, a month before trial, defendant and the trial court had a discussion about defendant representing himself. We have not been provided a transcript from that proceeding. Defendant is responsible for providing us a transcript, MCR 7.210(B)(1), and we generally refuse to consider issues for which an appellant has failed to do so, *PT Today, Inc v Comm'r of Fin & Ins Servs*, 270 Mich App 110,

151-152; 715 NW2d 398 (2006). It is apparent from the record that some kind of conversation occurred, but the record does not show that defendant made an unequivocal request. Rather, it appears that defendant's attorney was, for some reason, not present that day, but defendant wished to proceed immediately. The fact that defendant apparently also requested another lawyer at the same proceeding strongly suggests that defendant had not unequivocally asserted his right to self-representation. The record simply does not provide us with a sufficient factual basis for concluding that defendant's right of self-representation was infringed.

Defendant next contends that the prosecutor committed misconduct by commenting during closing argument that the victim's testimony was uncontroverted. Defendant reasons that this was an inappropriate comment because only defendant could have contradicted her testimony, so it interfered with his right against self-incrimination. We disagree.

Claims of prosecutorial misconduct are generally reviewed de novo to determine whether the defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005). The constitutional privilege against self-incrimination and the right to due process restrict the use of a defendant's silence in a criminal trial. *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001). However, the prosecutor may fairly respond to defense arguments. *People v Lawton*, 196 Mich App 341, 353-354; 492 NW2d 810 (1992). Here, defendant's theory of the case, as shown by defense counsel's opening statement and questioning throughout the case, was that the entire case rested on the victim's word alone, that her testimony could not be corroborated or otherwise proved, and that she was not worthy of belief. Defense counsel specifically stated that

the victim was "mad" at defendant and accused him of the crime because she was "a little more serious" in their relationship than he was and that she caught him seeing other women and that "angered her." The record reveals that the prosecutor's comments were proper argument, particularly in response to defendant's arguments and theory of the case that the victim's testimony was not corroborated.

Additionally, the trial court instructed the jurors that they were the sole judges of the evidence and that the attorneys' statements and arguments were not evidence. The court also instructed that the prosecution had the burden to "prove each element of the crime beyond a reasonable doubt," that defendant had "an absolute right not to testify," and that the jurors must not let the fact that defendant did not testify "[a]ffect your verdict in anyway." There is nothing in the record to even suggest that this Court should not presume that the jury followed these clear instructions. See *People v Unger*, 278 Mich App 210, 235-236; 749 NW2d 272 (2008). Finally, defense counsel's failure to object could not be ineffective assistance because counsel cannot be deemed ineffective for failing to object to comments that were proper in the context of this case. Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Finally, defendant argues that counsel was ineffective for failing to obtain casino records that would have provided impeachment and exculpatory evidence. We disagree.

Defense counsel's failure to present certain evidence will only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Moreover, decisions regarding what evidence to present

and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight. *Id*. Defense counsel might very well not have wanted to show the jury hard-copy evidence that defendant, an individual who was unemployed for nearly seven months, was frequently gambling significant amounts of money. Counsel could reasonably presume that the jury, if so informed, would wonder how defendant supported such a habit. The jury could have inferred that defendant had gambled with money taken from the victim, corroborating the investigator's eyewitness testimony. Alternatively, the jury could have inferred that defendant had a strong motive to commit the crime.

Moreover, contrary to defendant's assertions on appeal, the records do not provide defendant an alibi. The casino records show that defendant was present at one casino at a time when he told the police and the victim that he was at the unemployment office, and again later on; all these instances were at times other than when the crime was committed. Records from another casino do not show defendant to have been present on the dates in question, but this evidence is dubious because if defendant had gambled cash without a member card for the casino, there would have been no record of his presence. Consequently, the records do not significantly impeach any of the prosecution's testimony or support defendant's theory of the case. We conclude that it would have been sound trial strategy for counsel to avoid seeking to admit the casino records, so we find no ineffective assistance on that basis.

Affirmed.

SHAPIRO, P.J., and SERVITTO, J., concurred with RONAYNE KRAUSE, J.

DEPARTMENT OF COMMUNITY HEALTH v ANDERSON

Docket No. 309675. Submitted February 8, 2013, at Lansing. Decided February 26, 2013, at 9:05 a.m.

On July 28, 2009, the Department of Community Health, Bureau of Health Professions, Board of Veterinary Medicine Disciplinary Subcommittee (petitioner) filed an administrative complaint alleging that respondent, Cynthia S. Anderson, D.V.M, had violated MCL 333.16221(a) and (b)(*i*) as a result of negligence, failure to exercise due care, and incompetence in her treatment of a female canine on February 18, 2008. Following a hearing on June 23, 2010, a hearing officer issued an amended proposal for decision on December 9, 2010, that, in part, included three findings of fact that indicated that respondent did not ligate the dog's bladder, the dog could still urinate two days after respondent performed the surgery, and vomiting and wrenching can cause slippage of ligatures. The hearing officer therefore recommended that the evidence did not establish any statutory violation by respondent. On February 23, 2012, petitioner issued its findings of fact and conclusions of law that rejected the proposed findings of fact of the hearing officer, applied its own findings of fact, and concluded that the charges that respondent had violated the statutes had been proved by a preponderance of the evidence. Respondent appealed the final order of petitioner that found that respondent had violated the statutes and placed respondent on probation for two years, required respondent to complete 10 hours of continuing education, and assessed a $1,000 fine.

The Court of Appeals *held*:

1. The disciplinary subcommittee's findings of fact and conclusions of law were supported by competent, material, and substantial evidence on the whole record. The Court of Appeals defers to the disciplinary subcommittee's credibility determinations that are supported by competent, material, and substantial evidence on the whole record and, as in this case, are within the expertise of the subcommittee.

2. Petitioner's alleged failure to comply with the mandates of MCL 333.16237(5), that the hearing before the hearing officer and final disciplinary subcommittee action shall be completed within

one year after the department initiates an investigation, and MCL 333.16232(3), that a disciplinary subcommittee shall meet within 60 days after receipt of the recommended findings of fact and conclusions of law from a hearing officer to impose a penalty, does not warrant dismissal of the disciplinary proceedings. Although the statutes contain mandatory language ("shall"), the statutes do not provide a sanction for their violation. The lack of a sanction indicates that the time frames set out in the statutes are primarily guidelines for the disciplinary system at issue. The statutory mandates are designed to provide accountability to the department entrusted with the disciplinary process. The statutes do not confer substantive rights to the individual against whom the allegations are made.

Affirmed.

1. ADMINISTRATIVE LAW — HEARING OFFICERS — DISCIPLINARY SUBCOMMITTEES.

The Board of Veterinary Medicine Disciplinary Subcommittee is not bound by a hearing officer's recommended findings and is vested with the discretion to determine whether the preponderance of the evidence supports or does not support the findings of fact and conclusions of law of the hearing officer (MCL 333.16237[4]).

2. ADMINISTRATIVE LAW — PUBLIC HEALTH — LICENSED PROFESSIONALS — DISCIPLINARY SUBCOMMITTEES.

The time periods in MCL 333.16237(5), which requires that the hearing before a hearing officer and final action by a disciplinary subcommittee shall be completed within one year after the department initiates an investigation of a health-care licensee, and MCL 333.16232(3), which provides that a disciplinary subcommittee shall meet within 60 days after receipt of the recommended findings of fact and conclusions of law from a hearing officer to impose a penalty, are designed to provide accountability to the department entrusted with the disciplinary process and do not confer substantive rights to the licensee; although the statutes contain mandatory language ("shall"), the statutes do not provide a sanction for their violation and primarily provide guidelines for the discipline system at issue.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Robert J. Jenkins* and *Bruce C. Johnson*, Assistant Attorneys General, for petitioner.

Plunkett Cooney (by *John P. Deegan* and *Daniel W. Mabis*) for respondent.

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM. Respondent, Cynthia S. Anderson, D.V. M., appeals by right the March 20, 2012, final order of the Michigan Board of Veterinary Medicine Disciplinary Subcommittee finding that respondent violated MCL 333.16221(a) and MCL 333.16221(b)(*i*). The disciplinary subcommittee found that during a C-section to remove a dead fetus and a diseased uterus, respondent ligated[1] the dog's bladder rather than the uterine stump. The disciplinary subcommittee also found that respondent failed to break down adhesions (scar tissue) to separate the dog's organs before attempting the ligation, which was further evidence of respondent's negligent and incompetent care. The disciplinary subcommittee, in its final order, placed respondent on probation for two years, required her to complete 10 hours of continuing education, and assessed a $1,000 fine. We affirm.

On July 28, 2009, petitioner, Department of Community Health, Bureau of Health Professions, Board of Veterinary Medicine Disciplinary Subcommittee, filed an administrative complaint alleging that respondent had violated MCL 333.16221(a) "consisting of negligence or failure to exercise due care . . . whether or not injury results," and violated MCL 333.16221(b)(*i*), "[p]ersonal disqualifications, consisting of . . . [i]ncompetence." The complaint alleged in ¶ 5:

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[1] To "ligate" is "to bind with or as if with a ligature." *Random House Webster's College Dictionary* (1997). A "ligature" is "anything that serves for binding or tying up, as a band, bandage, or cord." *Id*.

> On February 18, 2008, "Laya," a female canine with a history of caesarians, presented to the facility because her water broke, but she never gave birth. Respondent performed a caesarian section and was given consent to perform a spay procedure. During the procedure, Respondent failed to break down the adhesions and ligated the bladder along with the uterine stump.

At a hearing on June 23, 2010, respondent, John Bumstead, Laya's owner, and several other veterinarians testified. Dr. Kenneth McCrumb, who performed exploratory surgery on Laya on February 25, 2008, also testified. In a statement drafted on February 26, 2008, admitted as Exhibit C, McCrumb wrote that Laya's "bladder had a ligature around it, eliminating 90% of its storage capacity and was necrotic. The uterine stump was represented by a large ball of necrotic tissue." McCrumb also found Laya's ureters were "unattached to the bladder and ending in the abdomen [and] were depositing urine into the abdomen and not into the bladder, consequently urine was leaking from the incision." Laya was euthanized.

Respondent testified, denying that she had ligated Laya's bladder or severed the dog's ureters. Respondent also testified that on February 20, 2008, after Bumstead brought Laya back to respondent's clinic because of her deteriorating condition, she had observed Laya urinating—something not possible if Laya's bladder were tied off. This claim was supported by a file note dated February 20, 2008, at 4 p.m.: "urination noted." But other evidence indicated that after the February 18 surgery Laya was leaking fluid from her incisions. Bumstead testified that he took Laya back to respondent's clinic two days after the surgery because "her teeth were chattering, I mean, she wasn't eating. She wasn't peeing. She wasn't pooping. So she wasn't doing

anything that you would expect of a dog that's in recover."

On December 9, 2010, the hearing officer issued an amended proposal for decision that included findings 4 (respondent did not ligate the dog's bladder), 6 (Laya could still urinate two days after surgery), and 7 (vomiting and wrenching can cause slippage of ligatures). In her proposed conclusions of law, the hearing officer noted that the evidence did not contradict respondent's testimony that she observed urination days after the surgery, which veterinarians for both parties agreed would not have been possible if the dog's bladder had been ligated during surgery two days previously. The hearing officer also accepted proffered defense expert testimony theorizing that there was slippage of a ligature due to wrenching caused by Laya's vomiting. Consequently, the hearing officer recommended that the evidence did not establish any violation of general duty, negligence or failure to exercise due care under MCL 333.16221(a) nor did it establish incompetence under MCL 333.16221(b)(*i*).

On February 23, 2012, the disciplinary subcommittee issued its findings of fact and conclusions of law, rejecting the hearing officer's proposed findings 4, 6, and 7. With respect to proposed finding 4, the disciplinary subcommittee found that respondent did ligate the dog's bladder during the surgery on February 18, 2008. The disciplinary subcommittee found compelling Dr. McCrumb's February 26, 2008, statement regarding what he found a week after respondent's surgical treatment of Laya.

The disciplinary subcommittee also rejected proposed finding 6, reasoning that:

> . . . Dr. McCrumb observed that the ureters were not attached to the bladder, the bladder was necrotic, and the

> ureters were depositing urine into the abdomen, not the bladder. Additionally, the owner brought the dog back to Respondent specifically because the dog had not urinated or defecated since being brought home from Respondent's clinic. . . . Therefore, . . . the dog did not have the ability to urinate as Respondent documented.
>
> In addition, when questioned as to whether the dog could urinate if the bladder had been tied off prior to February 20, 2008, Dr. McCrumb testified as follows: "I wouldn't think so because there was essentially no bladder to produce urine." . . . Also, Dr. McCrumb testified that the ureters were not connected to the bladder, the bladder was non-functional and the abdomen was full of fluid determined to be urine coming from the two detached ureters.

The disciplinary subcommittee also rejected finding 7, which theorized that a ligature might have slipped when the dog vomited. The disciplinary subcommittee found that a properly placed ligature would not slip in this way, reasoning as follows:

> During his exploratory surgery, Dr. McCrumb had to break down additional adhesions to identify the bladder and uterine stump. The bladder and uterus are not naturally attached. The ligatures would not move from one organ to another, as ligatures are designed to be tight enough to cut off blood flow. Therefore, vomiting and wrenching could not cause slippage of ligatures if properly placed. The Disciplinary Subcommittee notes that the bladder was disconnected from the ureters and necrotic, which indicates the blood flow to the bladder was cut off by the ligatures. Therefore, the Disciplinary Subcommittee rejects Findings of Fact 7.

Applying its own findings of fact, the disciplinary subcommittee rejected the hearing officer's proposed conclusion of law that respondent had not violated MCL 333.16221(a) and MCL 333.16221(b)(*i*). In addition to the findings summarized already, the disciplinary subcommittee relied on respondent's own testimony:

> Respondent admitted that she failed to break down the adhesions and separate the organs before attempting ligation, causing the structures to remain stuck together, which the Disciplinary Subcommittee concludes is further evidence of Respondent's negligent and incompetent care. As previously stated, Dr. McCrumb could not identify the bladder and uterine stump until he removed the adhesions. Therefore, the Disciplinary Subcommittee concludes the Respondent could not have been able to identify to what organ she attached the ligatures.

The disciplinary subcommittee summarized its findings of fact and conclusions of law that respondent "practiced below the minimal standard of care as a veterinarian and that Respondent was incompetent in her treatment of the dog." The disciplinary subcommittee concluded that the charges were proved by a preponderance of the evidence: that respondent had violated MCL 333.16221(a) and MCL 333.16221(b)(*i*) as alleged in the complaint.

Respondent first argues that the disciplinary subcommittee's findings of fact and conclusions of law are not supported by competent, material, and substantial evidence on the whole record. We disagree.

Appellate review of agency final decisions, findings, rulings, and orders regarding regulated professions is provided for and limited by Const 1963, art 6, § 28. "This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law[.]" *Id*. There is no claim in this case that the disciplinary subcommittee's findings and conclusions were not authorized by law. Also, "in cases in which a hearing is required," as in this case, appellate review includes whether the agency's final decisions, findings, rulings, and orders "are supported by competent, material and substantial evidence on the whole record." *Id*.

Although the agency was required to prove its case by the preponderance of the evidence in the proceedings below, MCL 333.16237(4); *Morreale v Dep't of Community Health*, 272 Mich App 402, 405; 726 NW2d 438 (2006), appellate review does not entail a determination de novo whether this standard was satisfied. "A reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by evidence on the record or because the court might have reached a different result." *Dep't of Community Health v Risch*, 274 Mich App 365, 373; 733 NW2d 403 (2007). Rather, the whole record must be reviewed to determine whether "competent, material and substantial evidence" supported the agency's action. Const 1963, art 6, § 28. "Substantial evidence" is that which " 'a reasonable person would accept as sufficient to support a conclusion.' " *Risch*, 274 Mich App at 372, quoting *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). To satisfy this standard there must be more than a scintilla of evidence, but less than a preponderance of the evidence may be enough. *Id*.; see also *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011).

Administrative findings of fact and conclusions of law must also be accorded deference, especially when based on credibility determinations. *Risch*, 274 Mich App at 372. "[S]uch findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence." *Id*. Moreover, an appellate court must generally defer to an agency's administrative expertise. See *Huron Behavioral Health*, 293 Mich App at 497 ("great deference should be given to an agency's administrative expertise").

We find that the Board of Veterinary Medicine Disciplinary Subcommittee's findings of fact and conclusions of law "are supported by competent, material and substantial evidence on the whole record." Const 1963, art 6, § 28. Respondent's arguments to the contrary are all rooted in the credibility determinations the disciplinary subcommittee made. This Court will defer to the disciplinary subcommittee's credibility determinations because they are supported by "competent, material and substantial evidence on the whole record" and are within the expertise of the subcommittee. *Huron Behavioral Health*, 293 Mich App at 497; *Risch*, 274 Mich App at 372. Consequently, this Court must affirm the final order of the disciplinary subcommittee.

Respondent's main argument is that the disciplinary subcommittee should have believed her testimony as the hearing officer apparently did. But as the statute clearly provides, the disciplinary subcommittee is not bound by the recommended findings of the hearing officer. See MCL 333.16237(4) (vesting the disciplinary subcommittee with the discretion to determine whether the preponderance of the evidence supports or does not support the findings of fact and conclusions of law of the hearing officer). Moreover, resolving conflicts in the evidence by making credibility determinations is not a basis for reversal of an administrative action. "[I]f the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence." *Risch*, 274 Mich App at 372. Respondent's attack on the credibility of Dr. McCrumb also fails for the same reason. "A reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by

evidence on the record or because the court might have reached a different result." *Id*. at 373.

Likewise, whether to accept the defense theory that ligature slippage caused the devastating result that Dr. McCrumb found during his exploratory surgery is uniquely within the expertise of the disciplinary subcommittee. The disciplinary subcommittee cited "competent, material and substantial evidence," respondent's own admissions, the testimony of Bumstead and Dr. McCrumb, and their own expertise, in rejecting this theory. In addition to deferring to the agency's credibility determinations, "great deference should be given to an agency's administrative expertise." *Huron Behavioral Health*, 293 Mich App at 497.

In sum, the disciplinary subcommittee made credibility determinations and utilized its expertise in making its findings of fact and conclusions of law. The disciplinary subcommittee's findings of fact and conclusions of law "are supported by competent, material and substantial evidence on the whole record." Const 1963, art 6, § 28. As such, this Court must affirm the final order of the Board of Veterinary Medicine Disciplinary Subcommittee.

Respondent next argues that the proceedings below failed to comply with statutory time lines and must be dismissed. Respondent asserts that petitioner failed to comply with MCL 333.16237(5), which plainly requires that "the hearing before the hearings examiner, and final disciplinary subcommittee action shall be completed within 1 year after the department initiates an investigation . . . ." Respondent also argues that petitioner failed to comply with MCL 333.16232(3), which provides: "A disciplinary subcommittee shall meet within 60 days after receipt of the recommended findings of fact and conclusions of law from a hearings

examiner to impose a penalty." We disagree with respondent that petitioner's failure to comply with these statutory time lines warrants dismissal of this disciplinary proceeding.

It is not clear whether this issue has been preserved by raising it in the proceedings below. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). But the issue is one of statutory interpretation and the facts necessary for its decision are not disputed. The Court may overlook preservation requirements if an issue is one of law and the facts necessary for its resolution have been presented. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Statutory interpretation presents a question of law that this Court reviews de novo. *Gen Motors Corp*, 290 Mich App at 369.

In *Dep't of Consumer & Indus Servs v Greenberg*, 231 Mich App 466, 468-469; 586 NW2d 560 (1998), this Court looked at the mandatory language in MCL 333.16232(3), which provides that "[a] disciplinary subcommittee shall meet within 60 days after receipt of the recommended findings of fact and conclusions of law from a hearings examiner to impose a penalty." The optometrist in that case argued that the complaint against him had to be dismissed because the disciplinary subcommittee did not meet within 60 days after receiving the hearing referee's proposal. *Greenberg*, 231 Mich App at 468. This Court rejected the idea that dismissal was required because of the agency's failure to follow the mandate. Although the language in the statute was mandatory, there was no language in the statute providing for a consequence for its violation: "The lack of [a] sanction leads us to believe that the time frames set out and relied on by appellant are primarily guidelines for the disciplinary system at issue

here." *Id*. The *Greenberg* Court also pointed to the fact that MCL 333.16241(8)(a) through (d) requires the Department of Commerce to file annual reports to the Legislature, detailing: investigations, complaints, recommendations by boards and task forces, and actions taken by the disciplinary subcommittee. Importantly, MCL 333.16241(8)(e) provides that the report include "[t]he number of extensions and delays granted by the department that were in excess of the time limits required under this article for each phase of the disciplinary process, and the types of cases for which the extensions and delays were granted." Thus, subsection (8)(e) "explicitly contemplates that delays will occur within the various stages of the disciplinary process." *Greenberg*, 231 Mich App at 469. Consequently, the Court held that a violation of the 60-day period of MCL 333.16232(3) did not require dismissal of a disciplinary action. *Id*.

This same reasoning applies with respect to the one-year time limit of MCL 333.16237(5). The statute itself recognizes that exceptions may occur by providing that "[t]he department shall note in its annual report any exceptions to the 1-year requirement." *Id*. Like it did with MCL 333.16232(3), the Legislature similarly has provided no sanction for the violation of the one-year period of MCL 333.16237(5). Therefore, the reasoning of *Greenberg* applies with equal force to violations of the time requirement of MCL 333.16237(5), so respondent's claim for dismissal fails. *Greenberg*, 231 Mich App at 468-469. The statutory mandates at issue in this case and in *Greenberg* are designed to provide accountability to the department entrusted with the disciplinary process. There is simply nothing in these time-related statutes that confers substantive rights to the individual against whom the allegations are made.

We affirm. As the prevailing party, petitioner may tax costs pursuant to MCR 7.219.

K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ., concurred.

PEOPLE v GRATSCH

Docket No. 305040. Submitted February 7, 2013, at Lansing. Decided February 28, 2013, at 9:00 a.m. Leave to appeal sought.

John D. Gratsch was convicted in the Emmet Circuit Court, Charles W. Johnson, J., of possession of a weapon in a jail, MCL 801.262(2). The weapon was a paper clip fragment attached to one end of a Q-tip, hidden inside the cotton ball at the end. In an unpublished order entered February 15, 2012 (Docket No. 305040), the Court of Appeals granted defendant's motion to remand to allow an evidentiary hearing on his claims of prosecutorial misconduct and to allow defendant to move for a new trial. The trial court denied defendant's motion after a hearing, and defendant appealed.

The Court of Appeals *held*:

1. MCL 801.262(2) provides that unless authorized by the jail administrator, a prisoner may not possess or have under his or her control any weapon or other item that may be used to injure a prisoner or other person or to assist in an escape. Under the Due Process Clause, a statute is unconstitutionally vague when (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words, but a term that requires persons of ordinary intelligence to speculate about its meaning and allows them to differ on its application may not be used. Defendant argued that MCL 801.262(2) is unconstitutionally vague because it failed to give him adequate notice that a sharpened paper clip fragment attached to the end of a Q-tip might be considered a weapon or other item prohibited under the statute. The statute is not void for vagueness. MCL 800.283(4), a similarly worded statute applying to prison inmates, has been interpreted as encompassing items with weapon-like qualities that could be used to harm others or make an escape. The element that transforms an unauthorized

article into a weapon is its potential to cause injury, not the inmate's subjective intent. A person of ordinary intelligence would understand that an unauthorized, sharpened fragment of metal attached to the end of a Q-tip is a weapon or other item that may be used to injure a prisoner or other person or assist a prisoner in escaping from jail.

2. Defendant's void-for-vagueness challenge to the statute regarding its application to his conduct also failed. To challenge MCL 801.262(2) as unconstitutionally vague for failure to provide fair notice, defendant had the burden of identifying specific facts that suggested that he complied with the statute before he could show that the language was vague. Defendant did not show that he complied with the statute.

3. Defendant's claim that the statute is unconstitutionally vague because it is overbroad and could apply to virtually any item also failed. When a vagueness challenge does not involve First Amendment freedoms, the constitutionality of the statute must be examined in light of the particular facts at hand without concern for the hypothetical rights of others. The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in the case. What defendant possessed was an item that could be used to injure another person and was clearly inappropriate for a jail setting. The hypothetical situation that defendant posited involving the use of tissue paper to transmit disease did not render the statute unconstitutionally vague as applied because this case involved a needle, not tissue paper.

4. Nor is the statute unconstitutionally vague because it allows for arbitrary enforcement. A statute may be unconstitutionally vague if it does not contain adequate standards to guide those who are charged with its enforcement or because it impermissibly gives the trier of fact unstructured and unlimited discretion in applying the law. But a statute cannot be determined to confer unstructured and unlimited discretion unless the wording of the statute itself is vague, which the wording of MCL 801.262(2) is not.

5. MCL 801.262(2) requires only that a defendant possess or have under his or her control the prohibited weapon or other item; it does not require that the defendant have the intent to use the weapon or other item as a weapon. The offense is a general intent crime. The distinction between specific intent crimes and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act, that is, specific intent designates a special mental element that is required above and beyond any mental state required with respect to the *actus reus* of the crime.

The plain language of MCL 801.262(2) requires no mental element above and beyond that required to purposely possess or control the prohibited weapon. Because MCL 801.262(2) is a general intent crime, the trial court did not err by failing to instruct the jury that defendant must have had the specific intent to use the item he possessed as a weapon.

6. Defendant argued that the prosecutor denied him a fair trial by not correcting the false testimony of a cooperating jail inmate and that he was therefore entitled to a new trial. A defendant's right to due process guaranteed by the Fourteenth Amendment is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony. Accordingly, a prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility. When a conviction is obtained through the knowing use of perjured testimony, however, a new trial is required only if the tainted evidence was material to the defendant's guilt or punishment. Thus, whether a new trial is warranted depends on the effect the misconduct had on the trial. The entire focus of the analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability. The inmate's testimony that he never received compensation even though he had received a favorable plea bargain in exchange for cooperating with the prosecution on an unrelated drug case was not perjury. The challenged testimony addressed only the inmate's cooperation regarding a jail incident and a robbery, for neither of which he received compensation. Moreover, defendant admitted possessing the altered Q-tip. Therefore, he was not entitled to relief on this basis.

7. Defendant also argued that the prosecutor denied him a fair trial by not disclosing a prior plea agreement with the inmate and that he was therefore entitled to a new trial. Upon request, a prosecutor has a duty under MCR 6.201(B)(5) to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony. Additionally, due process requires the prosecution to disclose any information that would materially affect the credibility of its witnesses. In order to establish a violation, the defendant must prove (1) that the prosecution possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with any reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability existed that the outcome of the proceedings would have been different. The trial court properly found that defendant could not establish the

second and fourth elements. The trial court's finding that defendant could have obtained the inmate's prior plea agreement with reasonable diligence was not clearly erroneous because evidence of the plea agreement was available in the court's files and defendant's discovery request could have included a request for all plea agreements entered with the prosecution's prospective witnesses. Nor was it reasonably probable that the outcome of the proceedings would have been different had the prosecution disclosed the plea agreement before trial given that defendant had made two written confessions admitting ownership of the item and the correction officers' testimony regarding its discovery in defendant's belongings provided overwhelming evidence at trial to support his conviction. Accordingly, defendant was not entitled to relief on this basis.

8. The trial court did not err by assessing 10 points for offense variable 9 (OV 9) of the sentencing guidelines, MCL 777.39 (number of victims). Assessment of 10 points is required when two to nine victims were placed in danger of physical injury or death. The inmate testified that defendant had made threats regarding use of the altered Q-tip against the inmate himself and a corrections officer, providing an adequate factual basis for the score. It was irrelevant that neither was actually harmed.

Affirmed.

1. PRISONS AND PRISONERS — WEAPONS — JAILS — ITEMS USED TO INJURE PERSONS OR ASSIST IN ESCAPE — POSSESSION.

MCL 801.262(2) provides that unless authorized by the jail administrator, a prisoner may not possess or have under his or her control any weapon or other item that may be used to injure a prisoner or other person or used to assist in an escape; the statute encompasses items with weapon-like qualities that could be used to harm others or make an escape; the element that transforms an unauthorized article into a weapon is its potential to cause injury, not the inmate's subjective intent.

2. PRISONS AND PRISONERS — WEAPONS — JAILS — POSSESSION.

MCL 801.262(2), which provides that unless authorized by the jail administrator, a prisoner may not possess or have under his or her control any weapon or other item that may be used to injure a prisoner or other person or used to assist in an escape, is a general intent crime and not a specific intent crime; it requires only that a defendant possess or have under his or her control the prohibited weapon or other item and does not require that the defendant have the intent to use the weapon or other item as a weapon.

3. CRIMINAL LAW — PROSECUTING ATTORNEYS — MISCONDUCT — DISCLOSURE OF MATERIAL INFORMATION.

The prosecution has a duty to disclose upon request the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony; additionally, due process requires the prosecution to disclose any information that would materially affect the credibility of its witnesses; to establish a violation, the defendant must prove (1) that the prosecution possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with any reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability existed that the outcome of the proceedings would have been different (MCR 6.201[B][5]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Laura A. Cook*, Assistant Attorney General, for the people.

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

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

MARKEY, J. Defendant appeals by right his conviction of possessing a weapon in jail, MCL 801.262(2). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to imprisonment of 2 to 10 years. This Court initially granted defendant's motion for remand "to allow defendant to have an evidentiary hearing on his claims of prosecutorial misconduct and to bring a motion for a new trial in the trial court based on those claims."[1] Following a hearing, the trial court denied defendant's motion for a new trial. We now affirm.

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[1] *People v Gratsch*, unpublished order of the Court of Appeals, entered February 15, 2012 (Docket No. 305040).

Defendant first argues that MCL 801.262(2) is unconstitutionally vague because it failed to provide defendant with adequate notice that a sharpened paper clip fragment attached to the end of a Q-tip might be considered a "weapon or other item" prohibited under the statute. Defendant made the item by removing the small cotton ball from one end of a Q-tip, placing the paper clip fragment inside the Q-tip, and then replacing the Q-tip cotton ball to cover the paper clip fragment. Jail staff referred to the item as a "needle" during trial. During sentencing, the trial court stated that the item was "not a knife or something that could cause anyone's death" but that "it could put out an eye" or "otherwise harm[] someone[.]"

Because defendant did not argue in the trial court that MCL 801.262(2) was unconstitutionally vague, he failed to preserve this claim for appellate review. Cf. *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998). Normally, unpreserved constitutional claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999). This Court may, however, overlook preservation requirements with respect to a challenge to the constitutionality of a criminal statute. *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999). This Court reviews de novo whether a statute is constitutional under the void-for-vagueness doctrine. *Id*. "Statutes and ordinances are presumed to be constitutional and are so construed unless their unconstitutionality is clearly apparent." *Id*. The party challenging the statute has the burden of proving its unconstitutionality. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009).

The void-for-vagueness doctrine flows from the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17, which guarantee that the state

may not deprive a person of life, liberty, or property, without due process of law. *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011). A statute may be challenged as unconstitutionally vague when (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. *Noble*, 238 Mich App at 651. A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Id*. at 652; *Roberts*, 292 Mich App at 497. "A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Noble*, 238 Mich App at 652. But "[a] term that requires persons of ordinary intelligence to speculate about its meaning and differ on its application may not be used." *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007).

MCL 801.262(2) provides:

> Unless authorized by the chief administrator of the jail, a prisoner shall not possess or have under his or her control any weapon or other item that may be used to injure a prisoner or other person, or used to assist a prisoner in escaping from jail.

This statute has not been interpreted or applied in any published appellate decision, but this Court has addressed a similarly worded statute applicable to Michigan's prison system.[2]

In *People v Herron*, 68 Mich App 381, 383; 242 NW2d 584 (1976), the defendant was convicted of violating

[2] MCL 800.283(4).

MCL 800.283, which at the time provided that "[a] convict without authorization, shall not have on his person or under his control or in his possession any weapon or other implement which may be used to injure any convict or other person, or to assist any convict to escape from imprisonment."[3] The defendant possessed a "draftsman's compass" in prison and argued that that the statute was void for vagueness because its language would permit the conviction of a prisoner for possessing pencils, pens, shoestrings, or religious paraphernalia. This Court concluded that the statute was not so vague that individuals of ordinary intelligence must guess at its meaning and application. *Id*. The Court observed that it was clear that "the statute was intended to prohibit possession of weapons or objects similar to weapons which might be used to harm others or make an escape. Moreover, the section challenged applies only to prison inmates and only to unauthorized possession or control." *Id*. The Court described the compass that the defendant possessed as being "bent, . . . sharpened on one end, and . . . unfit for normal use. In short, it was an object of weapon-like qualities that could be used to harm others." *Id*. The *Herron* Court concluded that because the statute was both facially constitutional and constitutional as applied, the defendant's hypothetical arguments could not form the basis for declaring the statute unconstitutional. *Id*. at 383-384.

This Court subsequently followed *Herron* in *People v Osuna*, 174 Mich App 530, 531; 436 NW2d 405 (1988), in which the defendant was convicted of violating MCL 800.283(4), which prohibited bringing a "weapon or

[3] This is the version of the statute as amended by 1972 PA 105, which subsequently was held to violate the title-object limitation of Const 1963, art 4, § 24. See *People v Stanton*, 400 Mich 192, 193; 253 NW2d 650 (1977). The Legislature enacted 1982 PA 343, containing the current version of MCL 800.283, to comply with the title-object limitation.

other implement which may be used to injure a prisoner or other person, or in assisting a prisoner to escape from imprisonment" into a correctional facility. This Court rejected the defendant's claim that the statute was unconstitutionally vague with respect to providing him notice that the hypodermic syringe he transported into a correctional facility was a prohibited item. Citing *Herron* with approval, the Court explained that the syringe was "an object with weapon-like qualities that could have been used to harm others or make an escape." *Id*. at 532. The *Osuna* Court also rejected the defendant's claim that the statute "only applies to objects which possess greater weapon-like qualities than syringes." *Id*. Further, citing *Acrey v Dep't of Corrections*, 152 Mich App 554, 559; 394 NW2d 415 (1986), the *Osuna* Court rejected the defendant's argument that the syringe was for narcotics use, noting that "within the prison setting, the element which transforms an unauthorized article into a weapon is its potential to cause injury, not the inmate's subjective intent." *Osuna*, 174 Mich App at 532.

In sum, the *Herron* and *Osuna* decisions support that language prohibiting "a weapon or other implement which may be used to injure a prisoner or other person, or in assisting a prisoner to escape from imprisonment" is understandable by persons of ordinary intelligence and provides a reasonable opportunity to know what is prohibited. *Roberts*, 292 Mich App at 497; *Herron*, 68 Mich App at 383. Specifically, MCL 800.283(4) is not unconstitutionally vague because persons of ordinary intelligence can understand that it encompasses items with weapon-like qualities that could be used to harm others or make an escape. *Osuna*, 174 Mich App at 532.

The wording of MCL 800.283(4) and MCL 801.262(2) is substantively identical. MCL 801.262(2) uses the

phrase "any weapon or other item that may be used to injure a prisoner or other person," while MCL 800.283(4) uses the phrase "a weapon or other implement which may be used to injure a prisoner or other person."

For the reasons discussed in *Herron* and *Osuna*, we reject defendant's claim that MCL 801.262(2) is void because it is unconstitutionally vague. A person of ordinary intelligence would understand that an unauthorized, sharpened fragment of metal attached to the end of a Q-tip is a "weapon or other item that may be used to injure a prisoner or other person, or used to assist a prisoner in escaping from jail." *Roberts*, 292 Mich App at 497. Particularly in light of judicial interpretations of the similar statute, *Noble*, 238 Mich App at 652 ("A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations . . . ."), the plain language of MCL 801.262(2) is not unconstitutionally vague. *Osuna*, 174 Mich App at 532; *Herron*, 68 Mich App at 383. Consistently with the reasoning of *Herron* and *Osuna*, we conclude the language of MCL 801.262(2) is not unconstitutionally vague.

Defendant also cannot establish a void-for-vagueness challenge to the statute regarding its application to his conduct. To challenge MCL 801.262(2) as unconstitutionally vague for failure to provide fair notice, defendant bears the burden of identifying specific facts that suggest that he complied with the statute. *People v Douglas*, 295 Mich App 129, 135; 813 NW2d 337 (2011). If he is able to do so, he must then show that the language "any weapon or other item that may be used to injure" is vague. *Id*.

Defendant cannot show that he complied with the statute. Defendant was convicted of the unauthorized

possession in jail of a "weapon or other item that may be used to injure a prisoner or other person," i.e., a paper clip fragment attached to a Q-tip. The so-called needle defendant possessed is a "weapon or other item" within the ambit of MCL 801.262(2) because it is a sharpened metal fragment that may be used to directly injure another person. It is comparable to the syringe in *Osuna*. While defendant argues that the needle was not a weapon because it was relatively small, the needle could have easily been used to inflict significant injury, such as to puncture an eye or other sensitive part of the human body. Thus, the needle was an item with weapon-like qualities that could be used to injure a prisoner or other person. Because the needle was a prohibited item under MCL 801.262(2), defendant did not comply with the statute and his vagueness claim must fail. *Douglas*, 295 Mich App at 135.

Defendant also argues that MCL 801.262(2) is unconstitutionally vague because it is overly broad and may apply to virtually any item. But when a vagueness challenge does not involve First Amendment freedoms, "the constitutionality of the statute in question must be examined in light of the particular facts at hand without concern for the hypothetical rights of others." *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). "The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case." *Id*. In this case, defendant possessed a needle, an item that falls within the scope of MCL 801.262(2) because it is an item that may be used to injure another person and is clearly inappropriate for a jail setting. The hypothetical situation that defendant posits involving the use of tissue paper to transmit disease does not render the statute unconstitutionally vague as applied because the

facts of this case involve a needle, not tissue paper. The needle defendant fashioned unambiguously fell within the scope of the statute because it could be used to injure another person.

Defendant next argues that MCL 801.262(2) is unconstitutionally vague because it allows for arbitrary enforcement. A statute may be unconstitutionally vague if it does not contain adequate standards to guide those who are charged with its enforcement or because it impermissibly gives the trier of fact unstructured and unlimited discretion in applying the law. *Douglas*, 295 Mich App at 138. But a statute cannot be determined to confer unstructured and unlimited discretion unless the wording of the statute itself is vague. *Id*. Here, for the reasons already noted, the wording of MCL 801.262(2) is not vague. Thus, we conclude that defendant's argument that the statute allows for arbitrary enforcement is meritless. In sum, MCL 801.262(2) is not impermissibly vague, and defendant's constitutional challenge fails.

Next, defendant argues that his conviction must be reversed because the trial court failed to instruct the jury that a necessary element of the charged offense requires proof that defendant intended to use the item as a weapon. We disagree.

Defendant failed to preserve his challenge to the jury instructions by raising this issue in the trial court. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003). We review unpreserved claims of instructional error for plain error affecting substantial rights. *Id*. at 643; *Carines*, 460 Mich at 763. The determination of the necessary elements of a crime presents a question of law that we review de novo. *People v Mass*, 464 Mich 615, 622; 628 NW2d 540 (2001).

We conclude that the trial court did not err in its instructions to the jury; consequently, defendant's substantial rights were not affected. We specifically reject defendant's argument that MCL 801.262(2) requires that a defendant have the intent to use the "weapon or other item" as a weapon. Rather, the statute requires only that a defendant "possess or have under his or her control" the prohibited "weapon or other item that may be used to injure a prisoner or other person." *Id*. Indeed, the offense is a general intent crime. "[T]he distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act." *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983). Stated otherwise, " 'specific intent' is often used to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *People v Fennell*, 260 Mich App 261, 266; 677 NW2d 66 (2004) (citations and quotation marks omitted). Here, the plain language of the statute requires no mental element above and beyond that required to purposely possess or control the prohibited weapon. In our criminal jurisprudence, possession may be either actual or constructive and includes either actual physical possession or the right to exercise dominion or control over a thing, whether directly or through another person or persons. *People* v *Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010), citing *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), and *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989).

The *Osuna* decision interpreting the similarly worded statute governing Michigan's prison system, MCL 800.283, supports our conclusion that MCL 801.262(2) is a general intent crime. The *Osuna* Court

held that why the defendant possessed the item was irrelevant. The Court opined that "the element which transforms an unauthorized article into a weapon is its potential to cause injury, not the inmate's subjective intent." *Osuna*, 174 Mich App at 532. As noted already, we find *Osuna* highly instructive with respect to the prohibition of weapons in jails in MCL 801.262(2) because *Osuna* interpreted the nearly identically worded statute prohibiting weapons in prisons. We therefore hold that MCL 801.262(2) is a general intent crime.

Because MCL 801.262(2) is a general intent crime, the trial court did not err by failing to instruct the jury that defendant must have had the specific intent to use the item he possessed as a weapon. Consequently, plain error did not affect defendant's substantial rights. *Gonzalez*, 468 Mich at 643; *Carines*, 460 Mich at 763. Finally, because the intent to use the item as a weapon is not an element of the offense, defendant's related argument that trial counsel was ineffective for failing to request this instruction must fail. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (stating that counsel is not ineffective for failure to raise a meritless argument).

Next, defendant argues that the trial court abused its discretion by not granting his motion for a new trial. Defendant argues that the prosecutor denied him a fair trial by (1) not correcting the false testimony of a cooperating jail inmate and (2) not disclosing a prior plea agreement with the inmate. The prosecution argues that the inmate's testimony was accurate and that the plea agreement had no bearing on this case because it had been entered approximately six months before the crime was committed. Moreover, it was a readily accessible part of the trial court's records. The prosecu-

tion also argues that if it erred by failing to disclose the plea bargain, its error was harmless in light of the overwhelming evidence of defendant's guilt, including his written confession admitting possession of the needle, the testimony of corrections officers that the needle was located in defendant's tote bag, and other testimony implicating defendant.

We review for clear error a trial court's factual findings on a motion for a new trial and for an abuse of discretion the court's decision to grant or deny the motion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). The trial court abuses its discretion when the court's decision is outside the range of principled outcomes. *Id*. Whether the prosecutor's conduct denies a defendant a fair and impartial trial presents a question of law that we review de novo. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010).

During cross-examination at trial, the inmate testified that he had "been a witness for the prosecution on some other cases and I'm not well-liked by the population in the jail." He also acknowledged that he had been convicted of fraud within the past year and false pretenses within the past two years, the last conviction being the result of a plea bargain. On redirect examination, the inmate testified that he had informed jail staff that two other inmates had destroyed a television. That information ultimately led to at least one conviction. In addition, the inmate informed authorities about a robbery at Boyne Highlands, leading to one or more convictions. The inmate testified that he had provided information to the authorities "of my own free will" and answered no when asked if the authorities had given him "any compensation."

After conducting an evidentiary hearing, the trial court determined that, in context, the inmate's answer

regarding compensation related to his "his cooperation with respect to the jail TV incident and the Boyne Highland's robbery." Further, the trial court found that the inmate's testimony appeared to be truthful given the evidence presented at the hearing. Additionally, the court found that the question regarding compensation was most likely understood by the inmate, the prosecutor, and the jury as referring to money, not some other form of compensation. Thus, the trial court concluded that the evidence did not support finding that the prosecutor either elicited or failed to correct false testimony.

With respect to defendant's second argument, the trial court concluded that defendant could have discovered the inmate's plea agreement through reasonable diligence because the plea agreement was available in the court's files. The trial court also reasoned that defendant could have asked the inmate during trial whether he had executed any plea agreements in previous cases. Therefore, the trial court found that the prosecutor did not suppress evidence of the plea agreement. Finally, the trial court found that there was no reasonable probability that the outcome of the proceedings would have been different had evidence of the plea agreement been introduced at trial. Accordingly, the trial court denied defendant's motion for a new trial.

A defendant's right to due process guaranteed by the Fourteenth Amendment is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Accordingly, a prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). When a conviction is ob-

tained through the knowing use of perjured testimony, a new trial is required "only if the tainted evidence is material to the defendant's guilt or punishment." *Aceval*, 282 Mich App at 389. So whether a new trial is warranted depends on the effect the misconduct had on the trial. *Id*. at 390. "The entire focus of [the] analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability." *Id*.

First, defendant asserts that the inmate's testimony that he never received "compensation . . . for any of this information" was perjury because the inmate had previously received a favorable plea bargain in exchange for cooperating with the prosecution in an unrelated drug case. The trial court found that the inmate's challenged testimony only addressed his cooperation regarding the damaged jail television and the Boyne Highlands robbery, so the testimony was not false. The trial court did not clearly err in so finding. Immediately before providing the challenged testimony, the inmate specifically testified about the television and Boyne Highlands cases. The trial court observed the exchange between the inmate and the prosecutor during trial, so it was able to fairly assess the context of the testimony at issue. Further, there is no dispute that the inmate did not receive any type of compensation or benefit regarding the television incident or the Boyne Highlands robbery; therefore, the inmate's testimony was not false.

Moreover, even if the testimony was perjury *and* the prosecutor knowingly allowed it to stand uncorrected, defendant still would not be entitled to a new trial because the perjury and prosecutorial misconduct did not "materially affect[] the trial's outcome . . . ." *Aceval*, 282 Mich App at 390. Defendant admitted possessing the needle immediately after corrections

officers discovered it in his "tote." Although the inmate testified that defendant intended to use the needle as a weapon, for the reasons explained already, defendant's intent to use the needle as a weapon is not an element of the crime. Rather, defendant's knowledge of possession of the needle was sufficient for a conviction under MCL 801.262(2).[4]

Second, defendant argues that the prosecutor violated his right to due process by failing to disclose before trial the inmate's prior plea agreement. Upon request,[5] the prosecution has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony. MCR 6.201(B)(5); *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009). Additionally, due process requires that a prosecutor "is a under a duty to disclose any information that would materially affect the credibility of his witnesses." *Lester*, 232 Mich App at 281. In order to establish a so-called *Brady* violation,[6]

> a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id*. at 281-282.]

In this case, the trial court found that defendant could not establish the second, third, or fourth elements

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[4] We note that the inmate's testimony regarding defendant's intent was material to defendant's sentencing, as discussed later, but the trial court was fully cognizant of the plea agreement, so it could consider it in assessing the inmate's credibility.

[5] Defendant made such a request before trial.

[6] See *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

of a *Brady* violation. Even if the trial court clearly erred regarding the third element, it did not clearly err regarding the second and fourth elements. Accordingly, defendant was not entitled to relief on the basis of his second argument.

The trial court's finding that defendant could have obtained the inmate's prior plea agreement with reasonable diligence was not clearly erroneous. As the trial court explained, evidence of the plea agreement was available in the court's files. Also, as the trial court explained, defendant's discovery request could have included a request for *all* plea agreements entered with the prosecution's prospective witnesses.

More importantly, we agree with the trial court that it is not reasonably probable that the outcome of the proceedings would have been different had the prosecution disclosed the plea agreement before trial. Defendant gave two written confessions admitting ownership of the needle, and the corrections officers' testimony regarding its discovery in defendant's belongings provided overwhelming evidence at trial to support his conviction. Further, the parties do not dispute that defendant was a jail inmate, and the jail administrator did not authorize his possession of the needle. Hence, even if the prior plea agreement were relevant to the inmate's credibility and defendant had been able to use it for that purpose, we cannot find any reasonable probability that the outcome of trial would have been different. Consequently, the trial court did not abuse its discretion by denying defendant's motion for a new trial for this reason.

Defendant also argues that he is entitled to resentencing because the trial court erred by assessing 10 points for offense variable (OV) 9 rather than zero points because fewer than two victims were placed in

danger. We disagree. In general, the application of the sentencing guidelines presents a question of law that this Court reviews de novo. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). But the trial court has discretion in assessing a particular score for a sentencing variable when there is evidence in the record to support it. *Id*. Thus, this Court reviews the trial court's scoring to determine whether there is adequate evidentiary support for a particular score and whether the sentencing court properly exercised its discretion. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). Record evidence in this case supports the trial court's scoring, and the court did not abuse its discretion by assessing 10 points for OV 9.

MCL 777.39(1)(c) requires a trial court to score 10 points for OV 9 when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death[.]" The trial court should "[c]ount each person who was placed in danger of physical injury . . . as a victim." MCL 777.39(2)(a). "OV 9 is scored only on the basis of the defendant's conduct during the sentencing offense." *People v Carrigan*, 297 Mich App 513, 515; 824 NW2d 283 (2012). In scoring OV 9, it is improper for a trial court to consider conduct after an offense has been completed. *People v McGraw*, 484 Mich 120, 122, 133-134; 771 NW2d 655 (2009).

In this case, the cooperating jail inmate testified that while defendant had the needle he had constructed, he stated, "I should stab her [a corrections officer] in the neck." In addition, the inmate testified that a few days earlier, defendant informed him that "if I told anybody about it [the needle] he would hurt me." From this testimony, the trial court had an adequate factual basis to conclude that while defendant possessed the needle in the jail, at least two victims were placed in danger of

physical injury. MCL 777.39(1)(c). Given that at least two victims were placed in danger of physical injury because of defendant's possession of the needle, the trial court properly scored OV 9 at 10 points. It is irrelevant that neither the inmate nor the correction officer was actually harmed. A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim. See *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). Accordingly, the trial court did not abuse its discretion by assessing 10 points for OV 9.

We affirm.

K. F. KELLY, P.J., and FORT HOOD, J., concurred with MARKEY, J.

PEOPLE v RATCLIFF

Docket No. 303950. Submitted January 15, 2013, at Detroit. Decided March 5, 2013, at 9:00 a.m. Leave to appeal sought.

Anthony D. Ratcliff was convicted after a bench trial in the Wayne Circuit Court, Michael M. Hathaway, J., of armed robbery, MCL 750.529; carjacking, MCL 750.529b; and possessing a firearm during the commission of a felony, MCL 750.227b, in connection with an armed robbery by two men of a store in Detroit. Defendant appealed his convictions and sentence.

The Court of Appeals *held*:

1. There was sufficient evidence to support defendant's convictions. Defendant's argument on appeal was based on the store owner's uncertainty that a photograph of defendant depicted one of the two robbers, his concession that a photograph of a similar-looking man might have depicted the unidentified robber instead, and his statement that the robber was in his twenties while defendant was only 17. However, viewing the evidence in the light most favorable to the prosecution, a trier of fact could have found the elements of the charged crimes proved beyond a reasonable doubt given that the store owner had readily identified defendant at a corporeal lineup, the discrepancy between the store owner's estimate and defendant's actual age was not great, and the police saw defendant in the stolen vehicle with the second robber within hours of the robbery. Defendant's unpreserved argument that his convictions were against the great weight of the evidence does not require reversal because, although some of the claims made by defendant's witnesses were plausible, the trial court did not clearly err by finding that the witnesses were not credible given the inconsistencies in their testimony.

2. Defendant was not denied the effective assistance of counsel on the ground that his attorney had been assigned only moments before the preliminary examination. The record indicates that counsel had in fact been appointed two weeks previously and effectively cross-examined and recross-examined the prosecution's lone witness, and defendant has not shown that his attorney otherwise committed errors serious enough to have violated his constitutional right to counsel.

3. The court properly assessed 10 points for offense variable 19 pursuant to MCL 777.49(c) for interfering with or attempting to interfere with the administration of justice on the basis of his decision to flee on foot after the stolen car he was riding in was pulled over by the police. Although defendant could not be faulted for the driver's decision to drive away rather than heeding the police officers' order to "freeze," defendant was aware that, as an occupant of the vehicle, he was also under an order to refrain from moving.

Affirmed.

SENTENCING — SENTENCING GUIDELINES — OFFENSE VARIABLE 19 — INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE — FLEEING AND ELUDING.

A sentencing court may assess 10 points for offense variable 19 pursuant to MCL 777.49(c) for interfering with or attempting to interfere with the administration of justice on the basis of an offender's decision to flee on foot from a vehicle whose occupants had been ordered by the police to refrain from moving.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Rebekah G. White* and *Erin Leigh Birkam*, Assistant Prosecuting Attorneys, for the people.

State Appellate Defender (by *Gail Rodwan*) and Anthony D. Ratcliff, *in propria persona*, for defendant.

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

RONAYNE KRAUSE, J. Defendant appeals as of right his bench trial convictions for armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This matter arises out of an armed robbery committed by two men, one of whom brandished a handgun, in

a store in Detroit. One of the men, by his own admission, was Jaymel Ward. The men took money, jewelry, and a car belonging to a former store employee who happened to be present. The owner reported the robbery and carjacking to the police. Later that evening, the police saw a vehicle matching the stolen car's description and attempted to pull it over. Ward, the driver, instead accelerated; eventually Ward and defendant, who was in the passenger seat, jumped out of the car and attempted to flee on foot. Ward attempted to dispose of a handgun while in the process of fleeing. Both were quickly apprehended. Another gun was found inside the car. The store owner later unhesitatingly identified defendant as the man who had brandished the gun.

Ward had pleaded guilty in a separate juvenile proceeding before trial, but in his testimony at this trial, he insisted that a third person had been in the car during the chase and was the true second perpetrator of the robbery. Defendant asserted that he was uninvolved in the crimes and had been picked up by Ward some time after the robbery. The third person was identified as going by various different names, including Javonte Malone, Kevin Johnson, "Victor," and "Tank." According to witnesses, Malone and defendant looked extremely similar, and in support, they provided photographs printed from Malone's Facebook page, which was no longer available at the time of trial. The photographs have not been provided to this Court. The officers who pursued the stolen vehicle testified that they never lost sight of the vehicle and did not see a third person in the car or exit the car. Apparently, Malone could not be located, and defendant's witnesses did not bring his claimed involvement to the attention of the authorities.

The trial court concluded that defendant's proffered alibi testimony contained too many significant internal contradictions to be believable. The robbery itself was undisputed. The trial court therefore concluded that because defendant had been unequivocally identified by one of the victims and, in what was unlikely to be a coincidence, was later found in the stolen car fleeing from the police, his identity as the perpetrator had been proven beyond a reasonable doubt. The trial court therefore convicted defendant.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that insufficient evidence was presented to support his convictions. We disagree. This Court will find the evidence sufficient to uphold a conviction if, when viewing it in the light most favorable to the prosecution, a trier of fact could have found the elements of the charged crime proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Witness credibility is for the trier of fact—the trial judge, in a bench trial—to decide. *People v Jackson*, 178 Mich App 62, 64-65; 443 NW2d 423 (1989). The trial court's findings of fact will be affirmed unless they are clearly erroneous, meaning we are " 'left with a definite and firm conviction that the trial court made a mistake.' " *Reese*, 491 Mich at 139 (citation omitted).

Defendant argues specifically that the only evidence that defendant was the second robber was the store owner's identification. Defendant relies significantly on the owner's uncertainty regarding whether a photograph of defendant that he was shown at trial was the robber, as well as the owner's concession that the photograph of Malone could also have depicted the robber. However, the owner pointed out that photo-

graphs were more limited than real life, and he further stated that his identification of defendant as the robber at a corporeal lineup was partly because of a characteristic hand-twitching movement that he observed the robber and defendant make. The owner also indicated to the police that the robber appeared to be in his twenties, whereas defendant was 17. Given the scope of human diversity, we are not persuaded by the unsupported implication that it should be readily possible for most people to accurately guess the age of another person—at least, one who is neither obviously a child nor obviously a senior—with any more precision than a decade or so, especially on the basis of a single visual interaction with little context from which an age could otherwise be deduced. Consequently, we disagree with defendant's conclusion that the store owner's identification was inherently unreliable or implausible.

Moreover, the store owner's identification was not the only evidence supporting defendant's identity as the second robber. The police observed defendant in the stolen vehicle with Ward mere hours after the robbery and carjacking, defendant fled from the police, the police recovered from the passenger seat of the stolen car a handgun that was consistent with Harris' description of defendant's handgun, and no other person was observed to be present or identified as the allegedly true perpetrator at the time. While not direct proof, a fair and permissible inference can be drawn from these facts that strongly supports the store owner's identification of defendant as the second robber. When viewed in the light most favorable to the prosecution, a trier of fact could find defendant's identity as the second robber proven beyond a reasonable doubt, and we are not definitely and firmly convinced that the trial court made a mistake.

For, in part, the same reasons, we also conclude that defendant's convictions were not against the great weight of the evidence. Our review of this issue would ordinarily be to determine whether the evidence is so heavily opposed to the verdict that the verdict can be said to be a miscarriage of justice, but because the issue was not properly preserved, we review for plain error affecting defendant's substantial rights. *People v Cameron*, 291 Mich App 599, 616-617; 806 NW2d 371 (2011). Generally, conflicting testimony or issues of witness credibility are not sufficient grounds to find a verdict against the great weight of the evidence unless challenged testimony is almost completely unbelievable, for example because it was seriously impeached or clearly defied known physical possibilities. *People v Lemmon*, 456 Mich 625, 643-644, 647; 576 NW2d 129 (1998). Although we find plausible defendant's witnesses' claims that they did attempt to inform the authorities about Malone, the trial court did not commit clear error in finding their inconsistent testimony so "riddled with conflicts and implausibilities" that they could not be deemed credible. Accordingly, because there was no plain error affecting defendant's substantial rights, reversal is not warranted.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied his right to counsel under *United States v Cronic*, 466 US 648, 659-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984), because his trial counsel was assigned "just moments" before his preliminary examination. We disagree.

Because defendant did not move the trial court for a new trial on this basis and did not move for a *Ginther*[1]

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

hearing, this issue is unpreserved. *People v Musser*, 259 Mich App 215, 218, 220-221; 673 NW2d 800 (2003). Our review is therefore limited to plain errors apparent from the record. *People v Snider*, 239 Mich App 393, 420, 423; 608 NW2d 502 (2000). The record simply does not show that counsel was appointed "just moments" before defendant's preliminary examination; rather, counsel had been appointed approximately two weeks previously. Furthermore, counsel effectively cross-examined and recross-examined the prosecution's lone witness at the preliminary examination. A "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not done so.

In any event, defendant was not completely denied the assistance of counsel at a critical stage of the proceedings and defense counsel did not "entirely fail[] to subject the prosecution's case to meaningful adversarial testing . . . ." *Cronic*, 466 US at 659; see also *People v Frazier*, 478 Mich 231, 243, 243 n 10; 733 NW2d 713 (2007). Moreover, nothing in the record indicates that this is one of the rare cases in which "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 US at 659-660; see also *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997). Otherwise, defendant has not shown that his trial counsel committed "errors so serious" that counsel's performance fell below the level guaranteed by the Sixth Amendment and that there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884

(2001), citing *Strickland v Washington*, 466 US 668, 687, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

IV. OV 19

Defendant finally argues that the trial court erred by scoring offense variable (OV) 19 at 10 points instead of zero points. We conclude that the trial court reached the correct result. "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "However, we review de novo questions of law involving the proper construction or application of the statutory sentencing guidelines." *People v Jamison*, 292 Mich App 440, 443; 807 NW2d 427 (2011).

Under OV 19, the trial court must "assess ten points if '[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]' " *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010), quoting MCL 777.49(c). The "interference with the administration of justice" contemplated is broad and can include activities that (1) do not necessarily rise to independently chargeable acts and (2) that affect something other than the judicial process itself. *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004) (interference with the investigation of a crime by providing a false name to the police constitutes conduct for which points can be assessed under OV 19). This Court has held that 10 points were properly assessed under OV 19 against a defendant who refused to pull his car over when a police officer activated his vehicle's lights and sirens and instead attempted to escape, first by car and then on foot. *People v Cook*, 254 Mich App 635, 637, 639-641; 658 NW2d 184 (2003), overruled in part on other grounds *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009).

Fleeing from the police can easily become "interference with the administration of justice" particularly where, as in this case and in *Cook*, there was an effective command for the vehicle to stop, in the form of the police activating their lights and sirens. In addition, defendant testified that, before the vehicle chase began, officers approached the stolen car and said "Freeze." Ward then drove away. While this was not a direct order to defendant specifically and exclusively, it was unambiguously an order directed at the occupants of the vehicle. Defendant obviously cannot be faulted for Ward's decision to disregard the order, but defendant nevertheless knew at that point that *he* was under an order to refrain from moving. He instead fled on foot after the vehicle came to a stop.

Defendant fled from the police contrary to an order to freeze. Doing so is sufficient to warrant assessing 10 points for OV 19. The trial court's scoring of the sentencing guidelines, and consequently defendant's sentence, are therefore proper.

Affirmed.

CAVANAGH and BOONSTRA, JJ., concurred with RONAYNE KRAUSE, P.J.

PRINS v MICHIGAN STATE POLICE

Docket No. 309803. Submitted February 5, 2013, at Grand Rapids. Decided March 5, 2013, at 9:05 a.m.

Nancy A. Prins filed an action in the Ionia Circuit Court against the Michigan State Police and David Fedewa, asserting that a violation of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., occurred when defendants denied her request for records regarding a traffic stop. The circuit court, Suzanne Hoseth-Kreeger, J., granted summary disposition in favor of defendants, and the Court of Appeals reversed and remanded for further proceedings. 291 Mich App 586 (2011). The Supreme Court originally granted defendant's application for leave to appeal, 489 Mich 979 (2011), but subsequently denied the application, 490 Mich 988 (2012). On remand, the circuit court granted plaintiff summary disposition, and awarded plaintiff attorney fees and punitive damages, but denied her request for compensatory damages. Plaintiff appealed.

The Court of Appeals *held*:

1. If a party prevails completely in an action to compel disclosure under the FOIA, MCL 15.240(6) requires the court to award reasonable attorneys' fees, costs, and disbursements to the plaintiff. The reasonableness of attorneys' fees awarded for a violation of the FOIA are calculated by considering the reasonableness factors articulated in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 506, 509-510 (1982), in conjunction with the reasonable attorneys' fees factors listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct (MRPC). The court must first multiply the fee customarily charged in the locality for similar legal services with the reasonable number of hours expended in the case, before then considering the remaining *Wood* and MRPC factors to determine whether any adjustment is appropriate. The trial court must discuss on the record its view of the remaining factors to aid appellate review. If additional factors are considered, the court must justify the relevance and use of the new factor. The burden of proving the reasonableness of the requested rate is on the party seeking the fees. In this case, remand was necessary because the trial court failed to address the *Wood* and MRPC factors on the record when awarding attorneys' fees to plaintiff.

2. Because plaintiff failed to request costs in the circuit court, fails to identify her costs and expenses, and does not refer to any facts in the record illustrating that she incurred costs, she abandoned any challenge to the lack of such an award. In addition, plaintiff abandoned the issue of her request for compensatory damages because she provided no legal authority to support her claim that the FOIA violation entitled her to such damages for her distrust of the Michigan State Police.

Award of attorneys' fees vacated, the case remanded for reevaluation of attorneys' fees and the order affirmed in all other respects.

RECORDS — FREEDOM OF INFORMATION ACT — PREVAILING PLAINTIFFS — REASONABLE ATTORNEY FEES, COSTS, AND DISBURSEMENTS — REASONABLENESS FACTORS — CONSIDERATION OF ALL FACTORS ON THE RECORD.

If a party prevails completely in an action to compel disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., MCL 15.240(6) requires the court to award reasonable attorneys' fees, costs, and disbursements to the plaintiff; the reasonableness of attorneys' fees are calculated by considering the factors articulated in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 506, 509-510 (1982), in conjunction with the reasonable attorneys' fees factors listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct (MRPC); the court must first multiply the fee customarily charged in the locality for similar legal services with the reasonable number of hours expended in the case, before then considering the remaining *Wood* and MRPC factors to determine whether any adjustment in the fees is appropriate; the trial court must discuss on the record its view of the remaining factors to aid appellate review or remand for consideration of the factors is required.

Bruce A. Lincoln for Nancy A. Prins.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A, Bandstra*, Chief Legal Counsel, *Michelle M. Brya*, Assistant Attorney General, for the Michigan State Police and David Fedewa.

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM. In this cost, attorney-fee, and compensatory-damages dispute under the Freedom of

Information Act (FOIA), MCL 15.231 *et seq*., plaintiff, Nancy Ann Prins, appeals as of right the circuit court's opinion and order granting plaintiff's motion for summary disposition, awarding plaintiff $12,250 in attorney fees and $500 in punitive damages, and denying plaintiff's request for compensatory damages. We vacate the circuit court's attorney-fee determination, remand for a reevaluation of that issue, and affirm the circuit court's order in all other respects.

I. FACTUAL BACKGROUND

This is the second time this case is before this Court. As set forth in this Court's prior opinion in *Prins v Mich State Police*, 291 Mich App 586, 587-588; 805 NW2d 619 (2011), the facts and procedural history leading up to the first appeal are as follows:

> On May 4, 2008, Michigan State Police trooper James Yeager stopped a vehicle driven by plaintiff Nancy Prins. Trooper Yeager issued Prins's passenger, Jack Elliott, a citation for not wearing a seat belt. In a letter dated July 22, 2008, Prins submitted a FOIA request to the state police seeking, among other things, "[a]ny recording or other electronic media taken by Trooper James Yeager (officer no 987) on May 4th, 2008 between the hours of 10:00 am to 12:00 pm of me while traveling upon Morrison Lake Rd and Grand River Rd, within Boston Twp., Ionia County, Michigan." In a letter dated July 26, 2008, a Saturday, the state police denied Prins's request, explaining, "Any in car video that may have existed is no longer available. Only kept 30 days [and] reused." The envelope enclosing the letter to Prins bore a postmark of July 29, 2008, a Tuesday.
>
> On October 29, 2008, Elliott appeared at a hearing to contest his seat belt citation, and the prosecutor produced the videotape depicting the May 4, 2008, traffic stop. On January 26, 2009, Prins filed in the Ionia Circuit Court a complaint seeking damages for defendants' violation of the FOIA. The state police moved for summary disposition on

> the ground that the applicable period of limitation, MCL 15.240(1)(b), barred Prins's FOIA action. The state police asserted that the 180-day period began to run on July 26, 2008, the date the police authored the denial letter, and that Prins untimely filed her complaint 184 days later. Prins countered that the act of mailing the denial letter triggered the 180-day time limit, rendering her complaint timely. In a bench opinion, the circuit court granted defendants summary disposition.

In the first appeal, we addressed the issue of "whether the 180-day period of limitation begins to run when a public body writes a letter denying access to information, or when the public body places the denial letter in the mail." *Id*. at 587. On February 15, 2011, we issued an opinion, holding that "mailing triggers the running of the 180-day period of limitation." *Id*. We reversed the circuit court's order granting summary disposition in favor of defendants and remanded for further proceedings. *Id*. at 587, 591-592.

On June 29, 2011, the Michigan Supreme Court granted the Michigan State Police's application for leave to appeal. *Prins v Mich State Police*, 489 Mich 979; 799 NW2d 17 (2011). However, on January 25, 2012, our Supreme Court vacated that order and denied the application for leave to appeal because the Court no longer believed that the questions presented merited review. *Prins v Mich State Police*, 490 Mich 988; 807 NW2d 298 (2012).

On February 21, 2012, plaintiff moved the circuit court for summary disposition under MCR 2.116(C)(9) (failure to state a valid defense), requesting a judgment in her favor, a finding that defendants' actions were arbitrary and capricious under MCL 15.240(7), and a hearing date to determine her damages. The circuit court held a hearing on March

15, 2012, to address plaintiff's motion. Defendants acknowledged that, in light of the appellate decisions, the issue before the court was "really the matter of damages." Plaintiff requested attorney fees for 104.73 hours worked at $385 per hour, $500 in punitive damages, and $7,500 in compensatory damages.[1] In response, defendants argued that plaintiff's attorney-fee request was excessive (particularly because counsel was only charging plaintiff $295 per hour), punitive damages were not warranted because the denial of plaintiff's FOIA request was not arbitrary and capricious, and plaintiff's request for compensatory damages was "without any real basis" and "unrelated to the matter before the Court." The circuit court indicated that it was inclined to grant plaintiff's motion for summary disposition and to award plaintiff reasonable attorney fees; the court explained that it would provide the parties with an opportunity to submit proofs regarding the amount of reasonable attorney fees at a later hearing. Plaintiff, however, requested that proofs be submitted during the instant hearing, to which defendants and the trial court agreed.

The court accepted as evidence plaintiff's retainer agreement, plaintiff's itemized bill, and excerpts from the State Bar of Michigan 2010 Economics of Law Practice Attorney Income and Billing Rate Summary Report. The court also heard testimony from plaintiff regarding her request for compensatory damages. Specifically, plaintiff testified that her husband was shot and killed by a Michigan State Police Trooper in 1998; however, the "official record" was that her husband committed suicide. Plaintiff explained that she made a FOIA request with the Michigan State Police to obtain "basically anything

[1] Later during the hearing, plaintiff stated that she "would accept" $2,500 in compensatory damages.

they had of any of the details of what happened." But the documents that she had received were "crossed out with a black marker" so that she "couldn't read everything," and the photographs provided were of such a poor quality that "you couldn't really see what the photographs were." As a result, plaintiff was disappointed and felt that the Michigan State Police lied to her. Plaintiff further testified that, as a result of the denial of her FOIA request in the present case, she feels as if the Michigan State Police "aren't included in your friends who are there to help you." Plaintiff felt that they are "deceptive and lying" and, therefore, that she should receive compensatory damages. The court advised the parties that it would take the matter under advisement to review the evidence and issue a written opinion.

The circuit court issued its opinion and order on April 2, 2012, granting plaintiff's motion for summary disposition. The court dismissed plaintiff's claims against defendant, David Fedewa, on the basis that Fedewa was not a public body. The court denied plaintiff's request for compensatory damages, explaining that there was no proof of a nexus between the death of plaintiff's husband and the FOIA request in this case. The court also stated that plaintiff had failed to present legal authority to award such damages. The court then concluded that plaintiff was entitled to $500 in punitive damages because the denial of her FOIA request was arbitrary and capricious. Finally, regarding attorney fees the Court stated, "This Court has reviewed the attorney fees requested by Defendant [sic] and determines without any disrespect to defense [sic] counsel's experience or expertise, that a reasonable attorney fee for representation at the trial and appellate court levels is $175 per hour at 70 hours or $12,250 . . . ."

II. ANALYSIS

A. COSTS

Plaintiff first argues that the trial court erred by holding that she was not entitled to the costs and expenses that she incurred in pursuing this action.

Section 10 of the FOIA, MCL 15.240(6), provides in part that, "[i]f a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements." Thus, if a plaintiff prevails completely in an action to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees, costs, and disbursements to the plaintiff. *Thomas v City of New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002); *Swickard v Wayne Co Med Examiner*, 196 Mich App 98, 101; 492 NW2d 497 (1992).

In this case, the circuit court did not conclude that plaintiff was not entitled to costs; rather, it did not address plaintiff's entitlement to costs at all. Plaintiff did not request costs when she moved the circuit court for summary disposition on February 21, 2012. She also did not request costs at the motion hearing on March 15, 2012, when she requested attorney fees, compensatory damages, and punitive damages. Although plaintiff now on appeal insists that the circuit court should have awarded her costs, she fails to identify her costs and expenses. And she does not refer to any facts in the record to illustrate that she incurred costs. Plaintiff may not merely announce her position and leave it to this Court to discover and rationalize the factual basis for her claims; plaintiff has abandoned this issue, and we decline to address it. See *Wilson v Taylor*, 457 Mich

232, 243; 577 NW2d 100 (1998); *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009); *Mich Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203, 222; 539 NW2d 745 (1995).

B. ATTORNEY FEES

Plaintiff next argues that the circuit court erred by awarding attorney fees for 70 hours of work at a rate of $175 per hour when she requested fees for 104.73 hours of work at a rate of $385 per hour.

We review for an abuse of discretion an award of attorney fees to a prevailing plaintiff in an action under the FOIA. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 647; 591 NW2d 393 (1998). We review a trial court's factual findings for clear error. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 142; 683 NW2d 745 (2004).

As previously discussed, section 10 of the FOIA provides in part that, "[i]f a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements." MCL 15.240(6). Thus, if a plaintiff prevails completely in an action to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees. *Thomas*, 254 Mich App at 202; *Swickard*, 196 Mich App at 101. "[T]he prevailing party's entitlement to an award of reasonable attorney fees . . . includes *all* such fees . . . related to achieving production of the public records." *Meredith Corp v Flint*, 256 Mich App 703, 715; 671 NW2d 101 (2003). "The amount of attorney fees awarded to a prevailing party under the FOIA is within the discretion of the trial court." *Yarbrough v Dep't of Corrections*, 199 Mich App 180, 186; 501 NW2d 207 (1993).

The touchstone in determining the amount of attorney fees to be awarded to a prevailing party in a FOIA case is *reasonableness*. See *Mich Tax Mgt Servs Co v City of Warren*, 437 Mich 506, 509-512; 473 NW2d 263 (1991). Our Supreme Court has held that although there is no precise formula to determine a reasonable fee, courts in FOIA cases should consider the following factors articulated in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 587-588; 321 NW2d 653 (1982): (1) the attorney's experience and professional standing; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the case's difficulty; (5) the expenses incurred; and (6) the length and nature of the professional relationship with the client. *Mich Tax Servs*, 437 Mich at 509-510. The Court explained that a reasonableness analysis is not limited to these factors and that a court need not detail its findings as to each factor considered. *Id*. at 510. Importantly, the Court emphasized that the circuit court's determination of a reasonable fee must be an independent determination. *Id*. at 511. "The court is not performing a review function limited to approval or disapproval of others' calculations regarding the amount of fees to be awarded." *Id*. at 511-512.

More recently, in *Smith v Khouri*, 481 Mich 519, 526-533; 751 NW2d 472 (2008), the Supreme Court addressed the *Wood* multifactor approach in the context of determining a reasonable attorney fee as case-evaluation sanctions and concluded that the current *Wood* analysis needed "some fine-tuning." The *Smith* Court held that trial courts should conduct a reasonableness analysis with an approach considering both the *Wood* factors and the reasonable attorney-fee factors listed in Rule 1.5(a) of the Michigan Rules of

Professional Conduct (MRPC).[2] *Smith*, 481 Mich at 528-533. The Court explained the approach as follows:

> We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.

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[2] The *Smith* Court listed the factors found in Rule 1.5(a) as follows:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [*Smith*, 481 Mich at 530, quoting MRPC 1.5(a).]

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. 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. 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. By recognizing the importance of such data, we note that the State Bar of Michigan, as well as other private entities, can provide a valuable service by regularly publishing studies on the prevailing market rates for legal services in this state. We also note that the benefit of such studies would be magnified by more specific data relevant to variations in locality, experience, and practice area.

In considering the time and labor involved (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*) the court must determine the reasonable number of hours expended by each attorney. The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence.

> Multiplying the reasonable hourly rate by the reasonable hours billed will produce a baseline figure. After these two calculations, the court should consider the other factors and determine whether they support an increase or decrease in the base number. [*Id*. at 530-533 (quotation marks and citations omitted).]

In addition to articulating this new approach, the *Smith* Court noted that, unlike the approach articulated in *Wood*, a "court should briefly address on the record its view of each of the factors" to aid appellate review. *Id*. at 529 n 14. The *Smith* Court also noted that, as in *Wood*, courts are not limited to the specific factors discussed; however, it emphasized that "[t]o the extent a trial court considers any factor not enumerated in *Wood* or MRPC 1.5(a), the court should expressly indicate this and justify the relevance and use of the new factor." *Id*. at 531 n 15.

Our Supreme Court subsequently issued an order reversing a decision of this Court in a FOIA case and remanded the case to the circuit court to determine the plaintiff's reasonable attorney fees pursuant to the factors set forth in *Smith*. *Coblentz v City of Novi*, 485 Mich 961; 774 NW2d 526 (2009). Accordingly, although *Smith* is not a FOIA case, it controls for purposes of determining reasonable attorney fees in FOIA cases, including plaintiff's reasonable attorney fees in this case. *Id*.

In this case, the circuit court took the attorney-fee issue under advisement at the conclusion of the March 15, 2012, hearing and then issued the following attorney-fee analysis in its opinion and order: "This Court has reviewed the attorney fees requested by Defendant [sic] and determines without any disrespect to defense [sic] counsel's experience or expertise, that a reasonable attorney fee for representation at the trial and appellate court levels is $175 per hour at 70 hours or $12,250 . . . ." Essentially, there is no attorney-fee analysis at all—let alone an analysis pursuant to *Smith*

—for this Court to conduct a meaningful review of the circuit court's attorney-fee determination. *Smith* explicitly requires trial courts to briefly address each of the *Smith* factors when reaching its decision to aid appellate review; the circuit court did not do so in this case. Therefore, we vacate the circuit court's April 2012 opinion and order with respect to attorney fees and remand this case to the circuit court to reevaluate the attorney-fee issue pursuant to *Smith*. See generally *id*. at 961 (remanding to the trial court for a redetermination of attorney fees pursuant to *Smith*).

C. COMPENSATORY DAMAGES

Plaintiff's final argument is that the circuit court erred by not awarding compensatory damages under MCL 15.240(7) to compensate for her "healthy distrust" of the Michigan State Police.

As previously discussed, MCL 15.240(6) provides in part that, "[i]f a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements." MCL 15.240(7) in turn states:

> If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, *in addition to any actual or compensatory damages*, punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function. [Emphasis added.]

The FOIA does not define "actual or compensatory damages," and neither this Court nor our Supreme Court have construed the term for purposes of MCL 15.240(6) and (7).

In this case, plaintiff essentially argues that she is entitled to be compensated for her distrust of the Michigan State Police simply because MCL 15.240(7) says "compensatory damages." Plaintiff does not provide this Court with any statutory-interpretation analysis for MCL 15.240(7) to support the proposition that the phrase "actual or compensatory damages" means something more than the "reasonable attorneys' fees, costs, and disbursements" provided for in MCL 15.240(6). Moreover, even assuming that the phrase "actual or compensatory damages" means something more than what is provided for in MCL 15.240(6), e.g., compensatory damages as understood for purposes of tort law, plaintiff provides this Court with no legal authority illustrating that such damages would include compensation for her distrust of the Michigan State Police. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (quotation marks and citation omitted). Therefore, we conclude that this issue is abandoned. *Id*. Regardless, the trial court did not clearly err by finding that plaintiff failed to prove a nexus between the death of her husband and the FOIA request in this case.

We vacate the circuit court's attorney-fee determination, remand for a reevaluation of that issue consistent with this Court's opinion, and affirm the circuit court's order in all other respects. We do not retain jurisdiction.

BECKERING, P.J., and STEPHENS and BOONSTRA, JJ., concurred.

PEOPLE v JOHNSON-El

Docket No. 306880. Submitted March 5, 2013, at Detroit. Decided March 7, 2013, at 9:00 a.m. Leave to appeal denied, 494 Mich ___.

Anthony L. Johnson-El was convicted of forgery, uttering and publishing, and encumbering real property without lawful cause following a bench trial in the Wayne Circuit Court, Daniel A. Hathaway, J. The convictions were based on an affidavit of allodial title that defendant, a "Washitaw Moor," authored, signed, and recorded with the Wayne County Register of Deeds for a parcel of property in which he had no ownership or security interest. The actions of defendant clouded title to the property, interfering with the true owner's ability to redeem the property from foreclosure by attempting to sell it to an interested buyer to secure the funds necessary to satisfy the secured debt. Defendant appealed.

The Court of Appeals *held*:

1. The prosecution presented sufficient evidence to establish that the affidavit was false and forged and that defendant was aware of the falsity of the affidavit when he authored and recorded it. The prosecution presented sufficient evidence from which the court could determine beyond a reasonable doubt that the affidavit was a false instrument, as required to establish that defendant committed forgery and uttering and publishing, and that defendant had no lawful cause to slander the true owner's title. The prosecution also presented sufficient evidence to show that defendant intended to defraud, harass, or intimidate anyone holding an actual interest in the property.

2. Claiming to be a citizen of a fictional sovereign does not bestow on defendant any legitimate right to real property situated in Michigan. The evidence demonstrates that defendant was aware that he had no legal right to the property and fraudulently filed the affidavit despite the real interests of the true owner and the foreclosing bank.

3. Defendant uttered and published the affidavit and unlawfully encumbered the property when he recorded the affidavit.

4. One need not know the victim of his or her harassment, fraud, or forgery, therefore, it is irrelevant that defendant did not actually know the true owner of the property at the time defendant filed the affidavit.

Affirmed.

1. FORGERY — ELEMENTS OF CRIME.

The elements of the crime of forgery are (1) an act that results in the false making or alteration of an instrument (which makes an instrument appear to be what it is not) and (2) a concurrent intent to defraud or injure (MCL 750.248[1]).

2. CRIMINAL LAW — UTTERING AND PUBLISHING — ELEMENTS OF CRIME.

The elements of the crime of uttering and publishing a forged instrument are (1) knowledge on the part of the accused that the instrument is false, (2) an intent to defraud, and (3) presentation of the forged instrument for payment; to utter and publish a forged instrument is to declare or assert, directly or indirectly, by words or actions, that an instrument is good (MCL 750.249).

3. CRIMINAL LAW — EVIDENCE — INFERENCES — INTENT TO DECEIVE.

A fact-finder can infer a defendant's intent to deceive from the evidence; minimal circumstantial evidence suffices to prove a defendant's intent.

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

Ronald D. Ambrose for defendant.

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM. Following a bench trial, the circuit court convicted defendant, Anthony Lee Johnson-El, of forgery, MCL 750.248, uttering and publishing, MCL 750.249, and encumbering real property without lawful cause, MCL 600.2907a(2), based on an "Affidavit of Allodial Title" that he authored, signed, and recorded with the Wayne County Register of Deeds for a parcel of property in which he had no ownership or other interest. The prosecution presented sufficient evidence to establish that the affidavit was false and forged and

that defendant was aware of the affidavit's falsity when he authored and recorded it. We therefore affirm.

I. BACKGROUND

On July 21, 2010, defendant recorded an "Affidavit of Allodial Title" with the Wayne County Register of Deeds claiming an interest in real property located at 14503 Faust in Detroit. The affidavit stated that defendant owned the property, that its value was secured by a $100-billion bond, and that defendant was a secured party. Defendant claims allodial title because he is a "Washitaw Moor," as indicated in his tribe-endorsed birth certificate provided to the circuit court. Although the United States Court of Appeals for the Sixth Circuit has called the Nation of Washitaw fictional, the Washitaw Moors apparently believe that all land in this country outside the 13 original colonies and Texas belongs to its members. *Bybee v City of Paducah*, 46 Fed Appx 735, 736 (CA 6, 2002); see Article 18(2) of the Proof of Truth Claim: International Declaration of Washitaw Muurs Standing.[1] Allodial title denotes "absolute ownership" of property over which no one can bring a superior claim. Black's Law Dictionary (7th ed), p 76. As a member of the sovereign nation that he believes owns all land in Michigan, defendant was of the opinion that his claim to the subject property was superior to all others. Consistent with this belief, defendant filed affidavits of allodial title for several properties in Wayne County. Benjamin Way, a deputy register

[1] The Washitaw Moors claim a mixture of Native American and African heritage and assert that they are a sovereign nation within the United States. See the Preamble and Article Seven of the Proof of Truth Claim: International Declaration of Washitaw Muurs Standing, October 17, 2009, available at <http://lawfortherecord.blogspot.com/2009/10/international-declaration-of-washitaw_17.html> (accessed March 1, 2013).

of deeds in Wayne County, explained that in relation to the Faust Street property and the others over which defendant claimed ownership, he found no recorded documents from a previous owner or security-interest holder transferring any interest to defendant.

Defendant's actions clouded the property's title. The property's true owner, Jesus Martin-Roman, was unable to redeem the property, which was then subject to a bank foreclosure, by attempting to sell it to an interested buyer to secure the funds necessary to satisfy the secured debt. When Martin-Roman's real estate agent contacted defendant, defendant asserted his "property rights" and warned the agent not to close the sale or "I got their ass."

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecutor failed to prove beyond a reasonable doubt that the affidavit was false or forged or that he filed the affidavit to harass or intimidate anyone. When reviewing challenges to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could conclude that the prosecution proved all the essential elements of the crime beyond a reasonable doubt. *People v Hunter,* 466 Mich 1, 6; 643 NW2d 218 (2002).

MCL 750.248(1) proscribes forgery as follows: "A person who falsely makes, alters, forges, or counterfeits a public record . . . with intent to injure or defraud another person is guilty of a felony[.]" "The elements of the crime of forgery are: (1) an act which results in the false making or alteration of an instrument (which makes an instrument appear to be what it is not); and (2) a concurrent intent to defraud or injure. The key is that the writing itself is a lie." *People v Grable*, 95 Mich App 20, 24; 289 NW2d 871 (1980), citing *People v Susalla*, 392 Mich 387, 392-393; 220 NW2d 405 (1974).

MCL 750.249 describes the crime of "uttering and publishing" as follows: "A person who utters and publishes as true a false, forged, altered, or counterfeit record, instrument, or other writing listed in [MCL 750.248] knowing it to be false, altered, forged, or counterfeit with intent to injure or defraud is guilty of a felony[.]" "The elements of the crime of uttering and publishing a forged instrument are: (1) knowledge on the part of the accused that the instrument was false; (2) an intent to defraud; and (3) presentation of the forged instrument for payment." *Grable*, 95 Mich App at 24. To "utter and publish a forged instrument is to declare or assert, directly or indirectly, by words or actions, that an instrument is good." *People v Fudge*, 66 Mich App 625, 632; 239 NW2d 686 (1976) (quotation marks and citation omitted).

MCL 600.2907a(2) creates criminal liability for a person who unlawfully encumbers real property as follows: "A person who violates [MCL 565.25] by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person is guilty of a felony[.]" This is the criminal version of a slander-of-title tort.

The prosecution presented sufficient evidence from which the court could determine beyond a reasonable doubt that the affidavit was a false instrument. In the affidavit, defendant swore that he owned the property and had secured a $100 billion bond over the property. Yet, defendant admitted at trial that he never purchased the property or took ownership through an interest transferred by a previous owner or security-interest holder. Rather, defendant admitted that he drove past the property, saw that the windows were boarded up and the door was padlocked, and then decided to simply take the property as his own by authoring and recording the affidavit. This evidence supports the determinations that

the affidavit was false, as required to establish that defendant committed forgery and uttering and publishing, and that defendant had no lawful cause to slander Martin-Roman's title.

The prosecution also presented more than sufficient evidence that defendant intended to defraud, harass, or intimidate anyone holding an actual interest in the property. A fact-finder can infer a defendant's intent to deceive from the evidence. *People v Reigle*, 223 Mich App 34, 39; 566 NW2d 21 (1997). Minimal circumstantial evidence suffices to prove a defendant's intent. *People v Guthrie*, 262 Mich App 416, 419; 686 NW2d 767 (2004). Defendant's only claim to the property is by virtue of his proclaimed Washitaw citizenship. Claiming to be a citizen of a fictional sovereign does not bestow upon defendant any legitimate right to real property situated in this state. Defendant's own witness, Roger Allen-Dey, testified that Washitaw Moors customarily seek out properties upon which creditors have foreclosed as targets to assert allodial title. Defendant had followed this scheme by filing similar affidavits for several properties in Wayne County; he was fortunate none of the other property owners complained to law enforcement officials. This evidence satisfactorily demonstrates that defendant was aware that he had no legal right to the property and fraudulently filed the affidavit despite the real interests of Martin-Roman and the foreclosing bank.

The prosecution presented sufficient evidence that defendant uttered and published the affidavit[2] and unlawfully encumbered the property when he recorded

[2] The recording of a false mortgage or deed meets the requirements for uttering and publishing. See *Perkins v People*, 27 Mich 386 (1873); *People v Caton*, 25 Mich 388 (1872); *People v Shively*, 230 Mich App 626, 630-631; 584 NW2d 740 (1998).

the affidavit with the Wayne County Registry of Deeds. Defendant swore to the truth of the statements in the affidavit before a notary public, knowing that his statements were not true. Defendant then presented the affidavit to the Register of Deeds for recording. As a result of this recorded false document, others were led to believe that Martin-Roman's title to the property was clouded.

Contrary to defendant's challenge on appeal, it is irrelevant that he did not actually know Martin-Roman at the time he filed the affidavit. One need not know the victim of his or her harassment, fraud, or forgery. Because defendant's admitted scheme was to file affidavits of allodial title for properties that were being foreclosed upon, defendant at least knew that he was interfering with the interests of the properties' original owners and the entities exercising their rights to foreclosure. Moreover, defendant exhibited his intent to harass or intimidate Martin-Roman personally when he threatened Martin-Roman's real estate agent. This evidence more than adequately supported defendant's convictions.

Affirmed.

GLEICHER, P.J., and SAWYER and FORT HOOD, JJ., concurred.

MEIER v AWAAD

Docket No. 310808. Submitted February 5, 2013, at Detroit. Decided March 12, 2013, at 9:00 a.m.

Benjamin Meier and other minor plaintiffs, through their next friends, brought an action in the Wayne Circuit Court against Yasser Awaad, M.D., Awaad's former employer, Oakwood Healthcare, Inc., and related corporate entities, alleging that Awaad had intentionally misdiagnosed them with epilepsy or seizure disorder for the purpose of increasing his billings, which resulted in their being subjected to inappropriate medication, treatment, and medical testing. To identify witnesses and potential members of a class action, plaintiffs sought to obtain the names and addresses of other patients whom Awaad had diagnosed with these disorders, initially from the patients' insurers, then from defendants, and finally by serving a subpoena on the Michigan Department of Community Health (MDCH), which had records of patients whose treatment costs had been reimbursed by Medicaid. The MDCH refused to comply with the subpoena without a court order stating that doing so would not violate the privacy protections of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*. The court, Daphne Means Curtis, J., ordered the MDCH to comply, ruling that the disclosure would not violate HIPAA. The court also issued a separate protective order restricting access to the information and the purposes for which it could be used. After the information was released and the patients were contacted by plaintiffs' counsel, defendants applied for leave to appeal both orders, arguing that they violated Michigan's statutory physician-patient privilege, MCL 600.2157. The Court of Appeals held the application for leave in abeyance and stayed all proceedings, including any further use of the information released pursuant to the orders. After leave was granted, defendants moved for sanctions or other relief, asserting that plaintiffs had violated the stay order by using the information to send notices of intent to sue and requests for medical records. The Court of Appeals granted the motion, ordering the firms representing plaintiffs to pay $250 each and to cease using the information. Plaintiffs did not appeal this order.

The Court of Appeals *held*:

1. Release of patient information pursuant to the trial court's orders violated MCL 600.2157, which prohibits a person duly authorized to practice medicine or surgery from disclosing any information acquired in attending a patient in a professional character except as otherwise provided by law. The privilege this statute provides belongs solely to the patient and therefore can only be waived by the patient. This provision's predecessor, which contained comparable language, was construed in *Massachusetts Mut Life Ins Co v Bd of Trustees of Mich Asylum for the Insane*, 178 Mich 193 (1913), to apply to third parties who obtain confidential information from doctors and surgeons, and that construction was extended to MCL 600.2157 in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26 (1999). Under these holdings, MCL 600.2157 bars the disclosure of confidential medical information by entities such as the MDCH, and the trial court's orders must be reversed. The fact that the information may have helped to establish plaintiffs' case is irrelevant, because the physician-patient privilege protects the identity of nonparty patients regardless of need or whether the patients themselves have invoked it.

2. Sanctions were not appropriate because the disclosure was the result of the trial court's decision rather than unilateral action by plaintiffs.

3. Defendants' appeal was not moot because, although the court could not prevent or remedy the harm caused by the disclosure, meaningful relief could be fashioned by ordering the return of all copies of the privileged information to the MDCH, the destruction of all electronic files containing the information except with respect to those patients who responded to plaintiffs' letters and were prepared to waive the physician-patient privilege, and the exclusion of the protected information from evidence at a future trial or for purposes of the class-certification analysis.

Reversed and remanded for implementation of conditional remedial measures.

1. PHYSICIANS AND SURGEONS — PHYSICIAN-PATIENT PRIVILEGE — THIRD-PARTY DISCLOSURES.

The physician-patient privilege established in MCL 600.2157, which prohibits a person duly authorized to practice medicine or surgery from disclosing any information acquired in attending a patient in a professional character except as otherwise provided by law, also applies to third parties who obtain confidential information from those authorized to practice medicine or surgery; this privilege

protects nonparty patients regardless of the motivation for seeking their information or whether the patients themselves have invoked it.

2. APPEALS — PHYSICIAN-PATIENT PRIVILEGE — RELEASE OF PROTECTED INFORMATION — MOOTNESS.

An appeal from an order allowing the release of information protected by the physician-patient privilege is not rendered moot by the information's subsequent disclosure if some form of meaningful relief can be fashioned, such as precluding the protected material and its fruit from being introduced as evidence.

Secrest Wardle (by *Bruce A. Truex* and *Drew W. Broaddus*) for plaintiffs.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Christina A. Ginter*, *Harry J. Sherbrook*, and *Charles W. Fisher*) for defendants.

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

MURPHY, C.J. The minor plaintiffs, through their next friends,[1] brought this lawsuit against defendant Yasser Awaad, M.D., and the remaining defendants, which are various corporate entities associated with Awaad's medical practice, alleging that Awaad intentionally misdiagnosed them with either epilepsy or seizure disorder for the purpose of increasing his billings. Plaintiffs maintained that, as a result of the false diagnoses, they were subjected to unnecessary and inappropriate medication, treatment, and medical testing. Plaintiffs alleged claims sounding in medical malpractice, negligent credentialing, negligent supervision, silent fraud, battery, conspiracy, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. In the course of discovery, plaintiffs served a subpoena on the Michigan Department of Community Health

[1] We note that the name "Laura Abel-Slater" also appears as "Laura Abdel-Slater" in some lower court filings.

(MDCH), requesting the names and addresses of all Medicaid beneficiaries who were treated by Awaad and coded as having been diagnosed with epilepsy or seizure disorder. The MDCH refused to comply absent a court order, and on plaintiffs' motion to show cause why the subpoena should not be enforced, the trial court ordered enforcement of the subpoena in order to allow the determination of putative class members and witnesses. The order also declared that disclosure of the specified information would not result in a violation of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*. In a separate protective order, the trial court restricted access to the requested patient list, set forth the permissible uses of the patient information, required the information to be maintained in a secure location, and authorized plaintiffs' counsel to contact individual patients identified in materials submitted by the MDCH in response to the subpoena. Defendants appeal by leave granted the two orders. We hold that the trial court's ruling violated Michigan's statutory physician-patient privilege, MCL 600.2157, as construed in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999), and, relative to an earlier but similar version of the statute, *Massachusetts Mut Life Ins Co v Bd of Trustees of Mich Asylum for the Insane*, 178 Mich 193; 144 NW 538 (1913). Accordingly, we reverse the trial court's orders and remand for implementation of conditional remedial measures as specified below, but not including sanctions, as plaintiffs proceeded pursuant to court orders.

I. BACKGROUND

The minor plaintiffs were patients of Awaad, a pediatric neurologist, who is alleged to have knowingly and willfully misdiagnosed plaintiffs with either epilepsy or seizure

disorder as part of an effort to maximize his billings.[2] Under this factual theory, plaintiffs commenced suit in 2008, asserting various legal causes of action including fraud and medical malpractice. Subsequently, in February 2012, plaintiffs subpoenaed the healthcare insurers of Awaad's patients, seeking the names and addresses of other patients that Awaad diagnosed with epilepsy or seizure disorder. Defendants and two of the recipients of the subpoenas filed an emergency motion to quash the subpoenas on the ground that disclosure of the requested information would violate the physician-patient privilege. Plaintiffs then decided to withdraw the subpoenas. Thereafter, plaintiffs served defendants with interrogatories, asking defendants to provide information regarding the number of Medicaid patients treated by Awaad who had been diagnosed with epilepsy and the amount of money expended by Medicaid in paying for treatment of those Medicaid beneficiaries. Defendants objected and plaintiffs' motion to compel was denied.

In May 2012, plaintiffs served the MDCH with a subpoena requesting the names and addresses of Medicaid beneficiaries whose records Awaad had coded with a diagnosis of epilepsy or seizure disorder. The MDCH, through the Attorney General's office, advised plaintiffs' counsel that there would be no compliance with the subpoena unless the trial court ruled that providing the requested information would not constitute a HIPAA

[2] In an administrative consent order entered in January 2012, Awaad was found to have violated the Public Health Code, MCL 333.16221(a), and he was fined $10,000 and placed on probation for one to five years under the supervision of a board-certified pediatric neurologist. See *In re Awaad*, consent order and stipulation before the Bureau of Health Professions Board of Medicine Disciplinary Subcommittee, Dep't of Licensing and Regulatory Affairs, entered January 25, 2012 (Complaint No. 43-07-105478).

violation. Plaintiffs proceeded to file a motion to show cause why their subpoena to the MDCH should not be enforced. Plaintiffs asserted that Awaad's Medicaid billings, including charges for electroencephalographies (EEGs), rose significantly after 2001, which was the first year that Awaad and his practice entered into incentive contracts that allowed Awaad to earn supplemental income based on a percentage of his net collected billings. Plaintiffs argued that the requested information was discoverable because it was relevant to the issues in the pending case, although they agreed that a protective order limiting the use of the information would be appropriate. Plaintiffs indicated that they intended to use the information to mail individual letters to each patient or former patient identified by the MDCH. They had no intent to disclose or publish the names in any other context. Plaintiffs requested that the trial court enter an order allowing disclosure of the requested information, declaring that no HIPAA violation would result from the disclosure, and compelling the MDCH's compliance with the subpoena.

The MDCH maintained that should the trial court grant plaintiffs' motion, the court should also require plaintiffs' counsel to stipulate to a protective order with respect to the disclosed names and addresses. In opposition to plaintiffs' motion, defendants characterized the motion as an attempt to evade or circumvent the statutory physician-patient privilege, MCL 600.2157, by seeking Medicaid information from the MDCH that plaintiffs would otherwise be unable to obtain directly from defendants. Defendants also argued that plaintiffs' request violated HIPAA's privacy protections. Defendants contended that disclosure of the names, addresses, and medical diagnoses of approximately 600 nonparty patients would violate Michigan's statutory physician-patient privilege, the common-law right of privacy, and public policy favoring patients' privacy. Defen-

dants also asserted that MCR 3.501(A), which governs class actions, precluded disclosure because that rule allows for notification to potential class members only after the class has been certified. Plaintiffs did move for class certification pursuant to MCR 3.501(B), but the trial court had not yet ruled on the certification motion at the time the orders at issue were entered.

In reply to defendants' response, plaintiffs argued that defendants lacked standing to challenge a subpoena directed at a nonparty and also lacked standing to assert the physician-patient privilege on behalf of the patients. Plaintiffs stated that they sought the names of the Medicaid beneficiaries because they were witnesses to Awaad's fraudulent scheme. Plaintiffs also anticipated that these witnesses would provide additional support for plaintiffs' request for class certification under MCR 3.501. Plaintiffs accused defendants of opposing the disclosure, not to protect former patients' confidential health information, but rather to conceal the fraudulent scheme from past patients, witnesses, and potential claimants.

At the hearing on plaintiffs' motion, the trial court ruled that MCL 600.2157 applied only to disclosures by healthcare providers, not third parties such as the MDCH. The court noted that the statute included a waiver for patients who bring malpractice actions against providers. The trial court did not agree that MCR 3.501 prohibited a party from discovering potential class members. The court ordered the MDCH to comply with plaintiffs' subpoena and provide the names and addresses of all Medicaid patients on whose behalf the MDCH made medical payments and who were assigned the epilepsy diagnostic code by Awaad, in order to allow a determination of putative class members and witnesses relative to the action. The order further declared that the disclosure did "not violate HIPAA" and that "the MDCH and [p]laintiff[s] may agree

to any additional [p]rotective [o]rder with regard to safeguarding the name[s] and address[es] of all Medicaid patients produced by the MDCH."

The trial court also issued a protective order that limited access to the information to plaintiffs' attorneys and any law clerks, paralegals, and secretaries employed by plaintiffs' attorneys and agents. The protective order prohibited the list from being disclosed publicly or used for any purpose other than trial preparation and appeals in the case, but it did authorize plaintiffs' counsel to send individual letters to patients indentified on the list. Under the protective order, all authorized individuals with a copy of the list were required to destroy or delete the copies within 30 days after the action was concluded and no longer appealable.

The MDCH released the information to plaintiffs' counsel pursuant to the subpoena and enforcement order, and plaintiffs' counsel immediately sent a letter to each of the persons identified in the MDCH's disclosure. The letter provided as follows:

> Dear Parent or Medicaid Beneficiary:
>
> We have been provided your name by the Michigan Department of Community Health. We believe you may be a witness in an action currently pending in the Wayne County Circuit Court against Dr. Yasser Awaad and Oakwood Hospital concerning the allegations set forth in the attached Complaint.
>
> Please call me . . . at your earliest convenience to discuss this matter.

Defendants filed their application for leave to appeal after the letters were sent. In an order, this Court held the application for leave in abeyance, stayed "[a]ll proceedings, including any further use by plaintiffs of the names and other information released as a result of the circuit court's orders," and directed the parties to submit briefs

"addressing the remedy for an improper release of privileged information." *Meier v Awaad*, unpublished order of the Court of Appeals, entered July 6, 2012 (Docket No. 310808). After supplemental briefs were filed, this Court granted defendants' application for leave to appeal. *Meier v Awaad*, unpublished order of the Court of Appeals, entered August 6, 2012 (Docket No. 310808). On September 25, 2012, defendants filed a motion for sanctions or other relief for plaintiffs' alleged violation of this Court's previous stay order. Noting that it was "undisputed" that "since July 6, 2012, plaintiffs' counsel have utilized the names released as a result of the circuit court's June 13, 2012 order by sending Notices of Intent to sue and medical record requests to numerous medical providers," this Court ordered that "both firms representing plaintiffs shall pay $250.00 to the Clerk of the Court . . . and shall forthwith discontinue the use of the names and other information as provided for in our order of July 6, 2012." *Meier v Awaad*, unpublished order of the Court of Appeals, entered October 24, 2012 (Docket No. 310808).

II. ANALYSIS

A. STANDARD OF REVIEW

The interpretation and application of the physician-patient privilege is a legal question that is reviewed de novo by this Court. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000). Matters concerning the construction of statutory language are likewise reviewed de novo. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

B. GOVERNING PRINCIPLES OF STATUTORY CONSTRUCTION

This appeal concerns, in part, the construction and applicability of Michigan's statutory physician-patient

privilege, MCL 600.2157. In *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010), our Supreme Court recited the familiar governing principles regarding statutory interpretation:

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical "words and phrases shall be construed and understood according to the common and approved usage of the language," MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme. Where the language used has been subject to judicial interpretation, the [L]egislature is presumed to have used particular words in the sense in which they have been interpreted. [Citations and quotation marks omitted.]

C. DISCUSSION

We begin by noting that defendants do not argue that disclosure was prohibited under HIPAA. Furthermore, in the context of this suit, application of MCL 600.2157 is not preempted by HIPAA. In *Isadore Steiner, DPM, PC v Bonanni*, 292 Mich App 265, 267; 807 NW2d 902 (2011), this Court explained:

> This discovery dispute requires us to decide whether federal or state law controls and whether disclosure would violate the nonparty patients' privacy rights.
>
> By its language, HIPAA asserts supremacy in this area, but allows for the application of state law regarding physician-patient privilege if the state law is more protective of patients' privacy rights. In the context of litigation

> that, as here, involves nonparty patients' privacy, HIPAA requires only notice to the patient to effectuate disclosure whereas Michigan law grants the added protection of requiring patient consent before disclosure of patient information. Because Michigan law is more protective of patients' privacy interests in the context of this litigation, Michigan law applies to plaintiff's attempted discovery of defendant's patient information.

We are similarly addressing a litigation discovery issue involving the privacy rights of nonparty patients. Accordingly, federal preemption is of no concern, and we continue with an examination of Michigan's statutory physician-patient privilege, MCL 600.2157, which provides:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition. If a patient has died, the heirs at law of the patient, whether proponents or contestants of the patient's will, shall be considered to be personal representatives of the deceased patient for the purpose of waiving the privilege under this section in a contest upon the question of admitting the patient's will to probate. If a patient has died, the beneficiary of a life insurance policy insuring the life of the patient, or the patient's heirs at law, may waive the privilege under this section for the purpose of providing the necessary documentation to a life insurer in examining a claim for benefits.

The scope of the physician-patient privilege is governed entirely by the statutory language, as the privilege was not recognized under the common law. *Dorris*, 460 Mich at 33. "It is well established that the purpose of the statute is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make a full disclosure of symptoms and condition." *Id*. Because the privilege of confidentiality belongs solely to the patient, it can only be waived by the patient. *Id*. at 34, citing *Gaertner v Michigan*, 385 Mich 49, 53; 187 NW2d 429 (1971). "A patient may intentionally and voluntarily waive the privilege." *Dorris*, 460 Mich at 39. As reflected in the express language of MCR 2.302(B)(1), which governs the scope of discovery, the protection of privileged information supersedes even the liberal discovery principles that exist in Michigan. *Id*. at 37.

With respect to the extent or reach of the physician-patient privilege, our Supreme Court in *Dorris*, *id*. at 34, noted that the Court had previously held in *Schechet v Kesten*, 372 Mich 346, 351; 126 NW2d 718 (1964), that the privilege precludes the disclosure of treatment histories and even the names of patients. The *Dorris* Court concluded:

> The language of [MCL 600.2157] is clear in its prohibition of disclosure of privileged information. In accordance with prior rulings of this Court, particularly *Schechet*, that the purpose of the privilege is to encourage patients' complete disclosure of all symptoms and conditions by protecting the confidential relationship between physician and patient, we find requiring the defendant hospitals to disclose the identity of unknown patients would be in direct contradiction of the language and established purpose of the statute.
>
> Historically, confidentiality has been understood to be necessary to promote full disclosure of a patient's medical

> history and present medical concerns. . . . [P]atients armed with the knowledge that their name may not be kept confidential may not be as willing to reveal their full medical history for fear that, ultimately, that information, too, may lose its confidential status. This chilling of the patient's desire to disclose would have a detrimental effect on the physician's ability to provide effective and complete medical treatment and is therefore "necessary" to enable a physician "to prescribe" for a patient. [*Dorris*, 460 Mich at 37-39 (citation omitted).]

Indeed, the physician-patient privilege prohibits disclosure even when the patient's identity is redacted. *Johnson v Detroit Med Ctr*, 291 Mich App 165, 169; 804 NW2d 754 (2010).

"[T]he physician-patient privilege is an absolute bar that prohibits the unauthorized disclosure of patient medical records, *including when the patients are not parties to the action*." *Baker*, 239 Mich App at 463 (emphasis added). "[P]rotecting the interests of . . . nonparty patients is of utmost importance." *Isidore Steiner*, 292 Mich App at 274. The names, addresses, telephone numbers, and medical information relative to nonparty patients fall within the scope of the physician-patient privilege. *Id*. at 276; see also *Johnson*, 291 Mich App at 169-170 (physician-patient privilege protected nonparty patient documents).

Plaintiffs argue that defendants lacked standing to pose a challenge under MCL 600.2157 because the physician-patient privilege is held only by the patient and here no patient has invoked the privilege. In further support of their standing argument, plaintiffs contend that although the courts have allowed healthcare providers to invoke the privilege when the healthcare providers themselves have been asked to make the disclosures during the course of litigation, the disclosure request in this case was not directed at defendants but at the MDCH, which does not

hold the privilege, did not provide the medical care, and is not a party to the suit. We initially question plaintiffs' reliance on "standing," which is a principle more closely associated with the question whether a party has the right to bring suit or has a legal cause of action. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Moreover, the issue of privilege has a bearing on whether materials are discoverable, MCR 2.302(B)(1) ("[p]arties may obtain discovery regarding any matter [that is] not privileged"), and the admissibility of evidence, MRE 104(a) (existence of a privilege is for the court to decide relative to admissibility) and MRE 501 (general evidentiary rule on privilege). Certainly, a party to a lawsuit has "standing" or a right to raise issues or challenges with respect to discovery and evidentiary matters. We also note that plaintiffs speak of the fact that no patient identified on the MDCH list has invoked the privilege; however, the nature of the confidentiality privilege held by a patient is that the privilege exists until waived by the patient. See *Dorris*, 460 Mich at 34, 39 (privilege is held by the patient but can then be voluntarily and intentionally waived). Express or implied invocation of the privilege by the patient does not trigger the privilege; rather, it arises by operation of MCL 600.2157 upon the development of a physician-patient relationship.

Additionally, the cases cited above substantively examined whether *nonparty* patients were protected by the physician-patient privilege for purposes of determining whether disclosure was barred in a lawsuit, even though the cases entailed objections and challenges raised by the litigants and not the patients themselves. *Dorris*, 460 Mich 26 (the defendant hospital challenged the plaintiffs' right to obtain disclosure through discovery of the name of a nonparty patient who shared a hospital room with one of the plaintiffs); *Isidore Steiner*, 292 Mich App 265 (the defendant doctor objected to the plaintiff's efforts to

obtain disclosure of the doctor's patient list); *Johnson*, 291 Mich App 165 (the defendant healthcare providers challenged the plaintiff's discovery request that asked the healthcare providers to produce nonparty patient documents); *Baker*, 239 Mich App 461 (the defendant doctor and hospital objected to the plaintiff's discovery request seeking the production of nonparty patient medical records). As noted by the panel in *Isidore Steiner*, 292 Mich App at 276, nonparty patients are unlikely to even be aware of the pending lawsuit. Furthermore, while plaintiffs' subpoena and the trial court's orders were directed at the MDCH, which of course did not provide the medical care to the nonparty patients, and although defendants themselves were not required to disclose patient information, we fail to understand why these facts would deprive defendants, parties to the suit, from raising discovery and evidentiary objections regarding the information. Regardless of the source of the disclosure, whether it be defendants or the MDCH, the information could clearly have some effect on the litigation, thereby minimally giving defendants a right to object. If a violation of the privilege would arise upon disclosure of information, discovery of the information is not permissible under the court rules, nor could the information be admitted into evidence.

Another aspect of plaintiffs' standing argument, interwoven with the arguments addressed earlier, is the assertion that the MDCH, an outside third party and payor by way of Medicaid, is not "a person duly authorized to practice medicine or surgery," as framed in MCL 600.2157. Therefore, plaintiffs argue, the prohibition against disclosure does not pertain to a disclosure made by the MDCH. Plaintiffs are apparently arguing that a duly authorized doctor or surgeon has standing to raise the privilege under the statute only when he or she provided the medical care *and* was the one asked to disclose the

patient information. We view this argument not in terms of "standing" but as simply challenging the applicability of the privilege and whether it can be successfully invoked under the statute when the information is sought not from the doctor or surgeon who provided the medical care, but rather from a third party who has obtained patient information from the doctor or surgeon. The trial court ruled that a disclosure by the MDCH would not offend the statutory privilege because the MDCH was not "a person duly authorized to practice medicine or surgery."

The initial sentence in MCL 600.2157 does state that "[e]xcept as otherwise provided by law, *a person duly authorized to practice medicine or surgery shall not disclose* any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon." (Emphasis added.) This language might suggest that persons other than the doctor or surgeon who cared for the patient could legally disclose patient information once obtained. The language of MCL 600.2157 only speaks of barring disclosure by "a person duly authorized to practice medicine or surgery," and there can be no dispute that neither the MDCH nor Medicaid fits within that category. However, we conclude that *Dorris*, 460 Mich 26, and *Massachusetts Mut Life*, 178 Mich 193, do not allow for the interpretation posited by plaintiffs. And we are of course bound by this Supreme Court precedent.

In *Dorris*, 460 Mich at 38 n 6, the Court, entertaining the argument that a hospital and not a doctor was asked to disclose patient information, ruled:

> The dissent argues that by not addressing the distinction that plaintiffs are requesting patient names from a hospital, as opposed to a physician, we are imputing the physician-patient privilege to the hospital. However, in

> [*Massachusetts Mut Life*, 178 Mich at 204], quoting *Smart v Kansas City*, 208 Mo 162, 198; 105 SW 709; 14 LRA Ann Cas 565 (1907), this Court stated:
>
> > "[I]t seems that it must follow as a natural sequence that when the physician subsequently copies that privileged communication upon the record of the hospital, it still remains privileged. If that is not true, then the law which prevents the hospital physician from testifying to such matters could be violated both in letter and spirit and the statute nullified by the physician copying into the record all the information acquired by him from his patient, and then offer or permit the record to be offered in evidence containing the diagnosis, and thereby accomplish, by indirection, that which is expressly prohibited in a direct manner."

In this case, plaintiffs are essentially claiming that, in contravention of MCL 600.2157, the physician-patient privilege would be imputed to the MDCH if we were to rule that the privilege prohibited the MDCH from disclosing to plaintiffs the nonparty patient information that the MDCH had acquired from Awaad for purposes of billing and payment. The gravamen of this argument was rejected by the *Dorris* Court, which held that the statute prohibited disclosure even though the plaintiffs requested the patient names from a hospital and not specifically from "a person duly authorized to practice medicine or surgery." The Court in *Dorris*, relying on language found in *Massachusetts Mut Life*, made clear that the privilege continues to protect against disclosure by parties other than a physician after the physician conveys privileged communications obtained in the physician-patient relationship to those third parties. The *Dorris* Court indicated that its decision was necessary in order to honor the letter and spirit of MCL 600.2157 and to prevent its indirect nullification. At the time *Massachusetts Mut Life* was decided in 1913, the statute contained comparable language, providing that " '[n]o person duly authorized to practice physic or surgery shall be allowed to disclose any

information which he may have acquired in attending any patient . . . .' " *Massachusetts Mut Life*, 178 Mich at 199, quoting 1897 CL 10181, as amended by 1909 PA 234. The Supreme Court in *Massachusetts Mut Life* held that the plaintiffs were not entitled to a writ of mandamus compelling the asylum's board of trustees to permit inspection of records concerning the mental and physical condition of an asylum patient. The Court, in part, relied on and quoted at length *Price v Standard Life & Accident Ins Co*, 90 Minn 264; 95 NW 1118 (1903), wherein the Minnesota Supreme Court observed:

> "The information communicated by Dr. Kimball to the superintendent of the hospital was acquired by the former while attending the patient, and was necessary to enable him to prescribe or act for him. Dr. Kimball would not have been allowed to make any such disclosure, *and the statutory restriction upon him could not be evaded by introducing in evidence testimony of a third party as to what the doctor said about the case*." [*Massachusetts Mut Life*, 178 Mich at 205, quoting *Price*, 90 Minn at 269-270 (emphasis added).]

Again, the principle that emanates from *Massachusetts Mut Life* and *Dorris* is that the statutory physician-patient privilege operates to bar disclosure even when the disclosure is not sought directly from a physician or surgeon but rather from a third party who obtained protected information from a doctor.[3] The principle, in our view, makes for good public policy, but we recognize that it is not the role of the courts to render decisions with the aim of setting social policy under the guise of construing a statute, especially when it becomes necessary to strain the statutory language in order to reach the policy goal. "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of

[3] Neither of these Supreme Court opinions suggested that agency principles played a role in the analysis.

the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). And our Supreme Court "has recognized that the Legislature is the superior institution for creating the public policy of this state[.]" *Woodman v Kera LLC*, 486 Mich 228, 245; 785 NW2d 1 (2010) (opinion by YOUNG, J.) (emphasizing that making social policy is the Legislature's job and not the job of the courts). While the relevant aspects of *Massachusetts Mut Life* and *Dorris* might make for good policy, support in the statutory language would seem to be lacking when it comes to prohibiting disclosures by a third party. However, it is for the Supreme Court to revisit the issue should it wish to do so, not this Court. In this case, the MDCH acquired patient names and diagnoses that originated from Awaad's practice of medicine and treatment of the nonparty patients. We therefore conclude that MCL 600.2157, as construed in *Massachusetts Mut Life* and *Dorris*, prohibited the disclosure ordered by the trial court, and the court's orders are hereby reversed.

Before addressing the proper remedy, we briefly examine and reject plaintiffs' argument that disclosure was proper because the information is relevant to establishing plaintiffs' case, it can be used in regard to potential certification of a class action, and its disclosure would prevent defendants from manipulating the physician-patient privilege in order to avoid liability, absent any true concern for protecting the patients' rights. In *Baker*, 239 Mich App at 476-478, this Court rejected an argument that a party should not be permitted to invoke the physician-patient privilege when the purpose for doing so is to shield the party from damaging or unfavorable evidence and to withhold relevant evidence from the requesting party. The Court held that the "alleged motive in asserting the privilege is inconsequential." *Id*. at 478. "The physician-patient privilege protects the identity of nonparty patients regardless of need." *Johnson*, 291 Mich

App at 169. "There are no exceptions under Michigan law for providing random patient information related to any lawsuit." *Isidore Steiner*, 292 Mich App at 272. Accordingly, plaintiffs' argument is unavailing.

With respect to a remedy, we initially reject defendants' recommendation that we impose sanctions, such as disqualifying plaintiffs' counsel from further engaging in representation or ordering the payment of fees and costs. The disclosure was not the result of unilateral action by plaintiffs. Although plaintiffs served the subpoena on the MDCH seeking the information, it was ultimately the trial court's decision that resulted in the improper disclosure. Defendants complain that plaintiffs acted improperly by immediately sending letters to the nonparty patients upon receipt of the subpoenaed information. The record reflects that the enforcement and protective orders were entered on the same date as the hearing on plaintiffs' motion to show cause. The record further indicates that defendants' oral motion for a stay made at the hearing was denied; that the MDCH had already gathered and prepared the information and had it available for disclosure pending the court's decision; that the trial court, at the hearing, reviewed and approved plaintiffs' proposed patient letter, which had already been drafted in anticipation of a favorable ruling; and that the court, at the hearing, ordered the MDCH to immediately turn over the information, which is also reflected in the protective order. The protective order gave plaintiffs permission to send the letters to the nonparty patients, and plaintiffs did so without delay. On review of the transcript of the hearing, it is evident that all concerned were aware that, with the court's full approval and blessing, plaintiffs were going to receive the information from the MDCH at the conclusion of the hearing and then as quickly as possible send the letters. Ultimately, plaintiffs were proceeding in accordance with the trial court's directives.

Despite the lack of a basis to invoke sanctions, this appeal is not moot. In *Church of Scientology of California v United States*, 506 US 9; 113 S Ct 447; 121 L Ed 2d 313 (1992), the Internal Revenue Service (IRS), as part of a tax investigation, sought access to church materials that were in the possession of a state court clerk, and the clerk permitted the IRS to examine and make copies of two tapes regarding the church after the clerk was served with an IRS summons. The two tapes contained recorded conversations between church officials and their attorneys. In a federal action initiated by the church, a court entered a temporary restraining order that required the IRS to file its copies of the tapes and related notes with the federal court.[4] The copies of the tapes were subsequently returned to the state court clerk. The IRS then filed a petition in federal court, seeking enforcement of the earlier summons directed at the state court clerk, and the church intervened, arguing that enforcement of the summons would violate the attorney-client privilege. The federal district court ordered compliance with the IRS summons, and the church appealed, but copies of the tapes were delivered to the IRS while the appeal was pending after the church's request for a stay was denied. The United States Court of Appeals for the Ninth Circuit dismissed the church's appeal as moot, given that the state court clerk had already delivered copies of the tapes to the IRS. The United States Supreme Court granted certiorari to address the narrow question whether the appeal was moot. *Id*. at 10-12.

The Supreme Court held that the appeal was not moot, stating that "[w]hile a court may not be able to return the parties to the *status quo ante* . . . , a court can fashion *some* form of meaningful relief in circumstances such as

[4] It is unclear regarding whether the IRS had any opportunity to study the tapes before the restraining order was entered.

these." *Id*. at 12-13. The Court observed that "[e]ven though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession." *Id*. at 13. The availability of these remedies precluded a finding that the appeal was rendered moot. *Id*. The Court concluded "that compliance with the summons enforcement order did not moot the Church's appeal." *Id*. at 18.

We likewise hold that compliance with the trial court's subpoena enforcement order did not moot defendants' appeal. With respect to the appropriate remedies to apply, the issue is a bit complex here and must be viewed in the context of the reality that the nonparty patients have now been informed of the pending litigation against Awaad and are aware of the disclosure by the MDCH. We must be extremely wary of the rights of these patients, considering that, although defendants as litigants had the right to raise physician-patient privilege issues in the lawsuit, it is ultimately the patients themselves who hold the privilege. We cannot tread on their rights through the imposition of remedies resulting from the trial court's error; the nonparty patients did nothing wrong. If these patients wish to waive the privilege and engage in litigation against Awaad —whether in this suit, assuming procedural rules allow them to be added as parties, or in a separate suit—they must be permitted to do so. Additionally, if these patients wish to waive the privilege and simply participate as witnesses in the lawsuit, they must be allowed to do so, if otherwise permissible under the Michigan Rules of Evidence. Accordingly, nonparty patients who came forward in response to plaintiffs' letters and showed a desire to participate can become involved in the litigation, subject to procedural and evidentiary rules, if they intentionally

and voluntarily waive the physician-patient privilege. Under such circumstances, defendants would not be in a posture to complain about a violation of the physician-patient privilege because the privilege will have been waived, whether considered a retroactive waiver, corrective waiver, or a waiver of ongoing observance of the privilege.

Moving forward, we order plaintiffs to return all copies of the privileged information to the MDCH and to destroy all electronic files containing the information, subject to an exception with respect to information concerning those patients who stepped forward in response to plaintiffs' letters and who are prepared to waive the physician-patient privilege.[5] Plaintiffs may use information obtained through the disclosure, but only as it relates to patients who waive the privilege.

With respect to evidentiary matters, the United States Supreme Court in *Mohawk Industries, Inc v Carpenter*, 558 US 100, 109; 130 S Ct 599; 175 L Ed 2d 458 (2009), noted that "[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." See also *Franzel v Kerr Mfg Co*, 234 Mich App 600, 617-618; 600 NW2d 66 (1999) (judgment on a breach of contract claim had to be reversed where the trial court erred in admitting a letter that was subject to the attorney-

[5] In regard to nonparty patients who did not respond to the letters, we rule, in attempting to fashion a just and reasonable remedy, that plaintiffs cannot initiate new efforts to contact those patients. We have the authority, on terms deemed just, to "enter any . . . order or grant further or different relief as the case may require[.]" MCR 7.216(A)(7). Of course, those patients who failed to respond are not precluded in pursuing their own course of action.

client privilege). In this case, absent participation in the litigation by a patient who waives his or her privilege, we order that the protected information contained in the MDCH's disclosure and any of its fruits are excluded from evidence should the case proceed to trial. And the trial court may not consider any information obtained by the wrongful disclosure for purposes of its class-certification analysis, with an exception for information pertaining to those nonparty patients who have come forward in an attempt to participate and are willing to waive the privilege, as well as an exception simply as to the number of patients identified by the MDCH, see MCR 3.501(A)(1)(a).

III. CONCLUSION

We hold that the trial court's ruling violated Michigan's statutory physician-patient privilege, MCL 600.2157, as construed in *Dorris*, 460 Mich 26, and *Massachusetts Mut Life*, 178 Mich 193. Information regarding nonparty patients sought in the discovery process falls within the scope of the physician-patient privilege. Defendants had the right as litigants to raise the issue of privilege in relationship to discovery and evidentiary matters. Defendants' motivation in raising the privilege issue and its effect on plaintiffs' ability to prove their case are irrelevant in determining whether the privilege applies. We reverse the trial court's orders and remand for implementation of conditional remedial measures as directed above.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendants having prevailed on appeal, we award them taxable costs under MCR 7.219.

DONOFRIO and GLEICHER, JJ., concurred with MURPHY, C.J.

PEOPLE v CORTEZ (ON REMAND)

Docket No. 298262. Submitted June 20, 2012, at Lansing. Decided March 12, 2013, at 9:05 a.m. Leave to appeal sought.

Burton D. Cortez was convicted by a jury in the Montcalm Circuit Court, David A. Hoort, J., of two counts of being a prisoner in possession of a weapon and was sentenced as a second-offense habitual offender. Defendant appealed, alleging that the court erred by ruling that the Department of Corrections' officer who questioned defendant following the discovery of two weapons in his cell was not required to provide him the warnings mandated by *Miranda v Arizona*, 384 US 436 (1966), before subjecting him to questioning and by admitting in evidence a recording of the incriminating statements defendant made during the questioning. The Court of Appeals affirmed, concluding that the circumstances of the questioning did not require the *Miranda* warnings. 294 Mich App 481 (2011). Defendant sought leave to appeal in the Michigan Supreme Court. While the application for leave to appeal was pending, the United States Supreme Court issued its opinion in *Howes v Fields*, 565 US ___; 132 S Ct 1181; 182 L Ed 2d 17 (2012), in which it addressed the proper test to apply for determining whether a prisoner is in custody for purposes of the *Miranda* warnings. The Michigan Supreme Court then, in lieu of granting leave to appeal, vacated the part of the Court of Appeals opinion holding that the failure to provide *Miranda* warnings did not violate defendant's Fifth Amendment rights and remanded the case to the Court of Appeals for reconsideration of that issue in light of *Fields*. 491 Mich 925 (2012).

On remand, in a lead opinion by METER, J., and a concurring opinion by O'CONNELL, P.J., the Court of Appeals *held*:

1. The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officer or the person being questioned. Courts, when determining whether a defendant was in custody, consider both whether a reasonable person in the defendant's situation would believe that he or she was free to leave and whether the relevant environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.

2. The *Fields* Court indicated that, in assessing the question of custody, a court must consider all the circumstances surrounding the interrogation in order to determine whether a reasonable person would have felt that he or she was not free to end the interrogation and leave. Relevant factors to consider include the location and duration of the questioning, statements made during the questioning, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.

3. An inmate's imprisonment alone is not sufficient to constitute custody for purposes of the *Miranda* warnings. Restraint on a person's freedom of movement is just the first step in the custody analysis and courts must also ask whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.

4. The *Fields* Court, after noting that the rule limiting the state's ability to initiate additional questioning after a suspect invokes his or her right to counsel does not apply when there is a sufficient break in custody between the suspect's invocation of the right to counsel and the initiation of subsequent questioning, concluded that because a break in custody can happen while a prisoner is serving his or her uninterrupted term of imprisonment, it must follow that imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*.

5. The *Fields* Court articulated three meaningful distinctions in the relative coerciveness of an interrogative setting as perceived by a free person compared to a prisoner. First, the initial shock that a recently arrested person might feel during an interrogation is not likely to be experienced by a prison inmate when the inmate is questioned. Second, a prisoner is unlikely to agree to talk to the police in the hopes that the prisoner will be able to go home if he or she cooperates. Third, a prisoner knows that law enforcement officers who question the prisoner probably lack the authority to affect the duration of his or her sentence or lack the power to give the prisoner early release on parole. In contrast, a person who is not incarcerated might feel compelled to talk out of fear of reprisal for remaining silent or out of hope for lenient treatment.

6. Questioning a prisoner in private, as opposed to questioning the prisoner in the presence of fellow inmates, does not necessarily convert a noncustodial situation to one in which *Miranda* applies.

7. Imposing additional restraints on a prisoner's freedom of movement, such as an armed escort to the interview room, does not necessarily suggest custodial interrogation because special security precautions may be standard procedures, an ordinary and

familiar attribute of life behind bars, regardless of the purpose for which an inmate is removed from his or her regular routine and taken to a special location.

8. With respect to the subject matter of the questioning, the distinction between events occurring inside the prison and events occurring outside the prison is not significant for purposes of determining whether a suspect is in custody. The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize is neither mitigated nor magnified by the location of the conduct about which questions are asked.

9. Security precautions that are undertaken do not affect the custody analysis if the precautions are routinely employed when an inmate is transferred from place to place within the prison or when away from the prison population. The security precautions employed in this case were standard prison procedures that are routinely employed when weapons are found in an inmate's cell. These were conditions and restraints to which defendant would have been subjected as a matter of prison policy regardless of the interview. The custody analysis is therefore not changed by the security precautions employed.

10. A relevant distinction between *Fields* and this case is that unlike the defendant in *Fields*, defendant was not told that he was free to end the questioning and return to his cell. However, other coercive aspects of the interrogation that occurred in *Fields* are absent in this case.

11. Defendant's isolation from other prisoners did not create a coercive atmosphere suggestive of custody to which *Miranda* applies. In light of all the features of the interrogation, defendant was not in custody for purposes of *Miranda* when he was questioned. No violation of defendant's Fifth Amendment rights occurred.

Affirmed.

O'CONNELL P.J., concurring, wrote separately to point out that the *Miranda* principles properly protect free citizens' Fifth Amendment rights, but those principles, with their focus on custody and police interrogation, do not comport with the controls necessary in a prison setting. The *Miranda* principles would be better preserved and protected by adopting a different standard to govern corrections officers' interviews of inmates about violations of prison rules. The new standard would be a recognition that the judicially crafted *Miranda* procedures are not necessarily better able to protect inmates' rights than the procedures developed by corrections experts. By attempting to maneuver the multifaceted principles of *Miranda*

into the simple structure of prison safety administration, we risk shattering both the *Miranda* rationale and the prison safety structure. In developing a different standard for prisoners it should be recognized that prison inmates are in custody. Custody in this context is not a term of art but a reflection of the inmates' extremely restricted environment. The proper Fifth Amendment analysis to protect inmates' rights should balance the inmates' individual rights against the institutional procedures that ensure the safety of all inmates. The analysis should enable courts to afford proper deference to prison administrators' ability to implement procedures that are reasonable for inmates. The analysis should begin with a determination whether the corrections officer complied with standard prison procedures for interviewing inmates. If there was compliance, any confession received during the interview would be presumed admissible in a subsequent criminal action, unless the inmate could demonstrate that the standard procedure was objectively unreasonable, i.e., unduly coercive, under the circumstances. If there was a failure to comply with standard prison procedures, any confession would be presumed inadmissible, unless the prosecution in a subsequent criminal action could demonstrate that the procedure used was objectively reasonable, i.e., not coercive under the circumstances.

BECKERING, J., dissenting, would hold, on the basis of all the features of the interrogation in this case, that defendant should have been advised of his *Miranda* rights before he was questioned and, therefore, defendant's confession should have been suppressed. Defendant was in custody during the interrogation for purposes of *Miranda*. In comparison to the *Fields* case, there are factors in this case that suggest that defendant was not in custody. However, this case and *Fields* share similarities that demonstrate that defendant was in custody. Furthermore, this case is distinguishable from *Fields* in several respects that strongly illustrate that defendant was in custody. The treatment of defendant should be viewed as the functional equivalent of an arrest in a prison setting. The objective circumstances demonstrate that a reasonable person would not have felt free to terminate the interrogation. *Fields* does not stand for the proposition that a prisoner is not in custody for purposes of *Miranda* when the treatment that the prisoner is subjected to is standard prison policy. The *Fields* Court, when distinguishing a prisoner's living environment from the living environment of a person who is not serving a term of incarceration, focused on restrictions and prison procedures that are ordinary and familiar to a prisoner. It should not be presumed that all standard prison policies are ordinary and familiar to a prisoner. The public-safety exception to the *Miranda* rule only applies to objectively reasonable questioning necessary to protect the police or the public from immediate danger. The ques-

tioning in this case was not objectively reasonable questioning necessary to protect the police or the public from immediate danger. The public-safety exception did not apply in this case. The erroneous admission into evidence of defendant's statements made during the interrogation was not harmless error. It is not clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent the error. Defendant's conviction should be reversed and the matter should be remanded for a new trial.

1. CONSTITUTIONAL LAW — SELF-INCRIMINATION — CUSTODIAL INTERROGATION — *MIRANDA* WARNINGS.

When a criminal defendant may have been subjected to custodial interrogation the totality of the circumstances is examined to determine whether the defendant was in custody at the time of the interrogation; the determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned; courts, when determining whether a defendant was in custody, consider both whether a reasonable person in the defendant's situation would have believed that he or she was free to leave and whether the relevant environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda v Arizona*, 384 US 436 (1966); relevant factors include the location and duration of the questioning, statements made during the questioning, the presence or absence of physical restraints during the questioning, and whether the interviewee was released at the end of the questioning.

2. CONSTITUTIONAL LAW — SELF-INCRIMINATION — CUSTODIAL INTERROGATION — *MIRANDA* WARNINGS.

An inmate's imprisonment is not sufficient by itself to constitute custody for purposes of the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966); whether there was restraint on a person's freedom of movement is the first inquiry in the custody analysis but courts must also ask whether the relevant environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.

3. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PRISONS AND PRISONERS — CUSTODIAL INTERROGATION — LOCATION OF CONDUCT ASKED ABOUT.

Questioning a prisoner in private, as opposed to questioning in the presence of fellow prisoners, does not necessarily convert a noncustodial situation to one in which the safeguards set forth in

Miranda v Arizona, 384 US 436 (1966), apply; imposing additional restraints on a prisoner's freedom of movement, such as an armed escort to the interview room, does not necessarily suggest custodial interrogation; it is not significant for purposes of determining whether a suspect is in custody whether the questions concern events occurring inside the prison or events occurring outside the prison; the threat to a person's Fifth Amendment rights that *Miranda* was designed to neutralize is neither mitigated nor magnified by the location of the conduct about which questions are asked.

4. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PRISONS AND PRISONERS.

The determination whether a prisoner who was questioned in prison was in custody for purposes of the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966), should focus on all the features of the interrogation, including the language that was used in summoning the prisoner to the interrogation and the manner in which the interrogation was conducted; an inmate who is removed from the general prison population for questioning and is thereafter subjected to treatment in connection with the interrogation that renders the inmate "in custody" for practical purposes is entitled to the full panoply of protections prescribed by *Miranda*.

5. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PRISONS AND PRISONERS — CUSTODIAL INTERROGATION.

Security precautions that are routinely employed when a prisoner is transferred from place to place within a prison or when away from the prison do not affect the analysis whether a prisoner who is interviewed in prison has been subjected to custodial interrogation for purposes of the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966); the fact that the prisoner was questioned about a matter involving conduct in prison, as opposed to conduct outside prison, is not a relevant consideration in determining whether custodial interrogation occurred; the removal of the prisoner from the general prison population for purposes of the interview may lessen the coercive aspects of an interview of a prisoner.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *David H. Goodkin*, Assistant Attorney General, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

ON REMAND

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

METER, J. This case is before us on remand from the Michigan Supreme Court. Defendant appeals as of right his convictions by a jury of two counts of being a prisoner in possession of a weapon, MCL 800.283(4). The trial court sentenced him, as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 24 to 90 months. In a previous opinion, we affirmed defendant's convictions. *People v Cortez*, 294 Mich App 481; 811 NW2d 25 (2011), vacated in part and remanded 491 Mich 925 (2012). Shortly after we decided our previous opinion, the United States Supreme Court decided *Howes v Fields*, 565 US ___; 132 S Ct 1181; 182 L Ed 2d 17 (2012). We are directed on remand to reconsider in light of *Fields* defendant's challenge under *Miranda v Arizona*[1] to the use of his confession at trial. *People v Cortez*, 491 Mich 925 (2012). We once again affirm defendant's convictions.

I. FACTS AND PROCEDURAL HISTORY

We set forth the relevant facts in our previous opinion:

> At the time of the incident in question defendant was an inmate at the Carson City Correctional Facility. On July 21, 2009, Michigan Department of Corrections (MDOC) officers discovered two weapons in defendant's cell during a search of a number of inmates' cells. Before trial, defendant moved to suppress a recorded statement taken during an interview with him after the weapons were discovered and in which he admitted possessing the weapons. At issue

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

on appeal is whether the trial court erred by ruling that the MDOC officer who questioned defendant during the interview was not required to provide him with *Miranda* warnings before subjecting him to the questioning and by admitting defendant's incriminating statements at trial. . . .

On July 21, 2009, a "siren drill" was carried out at the prison. Leading up to the drill there had been several assaults and fights involving suspected gang members; weapons were used and there were shots fired by corrections officers from the gun tower. On the morning of the drill, two homemade weapons had been found on an inmate who was a suspected gang member. Prison officials decided to conduct the siren drill to search for more weapons and identify inmates involved in the suspected gang activity.

Pursuant to protocol for the siren drill, all inmates were required to return to their cells for a lockdown, and the corrections officers then searched various cells for contraband. During the drill, an MDOC officer, Lieutenant Robert Vashaw, provided other corrections officers with a list of suspected gang members whose cells were to be searched. Defendant's name was on the list.

MDOC Officer Robert Hanes explained that before a cell is searched, the corrections officers have the inmates step out one at a time, undergo a pat-down search, and then proceed to a day room while their cell[s] [are] searched. According to defendant, about 30 minutes after the drill started, he was asked to leave his cell and was patted down. He was then sent to a day room or activity room.

Officer Hanes searched the area of defendant's cell that was considered to be in defendant's area of control. The cell was basically divided so that defendant, who slept on the bottom bunk, had the left side of the cell and the inmate who slept on the top bunk had the right side of the cell as their areas of control. Officer Hanes found pieces of metal in a trash can on the left side of defendant's cell. He also noticed that a metal shelf was missing from defendant's desk. At that point, Lieutenant Vashaw directed that a thorough search of the cell be conducted. The search

revealed a homemade shank, specifically a piece of sharpened metal that was inserted into a white plastic handle. The shank was stuck in the bottom bunk's framework on the [underside] of the bed frame. Officer Hanes turned the shank over to Lieutenant Vashaw and then continued to search the cell. A second shank was found inside a corner of the mattress on the bottom bunk. The second shank was made of a piece of metal wrapped in a bluish cloth and was also turned over to Lieutenant Vashaw.

Lieutenant Vashaw testified that he took control of the shanks, "bagged and tagged" them, and placed them in the Michigan State Police evidence locker. Once the shanks were in the locker, Lieutenant Vashaw no longer had control over them; only the state police had access to them. Lieutenant Vashaw testified that the two shanks were in the evidence locker when he later interviewed defendant but that the trash can containing the metal pieces may have been in the interview room during the interview. Defendant, on the other hand, testified that the shanks, which had been placed inside tubes, and the trash can, were all in the interview room.

Officer Vashaw testified that if an inmate is found with dangerous contraband, departmental policy calls for the inmate to be placed in segregation until his misconduct report is heard. On the basis of the items found in defendant's area of control, Officer Hanes prepared a misconduct report, and Lieutenant Vashaw ordered staff to escort defendant to a segregation cell or solitary confinement. While in the segregation unit, an inmate must be handcuffed and escorted by a staff member whenever he leaves segregation.

Approximately an hour to an hour and a half after Officer Hanes found the second shank, Lieutenant Vashaw requested to speak with defendant. Because defendant was already in segregation, he was escorted in handcuffs to the control center to meet Lieutenant Vashaw. According to the lieutenant, he had defendant come to the control center to be interviewed because inmates are often reluctant to speak openly in front of others. Lieutenant Vashaw and defendant then went to a back office for the interview.

According to Lieutenant Vashaw, defendant hesitated to speak at the outset of the interview and initially "denied everything." The lieutenant then told defendant that the evidence the corrections officers had obtained was "pretty damaging" and that two weapons had been found in defendant's area of control. Lieutenant Vashaw said that defendant needed to tell him what was going on inside the prison because violent events had recently occurred; defendant needed to tell him why he was making weapons or was in possession of weapons. The lieutenant testified that he never threatened defendant.

Lieutenant Vashaw further testified that defendant soon started to talk, and the lieutenant brought out a tape recorder. Defendant knew the recorder was running, and he did not hesitate to discuss the matter. On the recording, which was played, in part, for the jury, defendant said that the weapons were his and that gang members had forced him to make them. One weapon was for his own protection, and the other was to be sold. He also admitted selling a third weapon the previous day. Defendant also talked about gangs that operated within the prison. The interview lasted approximately 15 minutes, and defendant never sought to end the interview. After the interview, a staff member escorted defendant back to segregation pursuant to departmental policy.

According to defendant, Lieutenant Vashaw showed him the trash can and both shanks in the interview room. Defendant told the lieutenant that the items were not his, but then the lieutenant told him they could make a deal. Lieutenant Vashaw proposed that defendant either admit possessing the weapons, do his segregation time after his misconduct ticket was heard, and go home as scheduled in approximately 11 months, or the lieutenant could keep defendant from ever going home. Defendant testified that everything he admitted on the recording was untrue; he just said what he needed to say in order to get out of prison and go home. [*Cortez*, 294 Mich App at 482-487 (footnotes omitted).]

Before trial, defendant moved to suppress his confession on the basis that he was not given *Miranda* warnings. *Id*. at 487. He additionally argued that the

admission of his confession would be unfairly prejudicial because his recorded confession mentioned the length of time that he had been in prison as well as his gang activity. *Id*.

At the suppression hearing, Lieutenant Vashaw explained that his purpose in questioning defendant was to obtain information about ongoing prison gang activity. *Id*. at 487-489. The lieutenant was concerned about maintaining prison safety. *Id*. at 489. In response to the prosecution's and the court's questioning, Lieutenant Vashaw denied that the Department of Corrections had any arrangement with the police with respect to conducting interviews of inmates who are suspected of criminal activity. *Id*. at 490-492. He had no contact with any outside police agency before he questioned defendant. *Id*. at 489.

The trial court denied defendant's motion to suppress the confession and overruled his objections to playing the recording for the jury. *Id*. at 492. The trial court concluded that although defendant had been in custody and subjected to interrogation, Lieutenant Vashaw was not acting in the place of a police officer and therefore was not required to give *Miranda* warnings. *Id*. The trial court also recognized that " 'there were many good, legitimate reasons why the Department of Corrections follows up with an interview of the defendant, relating to the safety and security of the prison, not only corrections officers but also inmates. Also, in [an] effort to find out, not only what is going on, but whether there was a gang problem, and specifically what's going on in that unit.' " *Id*.

The trial court allowed a shortened version of the recorded interview to be played at trial, without a reference to the length of defendant's sentence. *Id*. at 492-493. The court also gave a limiting instruction. *Id*. at 493.

On appeal, defendant argued that Lieutenant Vashaw was required to give him *Miranda* warnings before questioning him and that, therefore, the admission of his confession at trial violated defendant's Fifth Amendment right against self-incrimination. *Id*. at 493. We applied the "reasonable person" standard and the four factors of the "free to leave" test. *Id*. at 495. We indicated, quoting *Cervantes v Walker*, 589 F2d 424, 428 (CA 9, 1978), that " 'the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him must be considered to determine whether a reasonable person would believe there had been a restriction of his freedom over and above that in his normal prisoner setting.' " *Cortez*, 294 Mich App at 495. We found the question to be a close one but concluded that the circumstances of the questioning did not require the *Miranda* warnings. *Id*. at 504. We concluded that "the questioning was more like general on-the-scene questioning" that was "essential to the administration of a prison" than custodial interrogation for which *Miranda* warnings are required. *Id*. We found no violation of defendant's Fifth Amendment rights.[2] *Id*.

Defendant filed an application for leave to appeal in the Michigan Supreme Court. While his application was pending, the United States Supreme Court decided *Fields*. *Fields* addressed the question of the proper test to apply for determining whether a prisoner is in custody for purposes of *Miranda*. In lieu of granting defendant's application, the Michigan Supreme Court vacated the part of our opinion addressing the alleged *Miranda* violation and remanded for reconsideration in light of *Fields*. *Cortez*, 491 Mich 925.

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[2] In our previous opinion, we also rejected defendant's argument that the admission of the recorded conversation was unfairly prejudicial under MRE 403. *Cortez*, 294 Mich App at 504-506.

II. ANALYSIS

A. STANDARD OF REVIEW

Whether a person is in custody for purposes of the *Miranda* warnings requirement is a mixed question of law and fact that must be answered independently after a review of the record de novo. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). "[A]n 'in-custody' determination calls for application of the controlling legal standard to the historical facts." *Id*. We review for clear error a trial court's factual findings regarding the circumstances surrounding the giving of the statement. *Id*.; *People v Tavernier*, 295 Mich App 582, 584; 815 NW2d 154 (2012). We review de novo the trial court's ultimate decision concerning a motion to suppress. *Id*.

B. PERTINENT LEGAL STANDARDS

Both the state and federal constitutions guarantee that no person shall be compelled to be a witness against himself or herself. US Const, Am V; Const 1963, art 1, § 17. To protect a defendant's Fifth Amendment privilege against self-incrimination, custodial interrogation must be preceded by advice to the accused that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We look at the totality of the circumstances to determine whether a defendant was in custody at the time of the interrogation. *Coomer*, 245 Mich App at 219. "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person

being questioned." *Id*. at 219-220 (citation and quotation marks omitted). "When determining whether a defendant was 'in custody,' courts consider both whether a reasonable person in the defendant's situation would believe that he or she was free to leave and 'whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.' " *People v Elliott*, 295 Mich App 623, 632; 815 NW2d 575 (2012), lv gtd 491 Mich 938 (2012), quoting *Fields*, 565 US at ___; 132 S Ct at 1190.

C. THE *FIELDS* DECISION

In *Fields*, two sheriff's deputies questioned a Michigan jail inmate, Randall Fields, about alleged sexual conduct with a 12-year-old boy that occurred before his incarceration. *Fields*, 565 US at ___; 132 S Ct at 1185. A deputy led Fields down one floor of the building and through a locked door to a conference room in another section of the facility. *Id*. at ___; 132 S Ct at 1185-1186. The deputies told Fields that he was free to leave and return to his jail cell at the beginning of and during the interview. *Id*. at ___; 132 S Ct at 1186. The deputies were armed, but Fields was not restrained. *Id*. The conference-room door was open at times and closed at times during the interview. *Id*. The questioning began between 7:00 p.m. and 9:00 p.m. and lasted for five to seven hours. *Id*. During the interview, Fields "became agitated and began to yell" when he was asked about the sexual-abuse allegations. *Id*. He ultimately confessed. *Id*. Fields was never given *Miranda* warnings. *Id*.

According to Fields, one of the deputies swore at him, told him to sit, and said that " 'if [he] didn't want to cooperate, [he] could leave.' " *Id*. Although Fields told

the deputies "several times during the interview that he no longer wanted to talk" to them, he did not ask to return to his cell. *Id*. After the interview, Fields waited 20 minutes for an officer to be summoned to take him back to his cell. *Id*. Fields arrived at his cell long after his usual bedtime. *Id*.

Fields was charged with criminal sexual conduct. *Id*. He unsuccessfully moved in the trial court to suppress his confession on the basis that he had been subjected to custodial interrogation without *Miranda* warnings. *Id*. Fields was convicted of third-degree criminal sexual conduct and sentenced to 10 to 15 years' imprisonment. *Id*. We affirmed his conviction and the Michigan Supreme Court denied leave to appeal. *Id*.; *People v Fields*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2004 (Docket No. 246041); *People v Fields*, 471 Mich 933 (2004).

The United States District Court for the Eastern District of Michigan granted Fields's petition for a writ of habeas corpus. *Fields*, 565 US at ___; 132 S Ct at 1186. The United States Court of Appeals for the Sixth Circuit affirmed, reasoning that a prisoner is in custody within the meaning of *Miranda* if he or she has been taken aside and questioned about events that occurred outside the prison walls. *Id*. at ___; 132 S Ct at 1186-1187. The Sixth Circuit's determination that Fields was in custody for purposes of *Miranda* was based on three factors: (1) Fields's imprisonment, (2) the fact that the questioning was conducted in private, and (3) the fact that the questioning involved events outside the prison. *Id*. at ___; 132 S Ct at 1189.

The United States Supreme Court reversed. *Id*. at ___; 132 S Ct at 1194. In addition to correcting the Sixth Circuit's interpretation of Supreme Court precedent, the Court rejected the proposition that the three factors

cited by the Sixth Circuit were sufficient to create a custodial situation for purposes of *Miranda*. *Id*. at ___; 132 S Ct at 1187-1189.

The *Fields* Court initially indicated that, in assessing the question of custody, a court must consider all the circumstances surrounding the interrogation in order to determine whether a reasonable person would have felt that he or she was not free to end the interrogation and leave. *Id*. at ___; 132 S Ct at 1189. Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning. *Id*.

The Supreme Court then clarified that an inmate's imprisonment alone is not sufficient to constitute custody for *Miranda* purposes. *Id*. at ___; 132 S Ct at 1190. The Court cautioned that restraint on a person's freedom of movement is just the first step in the custody analysis. *Id*. at ___; 132 S Ct at 1189. Courts must also ask "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id*. at ___; 132 S Ct at 1190. The *Fields* Court cited *Maryland v Shatzer*, 559 US 98, ___ ; 130 S Ct 1213, 1223-1226; 175 L Ed 2d 1045 (2010), for the proposition that the rule in *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), limiting the state's ability to initiate additional questioning after a suspect invokes his or her right to counsel, does not apply "when there is a sufficient break in custody between the suspect's invocation of the right to counsel and the initiation of subsequent questioning." *Fields*, 565 US at ___; 132 S Ct at 1190. The *Fields* Court noted that, according to *Shatzer*, a break in custody can happen while a prisoner

is serving his or her sentence. *Id*. The *Fields* majority concluded that, by extension, "[i]f a break in custody can occur while a prisoner is serving an uninterrupted term of imprisonment, it must follow that imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*." *Id*.

The Court examined the relative coerciveness of an interrogative setting as perceived by a free person compared to a prisoner and articulated three meaningful distinctions. *Id*. at ___; 132 S Ct at 1190-1191. First, the initial shock that a recently arrested person might feel during an interrogation is not likely to be experienced by a prison inmate when the inmate is questioned:

> [Q]uestioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest. In the paradigmatic *Miranda* situation—a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures. A person who is "cut off from his normal life and companions," *Shatzer*, [559 US] at ___, 130 S. Ct., at 1220, and abruptly transported from the street into a "police-dominated atmosphere," *Miranda*, 384 U.S., at 456, 86 S. Ct. 1602, may feel coerced into answering questions.
>
> By contrast, when a person who is already serving a term of imprisonment is questioned, there is usually no such change. "Interrogated suspects who have previously been convicted of crime live in prison." *Shatzer*, 559 U.S. at ___, 130 S. Ct., at 1224. For a person serving a term of incarceration, we reasoned in *Shatzer*, the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same "inherently compelling pressures" that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station. *Id*., at ___, 130 S. Ct., at 1219. [*Fields*, 565 US at ___; 132 S Ct at 1190-1191.]

Second, a prisoner is unlikely to agree to talk to the police in the hopes that the prisoner will be able to go home if he or she cooperates. *Id*. at ___; 132 S Ct at 1191. "[W]hen a prisoner is questioned, he knows that when the questioning ceases, he will remain under confinement." *Id*. Third, a prisoner "knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence" or lack the power to give the prisoner early release on parole. *Id*. In contrast, a person who is not incarcerated might feel compelled to talk out of fear of reprisal for remaining silent or out of hope for lenient treatment. See *id*. The *Fields* majority concluded that "service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody." *Id*.

The Supreme Court also rejected the Sixth Circuit's emphasis on the fact that the inmate was questioned in private:

> Taking a prisoner aside for questioning—as opposed to questioning the prisoner in the presence of fellow inmates—does not necessarily convert a noncustodial situation . . . to one in which *Miranda* applies. When a person who is not serving a prison term is questioned, isolation may contribute to a coercive atmosphere by preventing family members, friends, and others who may be sympathetic from providing either advice or emotional support. And without any such assistance, the person who is questioned may feel overwhelming pressure to speak and to refrain from asking that the interview be terminated.
>
> By contrast, questioning a prisoner in private does not generally remove the prisoner from a supportive atmosphere. Fellow inmates are by no means necessarily friends. On the contrary, they may be hostile and, for a variety of reasons, may react negatively to what the questioning reveals. In the present case, for example, would respondent have felt more at ease if he had been questioned in the presence of other inmates about the sexual abuse of

> an adolescent boy? Isolation from the general prison population is often in the best interest of the interviewee and, in any event, does not suggest on its own the atmosphere of coercion that concerned the Court in *Miranda*. [*Id*. at ___; 132 S Ct at 1191-1192 (citation and quotation marks omitted).]

The *Fields* Court also stated that imposing additional restraints on a prisoner's freedom of movement, such as an armed escort to the interview room, does not necessarily suggest custodial interrogation. *Id*. at ___; 132 S Ct at 1192. The Court stated that "such procedures are an ordinary and familiar attribute of life behind bars. Escorts and special security precautions may be standard procedures regardless of the purpose for which an inmate is removed from his regular routine and taken to a special location." *Id*.

With respect to the subject matter of the questioning, the *Fields* majority concluded that the distinction between events occurring inside the prison and events occurring outside the prison is not significant for purposes of determining whether a suspect is in custody:

> Finally, we fail to see why questioning about criminal activity outside the prison should be regarded as having a significantly greater potential for coercion than questioning under otherwise identical circumstances about criminal activity within the prison walls. In both instances, there is the potential for additional criminal liability and punishment. If anything, the distinction would seem to cut the other way, as an inmate who confesses to misconduct that occurred within the prison may also incur administrative penalties, but even this is not enough to tip the scale in the direction of custody. [*Id*.]

In sum, "[t]he threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize is neither mitigated nor magnified by the location of the

conduct about which questions are asked." *Id*. (citation and quotation marks omitted).

The Supreme Court concluded its analysis of the appropriate standards by stating, in part:

> When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. An inmate who is removed from the general prison population for questioning and is thereafter . . . subjected to treatment in connection with the interrogation that renders him "in custody" for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*." [*Id*. (citations and some quotation marks omitted).]

The Supreme Court determined that Fields was not in custody for purposes of *Miranda*. *Id*. The Court recognized the factors that militated in favor of a custody finding, such as the facts that Fields did not initiate or consent to the interview, the interview lasted five to seven hours and past Fields' regular bedtime, the deputies were armed, and one of them used a sharp tone and profanity. *Id*. at ___; 132 S Ct at 1192-1193. However, these factors were outweighed by other circumstances suggesting that Fields was not in custody when he was questioned. *Id*. at ___; 132 S Ct at 1193. Fields was told at the outset, and again during the interview, that he could return to his cell whenever he wanted. *Id*. He was not physically restrained and was not uncomfortable in the conference room. *Id*. Fields was offered food and water, and at times the conference-room door was open. *Id*. " 'All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.' " *Id*., quoting *Yarborough v Alvarado*, 541 US 652, 664-665; 124 S Ct

2140; 158 L Ed 2d 938 (2004). The *Fields* majority concluded: "Taking into account all of the circumstances of the questioning—including especially the undisputed fact that respondent was told that he was free to end the questioning and return to his cell—we hold that respondent was not in custody within the meaning of *Miranda*." *Fields*, 565 US at ___; 132 S Ct at 1194.

D. APPLICATION OF *FIELDS*

Defendant argues that *Fields* supports his position that he was in custody for purposes of *Miranda* when Lieutenant Vashaw questioned him. Defendant emphasizes that he was segregated from the general prison population, handcuffed, and confined in an office, which constituted more restrictive circumstances than the restrictions associated with his prison routine. In addition, defendant emphasizes that he did not volunteer to talk to the officers and that he was not told that he did not have to talk to them. He also notes that, unlike the mitigating circumstances in *Fields*, he was restrained, the door to the room was closed, and he was not told that he could return to his cell if he did not want to answer questions. Defendant contends that the totality of the circumstances establishes that he was in custody for purposes of *Miranda*.

We disagree. Although *Fields* alters our earlier analysis of the custody issue, it does not compel a different result.

Fields instructs that security precautions that are undertaken do not affect the custody analysis if the precautions are routinely employed when an inmate is transferred from place to place within the prison or when away from the prison population. *Id*. at ___; 132 S Ct at 1192. The record established that the security

precautions employed were standard prison procedures that are routinely employed when weapons are found in an inmate's cell. See *Cortez*, 294 Mich App at 485, 501, 503.[3] These were conditions and restraints to which defendant would have been subjected as a matter of prison policy regardless of the interview. See *Fields*, 565 US at ___; 132 S Ct at 1193 ("under no circumstances could he have reasonably expected to be able to roam free"). Thus, the custody analysis is not impacted by the security precautions undertaken. Also in accordance with *Fields*, the fact that defendant was questioned about a matter involving his conduct in prison, as opposed to his conduct outside prison, is not a relevant consideration. *Id*. at ___; 132 S Ct at 1192.

Admittedly, a relevant distinction between *Fields* and this case is that unlike Fields, defendant was not told that he was free to end the questioning and return to his cell. However, other coercive aspects of the interrogation that existed in *Fields* are absent here. Unlike Fields, who was questioned for up to seven hours late into the night, defendant's interview lasted only 15 minutes. *Cortez*, 294 Mich App at 486. Lieutenant Vashaw stated that defendant "did not hesitate to discuss the matter" even when he was aware that a tape recorder was running. *Id*. There was no evidence that defendant's sleep schedule was interrupted or that he was made uncomfortable. Lieutenant Vashaw testified that he never threatened defendant and the trial court found the lieutenant to be credible. *Id*. at 486, 492.

Additionally, we agree with the observation of the *Fields* majority that a prisoner's removal from the

[3] As noted in *Cortez*, 294 Mich App at 501, "Dangerous weapons were recovered from defendant's cell, for which a misconduct report was filed. Departmental procedure required that he be placed in segregation and handcuffed whenever outside of segregation."

general population might lessen the coercive aspect of the interview. See *Fields*, 565 US at ___; 132 S Ct at 1191-1192. Defendant was questioned about gang activity inside the prison and answered with specific information about prisoners and gangs. See *Cortez*, 294 Mich App at 490. In these circumstances, his isolation for purposes of questioning might have been more comforting than coercive. Indeed, Lieutenant Vashaw testified that he questioned defendant away from other prisoners because "inmates are often reluctant to speak openly in front of others." *Id*. at 485-486. Defendant's isolation from other prisoners did not create a coercive atmosphere suggestive of custody to which *Miranda* applies.

III. CONCLUSION

In light of all the features of the interrogation, defendant was not in custody for purposes of *Miranda* when he was questioned. On reconsideration in light of *Fields*, we again conclude that no violation of defendant's Fifth Amendment rights occurred.

Affirmed.

O'CONNELL, P.J. (*concurring*). I concur that defendant's convictions must be affirmed. I write separately to address the broader issue whether, by attempting to maneuver the multifaceted principles of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), into the simple structure of prison safety administration, we risk shattering both the *Miranda* rationale and the prison safety structure. Caselaw confirms that the *Miranda* principles are a vital set of judicially created and proliferated procedures that protect free citizens against the serious danger of coercive pressure during custodial police interrogations. As this case

demonstrates, however, these judicially created procedures may be ill-suited for use in the prison context.

I. THE LIMITS OF *MIRANDA*

The *Miranda* principles safeguard citizens against self-incrimination. US Const, Am V; *Miranda*, 384 US at 439. Specifically, the *Miranda* warning procedures protect against the coercion that can occur when a citizen is suddenly engulfed in a police-dominated environment. See *Howes v Fields*, 565 US___, ___; 132 S Ct 1181, 1190; 182 L Ed 2d 17 (2012). In *Fields*, the Supreme Court described the typical scenario that triggers *Miranda* procedures:

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

The *Fields* Court also noted that the *Miranda* principles have limited applicability: " 'Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, *but only in those types of situations in which the concerns that powered the decision are implicated*.' " *Id*. at ___; 132 S Ct at 1192, quoting *Berkemer v McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984) (emphasis added).

The locomotive that powered the original *Miranda* decision, and that prompted the Supreme Court to require police officers to recite *Miranda* warnings in certain circumstances, is the potential for police officers to use coercive pressure to obtain confessions from citizens taken into police custody. *Fields*, 565 US at ___;

132 S Ct at 1188-1189. Accordingly, the *Miranda* analysis centers on whether the interrogated citizen is "in custody." *Id*. at ___; 132 S Ct at 1189. For the *Miranda* analysis, "custody" is "a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id*. This analysis, with "custody" as a term of art, is logical and effective when applied in the typical police-custody situation.

When, however, the interrogated citizen is a prison inmate, application of the *Miranda* analysis can lead not only to semantic confusion (custody within custody[1]) but to disruption of the prison safety system. A prison inmate lives in a custodial environment that would certainly seem coercive outside the prison context.[2] Given the vast differences in the daily circumstances of free citizens as compared to prison inmates, it seems to me that rather than forcing the *Miranda* analysis into the prison mold, we should consider an alternate analytical framework to protect prison inmates' Fifth Amendment rights.[3]

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[1] See, e.g., Justice Ginsburg's partial dissent in *Fields*, 565 US at ___; 132 S Ct at 1194.

[2] See, e.g., Mich Dep't of Corrections Policy Directive 04.04.130 (Movement by Prisoners—Intra-Institutional).

[3] *Miranda* warnings are not part of our constitution. The warnings are simply a set of prophylactic measures designed to ward off inherently coercive pressures of custodial interrogation. *Fields*, 565 US at ___; 132 S Ct at 1188. The original *Miranda* decision was designed to mitigate the coercive environment created by police officers during custodial interrogation. Many decisions involving *Miranda* rely on two well-established elements to determine the degree of coercion: (1) whether the police have focused on a particular suspect and (2) whether the suspect is in custody. Significant to the present case is the fact that inmates are always in custody and the responsibility of corrections officers is to focus on the inmates 24 hours a day, 7 days a week.

Applying the coercive-elements test found in the original *Miranda* decision to the prison setting requires courts to reconfigure the original *Miranda* analysis so that it applies to (1) inmates incarcerated in prison, (2)

II. INMATES' RIGHTS

Inmates retain certain constitutional rights, but those rights are subject to restrictions and limitations. *Bell v Wolfish*, 441 US 520, 545; 99 S Ct 1861; 60 L Ed 2d 447 (1979). The *Bell* Court explained:

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights. There must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application. [*Id*. at 545-546 (quotation marks and citations omitted).]

III. AN ALTERNATIVE TO *MIRANDA*

In this case, the lead and dissenting opinions each accurately apply the *Miranda* principles, but reach opposite conclusions. That two scholarly and reasonable judges could apply the same principles but reach divergent outcomes suggests that the principles themselves are problematic. While I do not claim to have the solution to this problem, and I recognize that as a state appellate judge I am not at liberty to adjust the *Miranda* process to better fit the prison setting, I do

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who are under 24-hour supervision, and (3) who are being questioned by corrections officers (not police officers). In my opinion, the application of the traditional *Miranda* analysis to inmates is problematic and will lead to inconsistent results, as shown by the lead and dissenting opinions in this case. For further proof of this dichotomy, one needs to look no farther than the majority and the partial dissenting opinions in *Fields*. In this opinion, I suggest an administrative solution to the problem. Contrary to what the reader may initially perceive, I am not suggesting any diminution of an inmate's Fifth Amendment rights as they are set forth in our constitution. The proposed solution will, in my view, better protect inmates' Fifth Amendment rights.

have two suggestions that may prevent implosion of a standard that was created for one context and is currently being applied in an entirely different context.

First, I suggest we recognize the obvious: prison inmates are in custody. "Custody" in this context is not a term of art; it is a reflection of the inmates' extremely restricted environment. The *Fields* Court expressly concluded that being imprisoned does not constitute being in custody for *Miranda* purposes. *Fields*, 565 US at ___; 132 S Ct at 1191. Any judicial attempts to further parse the term "custody" for inmates results in the divergent opinions that occurred in this case. Instead, our analysis should recognize the obvious distinctions between inmates and other citizens.[4] The *Fields* Court recognized some of these distinctions, for example, "questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest." *Id*. at ___; 132 S Ct at 1190. And, "a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release." *Id*. at ___; 132 S Ct at 1191. Further, "a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence."[5] *Id*. The *Fields* Court also recognized

[4] Justice MARY BETH KELLY recently recognized that situational distinctions are critical to a Fifth Amendment analysis by pointing out: "Courts should be mindful that, as compared to an adult, a juvenile suspect faces a more acute risk of succumbing to the inherent pressures of custodial interrogation . . . ." *People v White*, 493 Mich 187, 232; 828 NW2d 329 (2013) (MARY BETH KELLY, J., dissenting).

[5] At the trial in this case, defendant testified that the corrections officer indicated that he could prevent defendant from ever being released from prison. As the dissent points out, however, defendant's testimony was not part of his motion to suppress. Even if it had been presented in the motion to suppress, the testimony does not establish that defendant

that taking a prisoner aside for private questioning imposes an additional restriction on the prisoner. *Id*. at ___; 132 S Ct at 1192. The Court explained, however, that "such procedures are an ordinary and familiar attribute of life behind bars. Escorts and special security precautions may be standard procedures regardless of the purpose for which an inmate is removed from his regular routine and taken to a special location." *Id*. The types of standard procedures referred to in *Fields* are used in the Michigan corrections system. In particular, the Michigan Department of Corrections has developed routine procedures for interviewing inmates about rule violations. See, e.g., Mich Dep't of Corrections Operating Procedure 03.03.105 (Major Misconduct Processing). The procedures could be highly coercive outside a prison, but are necessary and standard within a prison.

Second, if, as I suggest, the *Miranda* "custody" analysis is unhelpful as it applies to inmates, courts must apply an alternate Fifth Amendment analysis to protect inmates' rights. The proper analysis should balance the inmates' individual rights against the institutional procedures that ensure the safety of all inmates. Compliance with prison rules and procedures is one aspect of ensuring inmates' safety.[6] When an inmate violates a rule, a corrections officer can and should respond quickly to identify the inmate involved and discover whether any danger exists. This rapid, efficient response must be available to corrections officers even

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actually believed the corrections officer had authority to lengthen his sentence. Moreover, the *Fields* Court recognized that questioning about prison misconduct could result in administrative penalties, but that the risk of penalties did not necessarily render an inmate "in custody" for *Miranda* purposes. *Id*. at ___; 132 S Ct at 1192.

[6] See, e.g., Mich Dep't of Corrections Policy Directive 03.03.130(K) ("Staff have a responsibility to protect the lives of both employees and prisoners, provide for the security of the State's property, prevent escape, and maintain good order and discipline.").

if the rule violation could result in criminal charges against the inmate. To bind a corrections officer to the *Miranda* procedures every time the officer suspects a rule violation would be to pinion the officer's ability to protect the general prison population from the rule breakers. In my view, any rote application of the *Miranda* analysis to a prison safety interview is a failure to recognize the reality of the restrictive prison environment. Moreover, to require the use of the judicially created *Miranda* procedures in the prison context is to assume, incorrectly, that judges are more effective than corrections experts at designing prison procedures. As the Supreme Court recognized in *Bell*:

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. . . . [E]ven when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. [*Bell*, 441 US at 546-547.]

In sum, the *Miranda* analysis should not control Fifth Amendment issues that may arise when a corrections officer interviews an inmate about a prison rule violation. Instead, the analysis should enable courts to afford proper deference to prison administrators' ability to implement procedures that are reasonable for inmates. The analysis should begin with a determination whether the corrections officer complied with standard prison procedures for interviewing inmates. If the officer complied with the procedures, any confession received during the interview would be presumed admissible in a subsequent criminal action, unless the inmate could demonstrate that the standard procedure was objectively unreasonable—i.e., unduly coercive—under the circumstances. If the correc-

tions officer failed to comply with standard prison procedures, any confession would be presumed inadmissible, unless the prosecution in a subsequent criminal action could demonstrate that the procedure used was objectively reasonable—i.e., not coercive—under the circumstances.[7]

I recognize that these suggestions could, at first glance, be viewed as a failure to follow the binding *Miranda* precedent. After careful consideration, however, it seems to me that these suggestions are fully consistent with the *Miranda* opinion's Fifth Amendment concerns. In my view, some of the post-*Miranda* decisions have myopically focused on the form of the "custody" analysis without considering the substance of that analysis. I ascribe to the long-held recognition that, as judges and lawyers, we must constantly guard against our "tendency to attribute undue importance to form as opposed to substance, and to exalt the immaterial to the level of the material." Salmond, Jurisprudence (6th ed, 1920), § 10, p 25. The material and substantive aspects of *Miranda* are the preservation and protection of Fifth Amendment rights. I offer my suggestions to open a discussion about whether strict adherence to the "custody" analysis is the best means of protecting the Fifth Amendment rights of inmates.[8]

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[7] This approach is a refined application of the voluntariness standard that controls certain Fifth Amendment issues. See *Arizona v Fulminante*, 499 US 279, 285-288; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

[8] In our prior opinion, this panel unanimously affirmed defendant's convictions and concluded that the Michigan Department of Corrections officer was not required to recite the *Miranda* warnings under the circumstances presented in this case and that the admission of defendant's recorded statements at his trial was not unfairly prejudicial under MRE 403. *People v Cortez*, 294 Mich App 481, 504-506; 811 NW2d 25 (2011), vacated in part and remanded 491 Mich 925 (2012). Central to our prior decision was our conclusion that the *process* used by the Department of Corrections in obtaining defendant's confession did not create the same coercive pressures as the type of station house questioning by

IV. CONCLUSION

To impose prison protections on free citizens would be tyranny; to impose free citizens' protections in prison would be anarchy. Neither situation is desirable. The *Miranda* principles properly protect free citizens' Fifth Amendment rights, but those principles, with their focus on custody and police interrogation, do not comport with the controls necessary in a prison setting. The *Miranda* principles would be better preserved and protected by adopting a different standard to govern corrections officers' interviews of inmates about violations of prison rules. The new standard would be a recognition that the judicially created *Miranda* procedures are not necessarily better able to protect inmates' rights than the procedures developed by corrections experts.[9]

For these reasons, I agree that defendant's convictions must be affirmed.

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police officers at issue in the *Miranda* case, and therefore defendant's confession was admissible at his trial. While I still agree with our prior opinion, I am now convinced that the original *Miranda* warnings were not engineered to apply to inmates incarcerated in our state's prisons. Stated another way, as applied to prison inmates, there exists a design defect in the *Miranda* warnings.

[9] The primary purpose of this opinion is not to address safety and security in the prison setting, as my colleague suggests in footnote 4 of her dissenting opinion, but to address the undisputed fact that neither the *Miranda* nor the *Fields* decisions involved corrections officers questioning inmates in a prison setting. While both these opinions discussed *factors* that could or should be applied to a given situation, the juxtaposition of those factors, as shown by the lead and the dissenting opinions, is significant to the protection of an inmate's Fifth Amendment rights.

The primary purpose of this opinion is to address the issue of *Miranda* warnings as they apply to inmates who are taken aside and questioned by *corrections officers* about events that have occurred *inside* the prison walls. Application of *Miranda*'s prophylactic measures in an established coercive environment such as a prison is the antithesis of applying the same measures to individuals in a free society. As both the lead and the dissenting opinions aptly point out, the application of these *same* factors to dissimilar situations (dissimilar from *Miranda*) will most certainly lead to divergent results.

BECKERING, J. (*dissenting*). I respectfully dissent from the lead opinion. Our task on remand is to determine whether, in light of the United States Supreme Court's decision in *Howes v Fields*, 565 US ___; 132 S Ct 1181; 182 L Ed 2d 17 (2012), defendant, Burton David Cortez, was entitled to be advised of his rights under *Miranda v Arizona*[1] before being interrogated about his alleged possession of two shanks—a violation of MCL 800.283(4)[2]—that were found in his prison cell at the time of a siren-drill cell search. I would hold that, on the basis of all the features of the interrogation in this instance, defendant should have been advised of his *Miranda* rights before questioning and, thus, that his subsequent confession should have been suppressed.

I. PERTINENT FACTS

As summarized in our earlier opinion and recapped in the lead opinion, defendant was serving a prison sentence at the Carson City Correctional Facility at the time of the subject offense. On July 21, 2009, prison officials decided to conduct a "siren drill" to search for weapons after encountering several episodes of violence among the inmates and discovering two homemade weapons on an inmate who was a suspected gang member. Prison officials targeted defendant's cell among those to be searched. Pursuant to protocol, upon the initiation of a siren drill inmates are required to return to their cells for a lockdown. The corrections officers then search various cells

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

[2] MCL 800.283(4) provides as follows:

> Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

for contraband. When a particular inmate's cell is going to be searched, the corrections officers have the inmate step out of the cell, undergo a pat-down search, and then proceed to a day room to await completion of the search.

When defendant's cell was to be searched, he was patted down and sent to the day room. Michigan Department of Corrections Officer Robert Hanes searched defendant's cell, which defendant shared with another inmate. Officer Hanes discovered two homemade metal shanks hidden in the cell in the area considered to be under defendant's control. He also found pieces of metal in what was considered to be defendant's trash can and noted that a metal shelf was missing from defendant's desk.

Pursuant to departmental policy, an inmate found with dangerous contraband is placed in segregation until his or her misconduct report is heard. Officer Hanes prepared a misconduct report regarding his findings in defendant's cell. Rather than returning defendant to his cell after the search, Lieutenant Robert Vashaw ordered staff members to escort defendant to a segregation cell or solitary confinement.

After some time in solitary confinement, defendant was handcuffed and taken by a staff member to a back office in the control center to meet with Lieutenant Vashaw, who was "an acting Inspector" for the facility. In his testimony about the incident, Lieutenant Vashaw did not claim to have obtained defendant's permission or consent for the interview or to have otherwise advised him that the meeting was optional. Lieutenant Vashaw did not claim to have told defendant at the meeting that defendant could end the questioning at any time, refuse to speak, or elect to leave and be escorted back to his cell upon request. Lieutenant Vashaw testified that, when he questioned defendant,

he had already "bagged and tagged" the shanks and placed them in the Michigan State Police evidence locker (it would not escape the mind of any corrections officer that an inmate's possession of shanks constitutes an offense subject to criminal prosecution). But, Lieutenant Vashaw thought he may have had with him in the interview room the trash can containing metal pieces, presumably remnants of the missing desk shelf used to craft the shanks.[3]

Lieutenant Vashaw testified that defendant hesitated to speak at the outset of the interrogation and "denied everything." Lieutenant Vashaw then told defendant that the evidence the corrections officers had obtained was "pretty damaging" and that two weapons had been found in defendant's area of control. Lieutenant Vashaw told defendant that he needed to tell him what was going on inside the prison. As soon as defendant started to talk, Lieutenant Vashaw pulled out a tape recorder and recorded defendant's confession, which was later given to the prosecution in order to help prove the instant criminal offense. After the interrogation, which lasted approximately 15 minutes, a staff member escorted defendant back to the segregation unit.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion to suppress evidence. *People v Lapworth*, 273 Mich App 424, 426; 730 NW2d 258 (2006). However, we

[3] In our earlier opinion, we relate facts stated in testimony by defendant, including his claim that the shanks were in the interview room. Defendant did not, however, testify at the suppression hearing. As such, we are prohibited from considering in our analysis defendant's trial testimony when evaluating whether the trial court should have granted defendant's suppression motion on the basis of the failure to advise him of his *Miranda* rights.

defer to the trial court's findings of fact unless the findings are clearly erroneous. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). A finding is clearly erroneous if we are "left with a definite and firm conviction that a mistake has been made." *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

III. DISCUSSION

A. *MIRANDA*

The Fifth Amendment of the United States Constitution provides a right against self-incrimination: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In *Miranda*, the Supreme Court of the United States established "procedural safeguards . . . to secure the privilege against self-incrimination." *Miranda*, 384 US at 444. Specifically, when a criminal defendant is subjected to a custodial interrogation, the defendant must be warned of the following before any questioning: he or she has the right to remain silent, any statement that the defendant makes may be used as evidence against him or her, and he or she has a right to an attorney, either retained or appointed. *Id*. A custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. When determining whether a defendant was "in custody" in the context of *Miranda*, courts consider (1) whether a reasonable person in the defendant's situation would believe that he or she was free to leave and (2) "whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Fields*, 565 US at ___; 132 S Ct at 1190. "Interrogation refers to express questioning and to any

words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Statements made by a defendant during a custodial interrogation are inadmissible unless the defendant knowingly, voluntarily, and intelligently waived his or her Fifth Amendment rights. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005); see also *Miranda*, 384 US at 444-445.

B. *FIELDS*

The United States Supreme Court in *Fields* affirmed the longstanding principle that incarceration alone does not deprive a person of his or her Fifth Amendment right against self-incrimination. Rather, "[a]n inmate who is removed from the general prison population for questioning" and is thereafter subjected to treatment in connection with the interrogation that renders him or her "in custody" for practical purposes is "entitled to the full panoply of protections prescribed by *Miranda*." *Fields*, 565 US at ___; 132 S Ct at 1192 (quotation marks and citation omitted). But the Court rejected the idea of a categorical rule that deems any questioning of a prisoner custodial if he or she is removed from the general prison population and questioned. *Id*. at ___; 132 S Ct at 1187-1188. Instead, the determination of custody should focus on all the features of the interrogation and whether it manifests the coercive pressure that *Miranda* was designed to guard against—"the danger of coercion [that] results from the *interaction* of custody and official interrogation."[4] *Id*. at ___; 132 S Ct

[4] Upholding the tenets of *Miranda* in a prison setting does not necessarily hinder the safety and security of the facility, as my colleague suggests in his concurring opinion. Department of Corrections officers

at 1188 (quotation marks and citations omitted). Because we are tasked with determining whether defendant was entitled to "the full panoply" of protections prescribed by *Miranda* in light of the United States Supreme Court's ruling in *Fields*, its facts and analysis merit discussion.

In *Fields*, Randall Fields was serving a sentence in a Michigan jail when a corrections officer escorted him to a conference room that was "down one floor and . . . through a locked door that separated two sections of the facility." *Id*. at ___; 132 S Ct at 1186. Fields arrived at the conference room between 7:00 p.m. and 9:00 p.m. *Id*. The room was well lit and "average" in size. *Id*. at ___; 132 S Ct at 1193. Two sheriff's deputies were in the conference room to interview Fields about allegations that Fields had had sexual contact with a 12-year-old boy before his incarceration. *Id*. at ___; 132 S Ct at 1185. The two deputies were armed, but Fields was not handcuffed, otherwise restrained, or uncomfortable. *Id*. at ___, ___; 132 S Ct at 1186, 1193. He was offered food and water. *Id*. at ___; 132 S Ct at 1193. Both at the beginning of and later in the interview, the deputies told Fields that he was free

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are free to place prisoners in segregation as necessary, handcuff them during transport, and investigate, pursue, and punish acts of misconduct as well as crimes that occur within the prison. Furthermore, the right against self-incrimination does not prohibit corrections officers from interviewing inmates regarding their conduct. An inmate's statements are admissible in a future criminal proceeding: (1) if all the features of the interrogation do not amount to "custody" as set forth in *Miranda* and addressed in *Fields*; (2) when the questioning amounts to an on-the-scene investigation such as in *Cervantes v Walker*, 589 F2d 424, 427 (CA 9, 1978); or (3) in circumstances where "objectively reasonable question[ing is] necessary to protect the police or the public from an *immediate* danger." *People v Attebury*, 463 Mich 662, 671-672; 624 NW2d 912 (2001) (emphasis added). If circumstances mandate that the inmate be read his or her *Miranda* rights, violating such requirement merely results in an exclusion of the inmate's statements from being used as evidence against him or her in a criminal proceeding. Protecting the inmate's constitutional right in this regard should not jeopardize the safety and security of the prison facility.

to leave and return to his cell. *Id*. at ___; 132 S Ct at 1186. The conference-room door was open sometimes during the interview. *Id*. About halfway through the interview, Fields became agitated and began to yell after being confronted with the allegations of abuse. *Id*. According to Fields, one of the deputies spoke to him in "a very sharp tone" and, using an expletive, told him to sit down and that, " 'if [he] didn't want to cooperate, [he] could leave.' " *Id*. at ___, ___; 132 S Ct at 1186, 1193-1194. Fields eventually confessed to engaging in sexual conduct with the boy. *Id*. at ___; 132 S Ct at 1186. The questioning lasted between five and seven hours, and at no point during the interview did Fields ask to go back to his cell. *Id*. When Fields was eventually ready to go back to his cell, he had to wait 20 minutes for a corrections-officer escort. *Id*. He returned to his cell well after the hour of his normal bedtime. *Id*. "At no time was Fields given *Miranda* warnings or advised that he did not have to speak with the deputies." *Id*.

The state of Michigan charged Fields with criminal sexual conduct. *Id*. Fields moved the trial court to suppress his statements to the deputies, but the trial court denied the motion. *Id*. A jury convicted Fields of two counts of third-degree criminal sexual conduct. *Id*. This Court affirmed the conviction, and the Michigan Supreme Court denied leave to appeal. *Id*. Fields filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan; the court granted Fields relief, *id*., concluding that this Court's "decision that [Fields's] confession was properly admitted was an unreasonable application of *Mathis* v. *United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968)[, and] that the error was not harmless." *Fields v Howes*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 9, 2009 (Docket No. 2:06-CV-13373, 2009 WL 304751), unpub op, p 9. The

United States Court of Appeals for the Sixth Circuit affirmed, opining that the Supreme Court of the United States "clearly established in *Mathis* . . . that '*Miranda* warnings must be administered when law enforcement officers remove an inmate from the general prison population and interrogate him regarding criminal conduct that took place outside the jail or prison.' " *Fields*, 565 US at ___; 132 S Ct at 1187, quoting *Fields v Howes*, 617 F3d 813, 820 (CA 6, 2010).

The United States Supreme Court granted certiorari and rejected the Sixth Circuit's characterization of Supreme Court precedent, opining that "our decisions do not clearly establish that a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison." *Id*. at ___; 132 S Ct at 1188-1189. The Court emphasized that "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*" for several reasons: (1) "questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest" because they "live in prison" where "the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar"; (2) a prisoner is "unlikely to be lured into speaking by a longing for prompt release"; and (3) a prisoner "knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence." *Id*. at ___; 132 S Ct at 1190-1191 (quotation marks and citation omitted). In addition, the Court explained that questioning a prisoner outside the presence of other inmates "does not necessarily convert a noncustodial situation . . . to one in which *Miranda* applies" because such questioning "does not generally remove the prisoner from a supportive atmosphere." *Id*.

at ___; 132 S Ct at 1191 (quotation marks and citation omitted). Moreover, with respect to the subject matter of the questioning, the Court opined that the distinction between events occurring inside the prison and events occurring outside the prison is not significant because there is a potential for additional criminal liability and punishment in both instances. *Id*. at ___; 132 S Ct at 1192.

After rejecting the Sixth Circuit's "categorical rule" as "unsound," the Court explained the proper analysis to determine whether a prisoner is in custody for *Miranda* purposes:

> When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.[5] An inmate who is removed from the general prison population for questioning and is thereafter . . . subjected to treatment in connection with the interrogation that renders him in custody for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*.
>
> Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. [*Id*. at ___; 132 S Ct at 1192 (quotation marks and citations omitted).]

The Court then held that Fields was not in custody for purposes of *Miranda*. *Id*. at ___; 132 S Ct at 1194. The Court recognized that there were factors that supported a custody finding: Fields did not initiate or

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[5] The *Fields* Court also listed several other factors to consider when examining "all of the circumstances surrounding the interrogation": the location and duration of the questioning, statements made during the interview, the presence or absence of physical restraints during the interview, and the release of the interviewee at the conclusion of questioning. *Id*. at ___; 132 S Ct at 1189 (quotation marks and citation omitted).

consent to the interview in advance, Fields was not told that he was free to decline to speak, the interview lasted five to seven hours and continued past Fields's regular bedtime, the deputies were armed, and one of the deputes spoke in "a very sharp tone" and used profanity. *Id*. at ___; 132 S Ct 1193. Nevertheless, the Court concluded that these factors were outweighed by other factors illustrating that Fields was not in custody: Fields was not physically restrained, threatened, or uncomfortable in the conference room, he was offered food and water, the conference room was well lit and "average" sized, and the conference-room door was sometimes left open. *Id*. But, the most important factor to the Court was that Fields was told both at the outset of the interview and again thereafter that he could return to his cell whenever he wanted. *Id*. According to the Court, " '[a]ll of these objective facts [were] consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.' " *Id*., quoting *Yarborough v Alvarado*, 541 US 652, 664-665; 124 S Ct 2140; 158 L Ed 2d 938 (2004).

C. ANALYSIS

Focusing on all the features of Lieutenant Vashaw's interview of defendant, I would conclude that defendant was in custody during the interrogation for purposes of *Miranda*. See *Fields*, 565 US at ___; 132 S Ct at 1192. While defendant's cell was being searched during a siren drill, he was passing time in the day room along with other inmates. Instead of being returned to his cell after the search, however, defendant was ordered to be placed in the segregation unit. A prisoner is not typically placed in the segregation unit unless prison officials believe he or she has done something wrong, and a

reasonable person in defendant's situation could safely assume that to be the case. After some time had passed, defendant was then placed in handcuffs (not a normal situation for him) and taken to a back office of the control center, where Lieutenant Vashaw was waiting for him. A reasonable reading of the record indicates that defendant had no choice but to attend the meeting with Lieutenant Vashaw. Once in the interrogation room, Lieutenant Vashaw did not tell defendant that he could decline the interrogation, end it at any time, refuse to answer questions, or be returned to his cell—in the segregation unit or otherwise—upon request. It is also clear from the record that defendant was singled out for interrogation on the basis of the offense for which he was convicted in the instant case, even if an additional purpose of the interview was to investigate suspected gang violence in the prison. Defendant remained handcuffed during the interrogation. Early in the interrogation, defendant hesitated to speak and denied everything. However, defendant ultimately confessed once Lieutenant Vashaw told him about the discovery of two weapons in defendant's "area of control," that the evidence was "pretty damaging," and that defendant needed to tell him what was going on inside the prison. At no time was defendant told that he was free to leave. After defendant made incriminating statements regarding the weapons, the 15-minute interrogation ended, and defendant was taken back to the segregation unit.

In comparison to *Fields*, there are factors in the present case that suggest that defendant was not in custody. For example, Lieutenant Vashaw testified that he did not threaten defendant, other than his remarks as stated above. There is no indication that defendant was uncomfortable or subjected to expletives. There was one less interviewer than in *Fields*. There is no indication that Lieutenant Vashaw was armed as the deputies were in

Fields, and defendant's 15-minute interrogation was significantly shorter than the questioning in *Fields* (likely because defendant confessed quickly).

However, the present case and *Fields* share similarities that demonstrate that defendant was in custody. Here, as in *Fields*, defendant did not invite the interview. And, there is no indication that defendant was told that he could decline to speak with Lieutenant Vashaw. Furthermore, the present case is distinguishable from *Fields* in several respects that strongly illustrate that defendant was in custody. First, defendant's experience leading up to the interrogation supports the conclusion that a reasonable person in defendant's position would not have felt free to terminate the questioning and leave; the same cannot be said about the defendant in *Fields*. More specifically, Fields was taken directly from his jail cell to a conference room without any indication to him that he had done something wrong. *Fields*, 617 F3d at 815. In contrast, defendant here was awaiting the completion of a "shakedown"—a search of his cell—when he was handcuffed, taken out of the general prison population and into the segregation unit, and then, shortly thereafter, taken for questioning while he remained in handcuffs. A reasonable person in defendant's position would recognize, or at least suspect, that his placement in the segregation unit in physical restraints was directly linked to the shakedown of his prison cell. Second, defendant was not told that he was free to leave. Fields, however, was told both before and during his interview that he was free to leave, and the *Fields* Court characterized this fact as the "[m]ost important" circumstance of the interrogation. *Fields*, 565 US at ___; 132 S Ct at 1193. Third, defendant in this case was in handcuffs during the interrogation; Fields was not physically restrained. *Id*. Finally, defendant was returned to the segregation unit after the interrogation, whereas Fields was taken back to his cell. See *id*. at ___; 132 S Ct at 1189

(stating that the release of the interviewee at the end of the questioning is a relevant factor to consider when determining custody). I view this "treatment" of defendant as the functional equivalent of an arrest in a prison setting. The objective circumstances in this case demonstrate that a reasonable person would not have felt free to terminate the interrogation by Lieutenant Vashaw. See *id*. at ___; 132 S Ct at 1192 ("An inmate who is removed from the general prison population for questioning and is 'thereafter . . . subjected to treatment' in connection with the interrogation 'that renders him "in custody" for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*.' ") (citation omitted).

The prosecution contends that, under *Fields*, defendant was not in custody for *Miranda* purposes because "[a]ll of the restrictions placed on him were a result of . . . standard prison policy for prisoners found to possess weapons. None of it was related to his questioning." I do not find this argument to be persuasive. *Fields* simply does not stand for the proposition that a prisoner is not in custody for purposes of *Miranda* when the treatment that the prisoner is subjected to is standard prison policy. Rather, when distinguishing a prisoner's living environment from the living environment of a person who is not serving a term of incarceration, the *Fields* Court focused on restrictions and prison procedures that are "ordinary" and "familiar" to a prisoner. *Id*. at ___; 132 S Ct at 1191-1192. The prosecution's argument takes the *Fields* Court's distinction between "ordinary" conditions of prisoners and "ordinary" conditions of people who are not serving a term of imprisonment to an extreme by presuming that all standard prison policies are ordinary and familiar to a prisoner. Being sent to a segregation unit in handcuffs following the discovery of weapons in a prison cell is no more an "ordinary" condition to a prisoner than being sent to jail in handcuffs following an arrest on a city

street is an "ordinary" condition to a person who is not serving a term of incarceration. Both are unordinary conditions brought about by prohibited conduct. Furthermore, the actions taken by law enforcement officers in both circumstances are executed pursuant to a standard policy.

The prosecution further contends that the public-safety exception to the *Miranda* rule applies in this case. I disagree. I recognize "that the doctrinal underpinnings of *Miranda* [do not] require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *New York v Quarles*, 467 US 649, 656; 104 S Ct 2626; 81 L Ed 2d 550 (1984). However, the public-safety exception only applies to "objectively reasonable question[ing] necessary to protect the police or the public from an *immediate* danger." *People v Attebury*, 463 Mich 662, 671-672; 624 NW2d 912 (2001) (emphasis added). In the present case, Lieutenant Vashaw's questioning of defendant was not "objectively reasonable question[ing] necessary to protect the police or the public from an immediate danger." *Id*. While Lieutenant Vashaw's questioning may have been connected to concerns for prison safety given the recent, problematic gang activity occurring in the prison, there was no immediate danger. See *id*. There was no active prison violence at the time of defendant's interview. Rather, there was a potential for more violence in the future and, thus, a need to determine the likelihood of future violence. Lieutenant Vashaw's testimony illustrates this fact:

> *Q.* And then at some point, do you decide, I've got to talk to defendant?
>
> *A.* Yes.

* * *

Q. And—and you wanted information on the gang members because of what reason?

A. For prison safety. *For future*, I mean, *if we got a war going on* that's something we need to take control of.

* * *

Q. But again, you wanted to know what's going on because of what reason?

A. Prison safety, with—we're having these gang problems and I want to know *are we expecting more trouble*, are we—you know, *is there more weapons floating around out there*, you know, concerned about the prisoner and staff safety. [Emphasis added.]

As can be gleaned from Lieutenant Vashaw's testimony, there was a potential in the prison for a future danger to prisoner and staff safety given the recent events—but not an immediate danger. There was no exigency. The public-safety exception, therefore, does not apply in this case.

Accordingly, I would conclude that Lieutenant Vashaw's questioning of defendant was a custodial interrogation. Therefore, defendant's statements during the custodial interrogation were inadmissible at trial because he was not advised of his *Miranda* rights before questioning and, thus, did not knowingly, voluntarily, and intelligently waive his Fifth Amendment rights. See *Miranda*, 384 US at 444-445; see also *Tierney*, 266 Mich App at 707.

D. HARMLESS ERROR

The erroneous admission into evidence of defendant's statements to Lieutenant Vashaw, a preserved constitutional error occurring during the presentation of the case to a jury (i.e., a nonstructural error), is not grounds for reversal if the error was harmless. See

People v Miller, 482 Mich 540, 559; 759 NW2d 850 (2008); *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). A preserved constitutional error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Hyde*, 285 Mich App 428, 447; 775 NW2d 833 (2009) (quotation marks and citations omitted). "There must be no reasonable possibility that the evidence complained of might have contributed to the conviction." *Id*. (quotation marks and citations omitted); see also *Anderson*, 446 Mich at 406; *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967).

Given the evidence at trial, I would conclude that the admission into evidence of defendant's statements to Lieutenant Vashaw was not harmless error. It is not "clear beyond a reasonable doubt that a rational jury would have found . . . defendant guilty absent the error." See *Hyde*, 285 Mich App at 447 (quotation marks and citations omitted). To be convicted of being a prisoner in possession of a weapon, MCL 800.283(4) requires that a prisoner either possess a weapon or have a weapon under his or her control. See MCL 800.283(4) ("Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment."). The significance of defendant's inadmissible statements to Lieutenant Vashaw lies in the statements' relevance to whether defendant possessed or controlled the prison shanks. See *id*. Defendant told Lieutenant Vashaw that the shanks were his and that he made them. Defendant testified at trial, however, that the shanks belonged to his cellmate and that he had never seen them before they were confiscated as a

result of the search. Moreover, the shanks were not found on defendant's person but, rather, under the bed frame of his bunk and in his mattress. Thus, whether the shanks belonged to defendant and whether defendant knew that the shanks were under the bed frame and in his mattress were very significant factual questions with respect to whether defendant possessed or controlled the shanks. The evidence at trial demonstrating that defendant had control over the area where the shanks were found supports the reasonable inference that the shanks belonged to defendant and that he knew where they were. However, defendant's inadmissible statements to Lieutenant Vashaw directly prove these significant facts and, thus, that the shanks were under defendant's possession and control. Without this inadmissible direct evidence, a trier of fact would have to rely on the circumstantial evidence of possession and control offered by the prosecution and could find that the shanks did not belong to defendant and that defendant did not know they were there. There is, therefore, a reasonable possibility that defendant's statements to Lieutenant Vashaw might have contributed to defendant's convictions. See *Hyde*, 285 Mich App at 447.

Accordingly, I would conclude that the admission into evidence of defendant's statements to Lieutenant Vashaw was not harmless beyond a reasonable doubt. I would, therefore, reverse defendant's convictions and remand for a new trial.

LOCAL EMERGENCY FINANCIAL ASSISTANCE LOAN BOARD v BLACKWELL

Docket No. 306975. Submitted March 8, 2013, at Detroit. Decided March 14, 2013, at 9:00 a.m.

The Local Emergency Financial Assistance Loan Board appointed Arthur Blackwell, II, as the emergency financial manager (EFM) for the city of Highland Park. The board subsequently filed an action in the Wayne Circuit Court against Blackwell, alleging breach of contract, common-law conversion, statutory conversion, and breach of fiduciary duty in connection with Blackwell's service from April 2005 to April 2009. The action was joined with an earlier action brought by Blackwell against the board in the Court of Claims that alleged breach of contract, unjust enrichment, and fraud. The circuit court, Susan D. Borman, J., granted summary disposition for the board in Blackwell's Court of Claims case. The remaining claims proceeded to trial. Following the close of Blackwell's proofs, the circuit court, Robert J. Colombo, J., granted the board's motion to amend the complaint to add the Attorney General as a plaintiff. The jury determined that Blackwell had made $264,000 in unauthorized payments to himself from the city, and the court entered a judgment against him. Blackwell moved for judgment notwithstanding the verdict (JNOV), remittitur, or a new trial, all of which the court denied. Blackwell appealed.

The Court of Appeals *held*:

1. MCL 141.1218(1) (repealed by 2012 PA 436, effective March 28, 2013) provided that the board had the sole statutory authority to appoint and compensate an EFM. The Governor's authority under the statute was limited to determining whether a financial emergency existed and assigning the responsibility for managing the emergency to the board. Public officers can exercise only the powers that are conferred on them by law, and the state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution. Anyone dealing with an officer is charged with knowledge of the extent of the officer's authority to bind the state and must, at his or her own peril, ascertain whether the contemplated contract is within the power conferred. Blackwell claimed that he, the

former Governor, and the board had an understanding that modified the terms of his written agreement with the board and entitled him to compensation after his first year of serving as the EFM. According to Blackwell, the Governor directed that he be paid. His breach of contract claim failed as a matter of law because the Governor had no authority to modify the agreement and order that Blackwell be compensated. That authority rested solely with the board. Because the alleged oral agreement was without legal effect, it did not give rise to a question of fact regarding whether the board had breached its contract with Blackwell and the circuit court properly granted summary disposition for the board on his breach of contract claim.

2. The circuit court also properly granted summary disposition for the board on Blackwell's unjust-enrichment claim. An unjust-enrichment claim is available only if there is no express contract covering the same subject matter. It was undisputed that there was an express, written contract setting forth Blackwell's compensation as EFM.

3. With respect to Blackwell's fraud claim, the circuit court properly granted summary disposition in favor of the board because governmental immunity barred the claim and Blackwell failed to plead in avoidance of governmental immunity. MCL 691.1407(1) provides that a governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. Under MCL 691.1401, the term "governmental agency" includes the state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces. The Local Emergency Financial Assistance Loan Board is a state board located within the Department of Treasury. Blackwell's fraud claim (which is a tort claim) was based on the alleged failure to fully disclose the city's finances and the actual state of the city before he accepted the EFM appointment and his assertion that he was led to believe that he would be compensated for his work after the first year. The board was exercising a governmental function when it appointed Blackwell as EFM, negotiated his compensation, and executed the employment contract because it was conduct that was expressly authorized by statute.

4. The circuit court properly determined that Blackwell would suffer no prejudice as a result of the amendment of the complaint and did not abuse its discretion by granting the board's motion to amend the complaint to add the Attorney General as a plaintiff. A motion to amend a complaint should ordinarily be granted absent any apparent or declared reason, such as undue delay on the part of the moving party or undue prejudice to the nonmoving party.

Prejudice in the context of a motion to amend a complaint exists if the amendment would prevent the opposing party from receiving a fair trial, which did not happen here. None of the claims or theories changed as a result of the amendment. The board and the Attorney General represented the same general interest and pursued the same claims with the same evidence under the same theories.

5. Blackwell argued that the jury's verdicts were legally inconsistent. A reviewing court must make every attempt to harmonize a jury's verdicts. Only if verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. The reviewing court must carefully look beyond the legal principles underlying the plaintiff's causes of action and examine how those principles were argued and applied in the context of the specific case. If there is an interpretation of the evidence that provides a logical explanation for the jury's findings, the verdicts are not inconsistent. In returning a verdict of no cause of action on the breach of contract claim, the jury apparently determined that nothing in the contract expressly prohibited Blackwell from receiving additional compensation from the city. The fact that the contract did not prohibit that conduct, however, does not mean that it was authorized. Whether Blackwell's compensation was authorized was the core issue of the breach-of-fiduciary-duty and conversion claims. With regard to the claim of breach of fiduciary duty, the jury was asked to determine whether Blackwell breached his position of trust as the EFM. With respect to the conversion claims, the jury was asked to determine whether Blackwell wrongfully exerted dominion over the city's property. In light of these legal principles and the undisputed fact that nothing in the parties' contract authorized Blackwell to compensate himself with city funds, a reasonable jury could have logically concluded that Blackwell breached the trust placed in him and wrongfully exerted control over city funds. The circuit court did not err by denying Blackwell's motion for JNOV.

6. Blackwell argued that the trial court abused its discretion by denying his motion for remittitur because the Attorney General was added as a plaintiff and the relation-back doctrine and the three-year period of limitations on the statutory conversion claim barred recovery of the portion of the damages that were incurred outside of the applicable limitations period. The circuit court properly determined that the statute of limitations did not bar the recovery of damages because the addition of the Attorney General as a party related back to the original filing of the complaint. Generally, the relation-back doctrine does not extend to the

addition of new parties. An exception exists, however, if the original plaintiff had, in any capacity, an interest in the subject matter of the controversy, the defendant had notice of the interest of the person sought to be added as a plaintiff, and the new plaintiff's claim arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A new plaintiff may then be added and the defendant may not invoke a limitations defense. The claims of the Attorney General were identical to those of the board and arose out of the same conduct set forth in the original complaint. Both plaintiffs represented the interests of the state. Blackwell was fully apprised of the claims against him and was prepared to defend against them. He was thus not prejudiced by the addition of the Attorney General as a plaintiff, and the circuit court did not abuse its discretion by denying his motion for remittitur.

Affirmed.

1. PLEADING — COMPLAINTS — AMENDMENT — PREJUDICE.

A motion to amend a complaint should ordinarily be granted absent any apparent or declared reason, such as undue delay on the part of the moving party or undue prejudice to the nonmoving party; prejudice in the context of a motion to amend a complaint exists if the amendment would prevent the opposing party from receiving a fair trial.

2. JURY — VERDICTS — JUDGMENT NOTWITHSTANDING THE VERDICT — INCONSISTENT VERDICTS.

When reviewing a motion for judgment notwithstanding the verdict based on alleged inconsistencies in the jury's verdicts, the court must make every attempt to harmonize the verdicts; only if verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside; the court must carefully look beyond the legal principles underlying the plaintiff's causes of action and examine how those principles were argued and applied in the context of the specific case; if there is an interpretation of the evidence that provides a logical explanation for the jury's findings, the verdicts are not inconsistent.

3. PLEADING — COMPLAINTS — AMENDMENT — ADDITION OF PARTIES — RELATION-BACK DOCTRINE.

Generally, the relation-back doctrine does not extend to the addition of new parties, but an exception exists if the original plaintiff had, in any capacity, an interest in the subject matter of the controversy, the defendant had notice of the interest of the person sought to be added as a plaintiff, and the new plaintiff's claim arises out

> of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; a new plaintiff may then be added and the defendant may not invoke a statute-of-limitations defense.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Michael F. Murphy* and *Joshua O. Booth*, Assistant Attorneys General, for plaintiffs.

Giamarco, Mullins & Horton, P.C. (by *Ben M. Gonek*), for defendant.

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM. Defendant, Arthur Blackwell, II, appeals as of right the trial court's judgment in favor of plaintiffs in this action alleging breach of contract, common-law conversion, statutory conversion, and breach of fiduciary duty. Defendant also challenges the trial court's orders granting summary disposition for plaintiff Local Emergency Financial Assistance Loan Board (the Board) on defendant's counterclaims and denying defendant's motion for a judgment notwithstanding the verdict (JNOV), remittitur, or a new trial. Because the trial court properly granted summary disposition in favor of the Board on defendant's counterclaims, the court did not abuse its discretion by granting the Board's motion to amend its complaint, the jury's verdicts were not legally inconsistent, and the court properly denied defendant's motions for JNOV and remittitur, we affirm.

This appeal stems from defendant's service as the emergency financial manager (EFM) for the city of Highland Park (the City) from April 2005 to April 2009. The jury determined that, during that time, defendant made unauthorized payments to himself from the City

totaling $264,000. The trial court entered an amended judgment in favor of plaintiffs and against defendant in the amount of $332,837.11, which included $264,000 plus attorney fees and costs.

I. MOTION FOR SUMMARY DISPOSITION

Defendant first argues that the trial court erred by granting summary disposition in the Board's favor on his countercomplaint that alleged breach of contract, unjust enrichment, and fraud against the Board.[1] 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). Summary disposition under MCR 2.116(C)(7) is properly granted if the plaintiff's claims are barred by immunity granted by law. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The applicability of governmental immunity is a question of law that we review de novo. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint . . . ." *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*. Finally, a motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion under subrule (C)(10) is properly granted if, after viewing the

[1] Blackwell filed an original action alleging those claims against the Board in the Court of Claims, which was thereafter joined with the instant action that the Board filed against defendant in the Wayne Circuit Court.

evidence in the light most favorable to the nonmoving party, "there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Defendant argues that the trial court erred by granting summary disposition for the Board on his breach of contract claim because he, former Governor Jennifer Granholm, and the Board had an understanding that modified the terms of his written agreement with the Board and entitled him to compensation after his first year serving as the EFM of the City. According to defendant, Governor Granholm directed that he be paid. In granting summary disposition for the Board, the trial court determined that the Governor did not have authority to enter into an oral modification of defendant's contract.

The authority of a state official to contract with an EFM is governed by statute. MCL 141.1218(1)[2] states:

> If the governor determines that a financial emergency exists . . . , the governor shall assign the responsibility for managing the local government financial emergency to the local emergency financial assistance loan board created under the emergency municipal loan act . . . . *The local emergency financial assistance loan board shall appoint an emergency financial manager*. . . . The emergency financial manager shall be entitled to compensation and reimbursement for actual and necessary expenses from the local government *as approved by the local emergency financial assistance loan board*. [Emphasis added.]

Thus, according to the statute, the Board has the sole statutory authority to appoint and compensate an EFM.

[2] Although MCL 141.1218 was in effect during the period relevant to this case, pursuant to 2012 PA 436, the statute is repealed effective March 28, 2013.

The Governor's authority is limited to determining whether a financial emergency exists and assigning the responsibility for managing the emergency to the Board. "Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution." *Roxborough v Mich Unemployment Compensation Comm*, 309 Mich 505, 510; 15 NW2d 724 (1944) (quotation marks and citation omitted). "[A]ll persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred." *Id*. at 511 (quotation marks and citation omitted). Defendant's breach of contract claim fails as a matter of law because the Governor had no authority to modify the agreement and order that defendant be compensated. That authority rested solely with the Board. MCL 141.1218(1). Because the alleged oral agreement that defendant claims the Governor entered into was without legal effect, it did not give rise to a question of fact regarding whether the Board breached its contract with defendant. The trial court properly granted summary disposition for the Board pursuant to MCR 2.116(C)(10) on defendant's breach of contract claim.

The trial court also properly granted summary disposition for the Board on defendant's unjust-enrichment claim. As the trial court correctly noted, an unjust-enrichment claim is available "only if there is no express contract covering the same subject matter." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). It is undisputed that there was an express, written contract setting forth defendant's compensation as the EFM. Accordingly, the trial court

properly granted summary disposition for the Board under MCR 2.116(C)(8) and (10) on defendant's claim of unjust enrichment.

Further, with respect to defendant's fraud claim, the trial court properly granted summary disposition under MCR 2.116(C)(7) and (8) because governmental immunity barred the claim and defendant failed to plead in avoidance of governmental immunity. The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides that "a governmental agency is immune from tort[3] liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The term " '[g]overnmental agency' means this state or a political subdivision." MCL 691.1401(a).[4] MCL 691.1401(g) defines "state" as "this state and its agencies, departments, commissions, courts, *boards*, councils, and statutorily created task forces."[5] (Emphasis added). The Local Emergency Financial Assistance Board is a state board located within the Department of Treasury. MCL 141.932(1). Therefore, the Board is a governmental agency under the plain language of the GTLA.

Defendant's fraud claim was based on the alleged failure to fully disclose the City's finances and the actual state of the City before defendant accepted the appointment as the City's EFM and on defendant's assertion that he was led to believe that he would be compensated for his work after the first year. The Board was exercising a governmental function when it ap-

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[3] A claim alleging fraud is a tort claim. See *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009).

[4] During the relevant period, this language, with one insignificant difference, was codified at MCL 691.1401(d).

[5] During the relevant period, this language, with slight differences that are not significant, was codified at MCL 691.1401(c).

pointed defendant as the EFM of the City, negotiated his compensation, and executed an employment contract and addenda. A "governmental function" is "an activity that is expressly or impliedly mandated or authorized by . . . statute . . . or other law." MCL 691.1401(b).[6] As previously discussed, MCL 141.1218(1) authorized the Board to appoint defendant as the EFM and approve his compensation. Further, MCL 141.932(2)(b) of the Emergency Municipal Loan Act, MCL 141.931 *et seq*., provides that "[t]he board has the powers necessary to carry out and effectuate the purposes and provisions of this act," including the power "to make, execute, and deliver contracts . . . ." The alleged conduct on which defendant based his fraud claim constitutes a governmental function because it was conduct that was expressly authorized by statute. Because defendant failed to plead an applicable exception to governmental immunity, the trial court properly granted summary disposition for the Board on his fraud claim. See *Mack v Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002) ("[A] party suing a unit of government must plead in avoidance of governmental immunity.").

II. MOTION TO AMEND COMPLAINT

Defendant next argues that the trial court abused its discretion by granting the Board's motion to amend its complaint to add the Attorney General as a plaintiff after the close of defendant's proofs. Specifically, he argues that the trial court erred by determining that he would not be prejudiced if the court allowed the amendment. Defendant failed to preserve this issue for appellate review by setting forth any reason why he would be prejudiced by the amendment during trial. In fact,

[6] During the relevant period, this language was codified at MCL 691.1401(f).

counsel for defendant stated: "In terms of prejudice, your Honor, if the attorney — well, I withdraw. Never mind." As this Court has recognized, "[t]he purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Defendant cannot now complain that the trial court abused its discretion by determining that he would suffer no prejudice when he himself failed to offer any reason below regarding why he would be prejudiced. Indeed, as previously stated, defense counsel withdrew his objection with respect to prejudice, stating: "I withdraw. Never mind." " 'A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.' " *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (citation omitted).

In any event, the trial court properly determined that defendant would suffer no prejudice as a result of the amendment. A motion to amend a complaint should ordinarily be granted absent any apparent or declared reason, such as undue delay on the part of the moving party or undue prejudice to the nonmoving party. *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 9-10; 614 NW2d 169 (2000). Prejudice, in the context of a motion to amend a complaint, "exists if the amendment would prevent the opposing party from receiving a fair trial . . . ." *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997). Here, the amendment did not prevent defendant from receiving a fair trial. We agree with the trial court that none of the claims or theories changed as a result of the amendment. The Board and the Attorney General represented the same general

interest and pursued the same claims with the same evidence under the same theories. Therefore, defendant was not prejudiced by the amendment, and the trial court did not abuse its discretion by granting the Board's motion to amend the complaint.

III. MOTION FOR JNOV

Defendant next argues that the trial court erred by denying his motion for JNOV because the jury's verdicts were legally inconsistent and against the great weight of the evidence. Initially, we note that defendant has abandoned his argument that the verdicts were against the great weight of the evidence because he failed to present any argument or offer any legal authority in support of that claim. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008) (" 'It is not enough for an appellant in his brief simply to . . . assert an error and then leave it up to this Court to . . . unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' "), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). With respect to defendant's argument that the jury's verdicts were inconsistent, defendant failed to preserve that argument by raising it in his motion for JNOV below. Our review of unpreserved issues is limited to plain error affecting substantial rights. See *Veltman v Detroit Edison Co,* 261 Mich App 685, 690; 683 NW2d 707 (2004).

This Court must make " 'every attempt . . . to harmonize a jury's verdicts.' " *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998) (citation omitted). " 'Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.' " *Id*. (citations omitted). This Court must

take "a careful look, beyond the legal principles underlying the plaintiff's causes of action, at how those principles were argued and applied in the context of this specific case." *Id.* at 284-285. " '[I]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent.' " *Id*. at 282 (citation omitted).

Defendant argues that the jury's determination that he did not breach his contract with the Board is legally and logically inconsistent with its determinations that he breached his fiduciary duty and converted the City's funds. Defendant's argument lacks merit. A review of the legal principles underlying each claim and an examination of how the principles were applied in this case demonstrate that the jury's verdicts were not inconsistent. With respect to the breach of contract claim, the trial court instructed the jury as follows:

> The issue for you, the jury, is whether Defendant breached the contract with the Plaintiff by receiving additional funds from Highland Park. If the contract — or excuse me, if the contracts between Plaintiff and Defendant only allowed Defendant to receive compensation from the Plaintiff, then Defendant breached the contracts. If, on the other hand, the contracts between Plaintiff and Defendant did not prevent Defendant from receiving additional compensation from Highland Park, the Defendant did not breach the contracts.

In returning a verdict of no cause of action on the breach of contract claim, the jury apparently determined that nothing in the contract or the addenda expressly prohibited defendant from receiving additional compensation from the City. The fact that the contract and addenda did not *prohibit* such conduct, however, does not mean that it was *authorized*. Whether defendant's compensation was *authorized* was the core issue of the breach-of-fiduciary-duty and con-

version claims. With regard to the claim of a breach of fiduciary duty, the jury was asked to determine whether defendant breached his position of trust as the EFM. With respect to the conversion claims, the jury was asked to determine whether defendant wrongfully exerted dominion over the City's property. In light of these legal principles and the undisputed fact that nothing in the parties' contract or the addenda authorized defendant to compensate himself with City funds, a reasonable jury could have logically concluded that defendant breached the trust placed in him and wrongfully exerted control over City funds. Because the jury's verdicts can be reconciled and are not logically or legally inconsistent, defendant is entitled to no relief.

IV. MOTION FOR REMITTITUR

Defendant next argues that the trial court abused its discretion by denying his motion for remittitur. In particular, defendant argues that because the Attorney General was added as a plaintiff, the relation-back doctrine and the three-year period of limitations on the statutory conversion claim barred recovery of the portion of the damages that were incurred outside the applicable limitations period. The trial court determined that the statute of limitations did not bar recovery of any damages because the addition of the Attorney General as a party related back to the original filing of the complaint. The trial court also determined that defendant waived his statute-of-limitations defense by failing to assert it in response to the amended complaint or the motion to amend the complaint. We review for an abuse of discretion a trial court's decision whether to grant a motion for remittitur. *Diamond v Witherspoon*, 265 Mich App 673, 692; 696 NW2d 770 (2005). Whether the relation-back doctrine is applicable is a question of

law that this Court reviews de novo. See *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

Generally, "the relation-back doctrine does not extend to the addition of new parties." *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007) (quotation marks and citations omitted). In *Hayes-Albion Corp v Whiting Corp*, 184 Mich App 410, 418; 459 NW2d 47 (1990), this Court recognized an exception to that general rule and held as follows:

> [W]e find that where the original plaintiff had, in any capacity, an interest in the subject matter of the controversy, the defendant had notice of the interest of the person sought to be added as a plaintiff, and the new plaintiff's claim arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, then a new plaintiff may be added and the defendant is not permitted to invoke a limitations defense.

The Court further stated:

> "As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense. This seems particularly sound inasmuch as the courts will require the scope of the amended pleading to stay within the ambit of the conduct, transaction, or occurrence set forth in the original pleading." [*Id*., quoting 6A Wright, Miller & Kane, Federal Practice & Procedure (2d ed), § 1501, pp 154-155.]

In this case, as the trial court recognized, the original plaintiff—the Board—had an interest in the subject matter of the litigation. The claims of the added plaintiff—the Attorney General—were identical to those of the Board and arose out of the same conduct set forth in the original complaint. Both plaintiffs repre-

sented the interests of the state, and defendant was fully aware of the Attorney General's interest given that the Attorney General filed the original complaint against defendant. In addition, there is no question that defendant was fully apprised of the claims against him and was prepared to defend against them. Further, as the trial court determined when it granted the Board's motion to amend the complaint and as we have concluded in this appeal, defendant was not prejudiced by the addition of the Attorney General as a party. Accordingly, the trial court properly determined that the relation-back doctrine was applicable and that defendant was therefore not entitled to invoke a statute-of-limitations defense. *Hayes-Albion*, 184 Mich App at 418. Because the addition of the Attorney General as a party related back to the original filing of the complaint, we need not address defendant's argument that he did not waive the statute-of-limitations defense by failing to assert it in response to the Board's amended complaint or its motion to amend the complaint. Thus, the trial court did not abuse its discretion by denying defendant's motion for remittitur.

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

TALBOT, P.J., and DONOFRIO and SERVITTO, JJ., concurred.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered March 11, 2013:

In re HERNANDEZ/VERA MINORS, Docket No. 312136. The Court orders that its opinion issued February 7, 2013, is hereby vacated. A new opinion will be issued.*

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* New opinion issued April 16, 2013, as an unpublished opinion per curiam—REPORTER.

Index-Digest

INDEX–DIGEST

6. A claim of silent fraud requires a showing that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure; a healthcare provider has no duty to inform a patient of a doctor's success rates, including a history of falsely diagnosing other patients; a duty to refrain from communicating false diagnoses is not equivalent to a duty to disclose for purposes of a silent-fraud claim; the duty to report a doctor's misconduct to government agencies under federal law does not run to patients. *Lucas v Awaad*, 299 Mich App 345.

ACTUAL ATTORNEY FEES—*See*

ACTIONS 3

ADDITION OF PARTIES—*See*

PLEADING 2

ADEQUACY—*See*

ACTIONS 2

ADEQUACY OF AFFIDAVITS OF MERITORIOUS DEFENSE—*See*

ACTIONS 1

ADMINISTRATIVE LAW

See, also, APPEAL 1

APPEAL

1. *Community Health Dep't v Anderson*, 299 Mich App 591.

EVIDENCE

2. The weight and credibility to be accorded to evidence presented in the Tax Tribunal is within the Tax Tribunal's discretion; the Court of Appeals defers to the Tax Tribunal to assess the weight and the credibility of the evidence before it. *Drew v Cass County*, 299 Mich App 495.

HEARING OFFICERS

3. The Board of Veterinary Medicine Disciplinary Subcommittee is not bound by a hearing officer's recommended findings and is vested with the discretion to determine whether the preponderance of the evidence supports or

possession of a firearm and possessing a firearm during the commission of a felony without violating the constitutional protections against double jeopardy (US Const, Am V; Const 1963, art 1, § 15; MCL 750.224f, 750.227b). *People v Cain*, 299 Mich App 27.

5. Assault with intent to rob while armed is a lesser included offense of armed robbery; convicting a defendant of both armed robbery and assault with intent to rob while armed arising out of the same criminal episode violates the double jeopardy prohibition of multiple punishments for the same offense (US Const V; Const 1963, art 1 § 15; MCL 750.89, MCL 750.529). *People v Gibbs*, 299 Mich App 473.

DUE PROCESS

6. A criminal defendant can show that the state violated his or her due process rights under the Fourteenth Amendment by showing that the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant; if the defendant cannot show bad faith by the state or that the evidence was potentially exculpatory, the state's failure to preserve evidence does not deny the defendant due process. *People v Heft*, 299 Mich App 69.

FIREARMS

7. MCL 750.237 prohibits a person from possessing or carrying a firearm when he or she is under the influence of intoxicating liquor; an intoxicated individual may possess a firearm in her or her home without violating MCL 750.237 when the possession was constructive and there is no evidence that the individual was going to use the gun for an unlawful purpose; lawful constructive possession of a handgun in an individual's home while that individual is intoxicated is protected by the Second Amendment (US Const. Am II; Const 1963, art 1, § 6). *People v Deroche*, 299 Mich App 301.

HEADLEE AMENDMENT

8. An order requiring a municipality to take corrective action to stop the discharge of raw sewage from private septic systems within its borders, in accordance with the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., does not violate the Headlee Amendment's prohibition against the Legislature requiring any new or expanded activities by local govern-

ments without full state financing; municipalities have historically been responsible for the discharge of raw sewage that originates within its border and such an order would not improperly shift the financial burden from the state to a municipality or impose a new burden (Const 1963, art 9, § 29). *Dep't of Environmental Quality v Worth Twp (On Remand)*, 299 Mich App 1.

INEFFECTIVE ASSISTANCE OF COUNSEL

9. *People v Ratcliff*, 299 Mich App 625.

JURY

10. The failure to swear in a jury in a criminal prosecution by administering the oath required by MCL 768.14, MCR 2.511(H)(1), and MCR 6.412(F) before trial begins is a fatal defect that requires automatic reversal of the defendant's convictions and remand for a new trial. *People v Allan*, 299 Mich App 205.

RIGHT TO REMAIN SILENT

11. Under the Fifth Amendment, a criminal defendant has a right to remain silent; a prosecutor may not comment on a defendant's silence in the face of accusation, but may without violating the right comment on silence that occurred before any police contact; a prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version were true, but if it would not have been natural for the defendant to contact the police (for example, when doing so might have resulted in self-incrimination), the prosecutor cannot properly comment on the defendant's failure. *People v Gibbs*, 299 Mich App 473.

SELF-INCRIMINATION

12. When a criminal defendant may have been subjected to custodial interrogation the totality of the circumstances is examined to determine whether the defendant was in custody at the time of the interrogation; the determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned; courts, when determining whether a defendant was in custody, consider both whether a reasonable person in the defendant's situation would have believed that he or she was free to leave and whether the relevant environment presented the same inherently

coercive pressures as the type of station house questioning at issue in *Miranda v Arizona*, 384 US 436 (1966); relevant factors include the location and duration of the questioning, statements made during the questioning, the presence or absence of physical restraints during the questioning, and whether the interviewee was released at the end of the questioning. *People v Cortez (On Remand)*, 299 Mich App 679.

13. An inmate's imprisonment is not sufficient by itself to constitute custody for purposes of the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966); whether there was restraint on a person's freedom of movement is the first inquiry in the custody analysis but courts must also ask whether the relevant environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. *People v Cortez (On Remand)*, 299 Mich App 679.
14. Questioning a prisoner in private, as opposed to questioning in the presence of fellow prisoners, does not necessarily convert a noncustodial situation to one in which the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966), apply; imposing additional restraints on a prisoner's freedom of movement, such as an armed escort to the interview room, does not necessarily suggest custodial interrogation; it is not significant for purposes of determining whether a suspect is in custody whether the questions concern events occurring inside the prison or events occurring outside the prison; the threat to a person's Fifth Amendment rights that *Miranda* was designed to neutralize is neither mitigated nor magnified by the location of the conduct about which questions are asked. *People v Cortez (On Remand)*, 299 Mich App 679.
15. The determination whether a prisoner who was questioned in prison was in custody for purposes of the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966), should focus on all the features of the interrogation, including the language that was used in summoning the prisoner to the interrogation and the manner in which the interrogation was conducted; an inmate who is removed from the general prison population for questioning and is thereafter subjected to treatment in connection with the interrogation that renders the inmate "in custody" for practical purposes is entitled to the full panoply

of protections prescribed by *Miranda*. *People v Cortez (On Remand)*, 299 Mich App 679.

16. Security precautions that are routinely employed when a prisoner is transferred from place to place within a prison or when away from the prison do not affect the analysis whether a prisoner who is interviewed in prison has been subjected to custodial interrogation for purposes of the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966); the fact that the prisoner was questioned about a matter involving conduct in prison, as opposed to conduct outside prison, is not a relevant consideration in determining whether custodial interrogation occurred; the removal of the prisoner from the general prison population for purposes of the interview may lessen the coercive aspects of an interview of a prisoner. *People v Cortez (On Remand)*, 299 Mich App 679.

SELF-REPRESENTATION

17. To invoke the right of self-representation, (1) a defendant must make an unequivocal request to represent himself or herself, (2) the trial court must determine that the choice to proceed without counsel is knowing, intelligent, and voluntary, and (3) the trial court must determine that the defendant's acting as his or her own counsel will not disrupt, unduly inconvenience, or burden the court and the administration of the court's business (US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1). *People v Dunigan*, 299 Mich App 579.

SEPARATION OF POWERS

18. A case is nonjusticiable because it involves a political question when (1) the issue to be resolved involves a question that is reserved in the Constitution to a coordinate branch of government, (2) the court must move beyond its areas of judicial expertise to resolve the issue, and (3) there are prudential considerations for maintaining respect between the three branches that counsel against judicial intervention; the Governor's decision to grant or deny a prisoner's application for commutation is not reviewable by the judiciary because it presents a nonjusticiable political question; the Governor has exclusive authority under Const 1963, art 5, § 14, to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, subject to the procedures and regulations prescribed by law; the judiciary does not tradi-

patient's debilitating medical condition or symptoms associated with the debilitating medical condition; the transfer or delivery of marijuana between qualified registered patients, without compensation, constitutes "medical use" for purposes of determining immunity from arrest, prosecution, or penalty for such transfer or delivery under § 4(a) of the MMMA (MCL 333.26423[e]; MCL 333.26424[a]). *People v Green*, 299 Mich App 313.

CORPORATIONS—*See*

TAXATION 6

CORRESPONDING DEFINED—*See*

SENTENCES 8

CORRESPONDING STATUTES OF OTHER STATES—*See*

SENTENCES 9

COSTS

See, also, FINES 1

ATTORNEY FEES

1. A circuit court does not have the authority to award costs and attorney fees incurred as the result of a frivolous appeal under MCR 2.114, MCR 2.625(A)(2), or MCL 600.2591. *Edge v Edge*, 299 Mich App 121.
2. MCR 7.208(I) provides a circuit court with jurisdiction to award sanctions despite the filing of a claim of appeal; it does not authorize a circuit court to grant a request for sanctions made under a court rule or statute that does not provide a proper basis for doing so. *Edge v Edge*, 299 Mich App 121.

FRIVOLOUS ACTIONS

3. A court may find that a party's action is frivolous under MCR 2.625(A)(2), and award costs, when (1) the party initiated the suit for purposes of harassment, (2) the party's legal position was devoid of arguable legal merit, or (3) the party had no reasonable basis to believe that the facts underlying its legal position were true; an appellate court must affirm the Tax Tribunal's finding concerning whether a claim was frivolous unless competent, material,

CARJACKING

2. A completed larceny is not necessary to sustain a conviction for the crime of carjacking; a defendant may be convicted of both carjacking and unlawfully driving away a motor vehicle without violating the constitutional protections against double jeopardy (US Const, Am V; Const 1963, art 1, § 15; MCL 750.529a, 750.413). *People v Cain*, 299 Mich App 27.

ENTERING DWELLING WITHOUT PERMISSION

3. The offense of entering a dwelling or certain structures without permission is not a lesser included offense of entering a dwelling or certain structures without breaking with the intent to commit a felony or larceny therein (MCL 750.111; MCL 750.115[1]). *People v Heft*, 299 Mich App 69.

EVIDENCE

4. An individual who has been arrested must be brought before a magistrate for arraignment without unnecessary delay under MCL 764.13 and MCL 764.26; a delay in arraignment of more than 48 hours after the arrest is presumptively unreasonable unless there are extraordinary circumstances; an improper delay in arraignment may necessitate the suppression of evidence obtained as a result of that delay, but it does not entitle a defendant to a dismissal of the charges. *People v Cain*, 299 Mich App 27.

5. A fact-finder can infer a defendant's intent to deceive from the evidence; minimal circumstantial evidence suffices to prove a defendant's intent. *People v Johnson-El*, 299 Mich App 648.

INFORMATIONS

6. *People v Siterlet*, 299 Mich App 180.

PRETRIAL IDENTIFICATION PROCEDURES

7. A photographic lineup generally should not be used to identify the person accused of having committed a crime when the suspect is in custody; this rule is subject to exceptions, including when a corporeal lineup is not feasible because there are insufficient numbers of people available with the defendant's physical characteristics; an identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Cain*, 299 Mich App 27.

PROSECUTORIAL MISCONDUCT

8. The prosecution has a duty to disclose upon request the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony; additionally, due process requires the prosecution to disclose any information that would materially affect the credibility of its witnesses; to establish a violation, the defendant must prove (1) that the prosecution possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with any reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability existed that the outcome of the proceedings would have been different (MCR 6.201[B][5]). *People v Gratsch*, 299 Mich App 604.

RESTITUTION

9. The Crime Victim's Rights Act mandates that a defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate; a trial court must order the defendant to pay restitution and the amount must fully compensate the defendant's victims (MCL 780.766[2]). *People v Bowling*, 299 Mich App 552.

UTTERING AND PUBLISHING

10. The elements of the crime of uttering and publishing a forged instrument are (1) knowledge on the part of the accused that the instrument is false, (2) an intent to defraud, and (3) presentation of the forged instrument for payment; to utter and publish a forged instrument is to declare or assert, directly or indirectly, by words or actions, that an instrument is good (MCL 750.249). *People v Johnson-El*, 299 Mich App 648.

CRUEL OR UNUSUAL PUNISHMENT—*See*

CONSTITUTIONAL LAW 2

SENTENCES 12

CUSTODIAL INTERROGATION—*See*

CONSTITUTIONAL LAW 12, 13, 14, 16

DAMAGES—*See*

INSURANCE 1

initial motions under MCL 552.507 and MCR 3.215(B). *Visser v Visser*, 299 Mich App 12.

3. A court's failure to schedule a hearing on a motion to modify, rescind, or terminate an ex parte personal protection order within 14 days after the motion was filed as required by MCL 600.2950(14) and MCR 3.707(A)(2) does not require the automatic dismissal of the personal protection order. *Visser v Visser*, 299 Mich App 12.
4. MCR 3.705(A)(2) requires a court that issues a personal protection order under MCL 600.2950a to state in writing the specific reasons for issuing the order; this requirement does not apply to personal protection orders issued under MCL 600.2950. *Visser v Visser*, 299 Mich App 12.

INSURANCE

NO-FAULT

1. MCL 691.1405 provides that governmental agencies may be held liable for bodily injury and property damage resulting from the negligent operation of a motor vehicle that the agency owns; the scope of recoverable damages in negligence actions involving agency-owned motor vehicles is also governed by the no-fault act, MCL 500.3101 et seq.; MCL 500.3135(3)(c) specifically allows the recovery of damages for allowable expenses, work loss, and survivor's loss exceeding the daily, monthly, and three-year limitations contained in MCL 500.3107 to MCL 500.3110; these damages are not independent causes of action but are types of damages that arise from, and may be recovered because of, the bodily injury a plaintiff sustained; the bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another. *Hannay v Dep't of Transportation*, 299 Mich App 261.
2. MCL 500.3105(1) requires an insurance company to provide first-party insurance benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle; under MCL 500.3107(1), those benefits include allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for the injured person's care, recovery, or rehabilitation and also include expenses not exceeding $20 a day reasonably incurred in obtaining ordinary and necessary

services in lieu of those that, had the person not been injured, he or she would have performed during the first three years after the date of the accident for the benefit of himself or herself or of his or her dependent; transportation services that are not directly related to an insured's medical treatment but are solely to maintain the insured's preinjury quality of life constitute replacement services rather than allowable expenses; transportation expenses unrelated to medical treatment are not recoverable under MCL 500.3105(1) even if prescribed by a doctor as being necessary for the patient's care, recovery, and rehabilitation. *ZCD Transportation, Inc v State Farm Mutual Automobile Ins Co*, 299 Mich App 336.

3. The cost of transportation and mileage to and from medical appointments are allowable expenses under MCL 500.3107(1); whether pick-up and wait-time fees charged in connection with transporting an insured to and from medical appointments are reasonable is a question of fact. *ZCD Transportation, Inc v State Farm Mutual Automobile Ins Co*, 299 Mich App 336.
4. Charges for transportation services that are not actually rendered to an insured, such as minimum mileage charges, are not allowable expenses for purposes of MCL 500.3105(1). *ZCD Transportation, Inc v State Farm Mutual Automobile Ins Co*, 299 Mich App 336.
5. An injured person may execute a release with an insurer that discharges the insurer's liability under the no-fault automobile insurance act, MCL 500.3101 et seq., for future medical services; the scope of a release is governed by the intent of the parties as it is expressed in the release; a medical treatment provider may not maintain an independent cause of action against an insurer to recover payment for medical services provided after the execution of a release by the injured party and the insurer when the scope of the release discharged the insurer's liability for those services (MCL 500.3112). *Michigan Head & Spine Institute, PC v State Farm Mutual Automobile Ins Co*, 299 Mich App 442.

INTENT TO DECEIVE—*See*

CRIMINAL LAW 5

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS—*See*

ACTIONS 5

they be set aside; the court must carefully look beyond the legal principles underlying the plaintiff's causes of action and examine how those principles were argued and applied in the context of the specific case; if there is an interpretation of the evidence that provides a logical explanation for the jury's findings, the verdicts are not inconsistent. *Local Emergency Financial Assistance Loan Bd v Blackwell*, 299 Mich App 727.

JUSTICIABILITY—*See*

CONSTITUTIONAL LAW 18

LARCENY—*See*

CRIMINAL LAW 3

LESSER INCLUDED OFFENSES—*See*

CONSTITUTIONAL LAW 5

CRIMINAL LAW 3

LIABILITY OF INSURERS—*See*

INSURANCE 5

LICENSED HEALTHCARE PROFESSIONALS—*See*

ADMINISTRATIVE LAW 4

LIFE SENTENCES—*See*

PRISONS AND PRISONERS 1

LIMITATION OF ACTIONS

STATUTE OF LIMITATIONS

1. Under MCL 600.5856(b), a period of limitations may be tolled when an action is dismissed or transferred on some ground other than on the merits; MCL 41.726(3) provides that all assessments on a confirmed special assessment roll are final and conclusive unless an action contesting an assessment is filed in a court of competent jurisdiction within 30 days after the date of confirmation; even though the Michigan Tax Tribunal is a quasi-judicial agency and lacks jurisdiction, the MCL 41.726(3) 30-day filing period for contesting a special assessment is tolled when the plaintiff files an action in the tribunal, which constitutes a court of competent jurisdiction, within that 30-day period. *Ashley Ann Arbor, LLC v Pittsfield Charter Twp*, 299 Mich App 138.

its mortgagor's liabilities that are extinguished by a foreclosure sale of the mortgaged property. *Citizens Bank v Boggs*, 299 Mich App 517.

MORTGAGORS—*See*

MORTGAGES 3

MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY—*See*

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MOTOR VEHICLES—*See*

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MULTIPLE-OFFENDER SITUATIONS—*See*

SENTENCES 6

MULTIPLE OFFENSES ARISING FROM SAME INCIDENT—*See*

SENTENCES 11

MULTIPLE PUNISHMENTS FOR SAME OFFENSE—*See*

CONSTITUTIONAL LAW 5

MUNICIPAL CORPORATIONS

See, also, CONSTITUTIONAL LAW 8

ORDINANCES

1. A local government cannot enact an ordinance that is in direct conflict with a state statutory scheme; a state statutory scheme preempts local regulation in that same field when the Legislature enacts a statutory scheme with the intent to entirely occupy the regulatory field; the Legislature intends to preempt local regulation when it expressly provides for preemption; in the absence of an express statement of such intent, courts will infer that the Legislature intended to preempt local regulation when the state scheme occupies the field of regulation to the exclusion of the ordinance; the Legislature did not preempt local governmental authority to regulate septage disposal; MCL 324.11715(1) grants local governments the authority to regulate septage disposal as long as any ordinance is more

gardless of the motivation for seeking their information or whether the patients themselves have invoked it. *Meier v Awaad*, 299 Mich App 655.

PICK-UP FEES—*See*

INSURANCE 3

PLAIN ERROR—*See*

APPEAL 3

PLEADING

COMPLAINTS

1. A motion to amend a complaint should ordinarily be granted absent any apparent or declared reason, such as undue delay on the part of the moving party or undue prejudice to the nonmoving party; prejudice in the context of a motion to amend a complaint exists if the amendment would prevent the opposing party from receiving a fair trial. *Local Emergency Financial Assistance Loan Bd v Blackwell*, 299 Mich App 727.
2. Generally, the relation-back doctrine does not extend to the addition of new parties, but an exception exists if the original plaintiff had, in any capacity, an interest in the subject matter of the controversy, the defendant had notice of the interest of the person sought to be added as a plaintiff, and the new plaintiff's claim arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; a new plaintiff may then be added and the defendant may not invoke a statute-of-limitations defense. *Local Emergency Financial Assistance Loan Bd v Blackwell*, 299 Mich App 727.

POLICE OFFICERS—*See*

SEARCHES AND SEIZURES 1

POLITICAL QUESTIONS—*See*

CONSTITUTIONAL LAW 18

POSSESSION—*See*

PRISONS AND PRISONERS 3

POSSESSION OF CHILD SEXUALLY ABUSIVE MATERIALS—*See*

SENTENCES 5

STATUTES 2

by the jail administrator, a prisoner may not possess or have under his or her control any weapon or other item that may be used to injure a prisoner or other person or used to assist in an escape, is a general intent crime and not a specific intent crime; it requires only that a defendant possess or have under his or her control the prohibited weapon or other item and does not require that the defendant have the intent to use the weapon or other item as a weapon. *People v Gratsch*, 299 Mich App 604.

PROSECUTING ATTORNEYS

VOUCHING FOR CREDIBILITY OF WITNESSES

1. Prosecutors may not comment on their personal knowledge or belief with respect to a witness's credibility; prosecutors may argue and make reasonable inferences from the evidence to support a witness's truthfulness and may respond to defense allegations that the prosecution's witnesses testified dishonestly by arguing that the witnesses had no motive to lie. *People v Cain*, 299 Mich App 27.

attorneys' fees are calculated by considering the factors articulated in Wood v Detroit Auto Inter-Ins Exch, 413 Mich 506, 509-510 (1982), in conjunction with the reasonable attorneys' fees factors listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct (MRPC); the court must first multiply the fee customarily charged in the locality for similar legal services with the reasonable number of hours expended in the case, before then considering the remaining Wood and MRPC factors to determine whether any adjustment in the fees is appropriate; the trial court must discuss on the record its view of the remaining factors to aid appellate review or remand for consideration of the factors is required. *Prins v Michigan State Police*, 299 Mich App 634.

HABITUAL OFFENDERS

1. *People v Siterlet*, 299 Mich App 180.

PRESENTENCE INVESTIGATION REPORTS

2. A sentencing court may treat the contents of a defendant's presentence investigation report as presumptively accurate and rely on the report unless the defendant effectively challenges an adverse factual allegation in the report. *People v Bowling*, 299 Mich App 552.

SENTENCING GUIDELINES

3. Offense variable (OV) 3 of the sentencing guidelines, MCL 777.33, considers physical injury to a victim, and a trial court must assess 10 points if bodily injury requiring medical treatment occurred to a victim; the term "victim" includes any person harmed by the actions of the charged party and it is not limited to only the actual victim of the charged offense; a firefighter who is injured while responding to a fire later determined to be arson is a victim for purposes of OV 3. *People v Fawaz*, 299 Mich App 55.
4. Offense variable (OV) 9 of the sentencing guidelines, MCL 777.39, considers the number of victims; a victim is defined as each person who was placed in danger of physical injury or loss of life or property; a firefighter who was injured while responding to a fire later determined to be arson, and a neighbor living in a house next door who had to be evacuated from his or her house due to the danger of the fire spreading, constitute victims for purposes of assessing point under OV 9 of the sentencing guidelines. *People v Fawaz*, 299 Mich App 55.
5. Ten points may be assessed under offense variable 10 of the sentencing guidelines if the offender exploited a victim's physical disability, mental disability, or youth or agedness or a domestic relationship or if the offender abused his or her authority status; evidence of possession of child sexually abusive material supports a scoring of 10 points for offense variable 10 even if the offender had no direct or physical contact with the children depicted in the images (MCL 777.40[1][b]). *People v Needham*, 299 Mich App 251.
6. Under offense variable 14, which considers the offender's role in the entire criminal transaction, a trial court should assess 10 points when the offender was a leader in a multiple-offender situation; a multiple-offender situation

is one consisting of more than one person violating the law while part of a group (MCL 777.44). *People v Jones*, 299 Mich App 284.

7. The Legislature, by distinguishing between high- and low-severity prior felony convictions for purposes of scoring prior record variables 1 and 2 of the sentencing guidelines, intended to provide sentencing courts with a mechanism for matching criminal conduct prohibited by other states with similar conduct prohibited by Michigan statutes, with the focus on the type of conduct and harm that each respective statute seeks to prevent and punish (MCL 777.51, 777.52). *People v Crews*, 299 Mich App 381.
8. The term "corresponding" in the statute pertaining to scoring prior record variable 1 that provides, in part, that a prior high-severity felony conviction means a conviction for a felony under the law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D, means similar or analogous; "analogous" means corresponding in some particular and "similar" means having qualities in common; the goal of the corresponding requirement is to ensure that convictions for out-of-state crimes and in-state crimes under statutes that seek to prevent the same harm are scored in the same category (MCL 777.51[2][b]). *People v Crews*, 299 Mich App 381.
9. The felony of second-degree burglary in Ohio, Ohio Rev Code Ann 2911.12(A)(2), corresponds with second-degree home invasion in Michigan, MCL 750.110a(3), for purposes of scoring prior record variable 1 of the sentencing guidelines, MCL 777.51. *People v Crews*, 299 Mich App 381.
10. *People v Gibbs*, 299 Mich App 473.
11. Offense variable 13 under the sentencing guidelines, MCL 777.43, is scored for a continuing pattern of criminal behavior); under MCL 777.43(1)(c), the sentencing court must assess 25 points if the sentencing offense was part of a pattern of felonious activity involving three or more crimes against a person; the statute does not prohibit consideration of multiple convictions arising from the same incident for scoring the variable. *People v Gibbs*, 299 Mich App 473.
12. A sentence within the sentencing guidelines range is presumptively proportionate; a proportionate sentence is not cruel or unusual punishment; a defendant must

present unusual circumstances that would render a presumptively proportionate sentence disproportionate in order to overcome the presumption. *People v Bowling*, 299 Mich App 552.

13. *People v Gratsch*, 299 Mich App 604.

SENTENCING

SENTENCING GUIDELINES

1. A sentencing court may assess 10 points for offense variable 19 pursuant to MCL 777.49(c) for interfering with or attempting to interfere with the administration of justice on the basis of an offender's decision to flee on foot from a vehicle whose occupants had been ordered by the police to refrain from moving. *People v Ratcliff*, 299 Mich App 625.

SENTENCING GUIDELINES—*See*

SENTENCES 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

SENTENCING 1

SEPARATION OF POWERS—*See*

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SEPTAGE DISPOSAL ORDINANCES—*See*

MUNICIPAL CORPORATIONS 1

SETTLEMENTS—*See*

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SENTENCES 7

SEWAGE—*See*

CONSTITUTIONAL LAW 8

SILENT FRAUD—*See*

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SINGLE BUSINESS TAX—*See*

TAXATION 6

common purpose; the Legislature knowingly criminalized the possession of such materials, as well as the use of a particular instrumentality to accomplish that illegal possession; they are two separate crimes that can be charged separately. *People v Loper*, 299 Mich App 451.

STATUTORY CONSTRUCTION—*See*

TAXATION 2

SUBJECT-MATTER JURISDICTION OVER ADOPTIONS—*See*

PARENT AND CHILD 1

SUBSTANTIAL EVIDENCE—*See*

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SUFFICIENCY OF THE EVIDENCE—*See*

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TAX BASE—*See*

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ADMINISTRATIVE LAW 2

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TAXATION

CONSTITUTIONAL LAW

1. To establish that the Department of Treasury violated the constitutional right to equal protection and uniform taxation, a plaintiff must show that defendant failed to treat similarly situated enterprises equally and that its failure to do so was intentional and knowing rather than mistaken

penditures for research and experimentation under 26 USC 59(e). *Lear Corp v Dep't of Treasury*, 299 Mich App 533.

TAX TRIBUNAL

7. The Michigan Tax Tribunal (MTT) has exclusive and original jurisdiction over a proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to the assessment, valuation, rates, special assessments, allocation or equalization under the property tax laws of Michigan; the tribunal's jurisdiction extends to a taxpayer's challenge to a special assessment levied by a public corporation, such as a township, but only if the assessment is levied under property tax laws; the MTT does not have original and exclusive jurisdiction over special assessments made by public corporations under the Drain Code, MCL 280.1 et seq., because such an action does not involve a property tax law (MCL 205.703[f]; MCL 205.731[a]). *Ashley Ann Arbor, LLC v Pittsfield Charter Twp*, 299 Mich App 138.