MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

September 14, 2010, through November 23, 2010

JOHN O. JUROSZEK
REPORTER OF DECISIONS

VOLUME 290
FIRST EDITION

WEST®
A Thomson Reuters business

2012

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[1] From October 13, 2010.

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COURT OF APPEALS CASES

OAKLAND COUNTY v DEPARTMENT OF HUMAN SERVICES

Docket No. 288812. Submitted June 23, 2010, at Detroit. Decided September 14, 2010, at 9:00 a.m.

Oakland County brought an action in the Court of Claims against the Department of Human Services, seeking declaratory relief and a refund of monies that defendant had withheld from plaintiff as a result of retroactive rate increases defendant implemented for expenses related to the supervision and transportation of children under the control of the Michigan Children's Institute. Plaintiff argued that the retroactive rate increases were illegal and thus that the funds were wrongfully withheld. Plaintiff sought a declaration that defendant was required to establish the cost of caring for the children each September, that the rates established by defendant in September could not go into effect until the following year, and that defendant was not entitled to retroactively establish or increase such rates. Defendant moved for summary disposition, contending that the Court of Claims did not have subject-matter jurisdiction because the action had not arisen out of contract or tort. The court, Thomas L. Brown, J., denied defendant's motion, concluding that the court had jurisdiction because plaintiff sought monetary damages. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

1. It is the essential nature of the claim and not the particular type of relief sought that determines whether the Court of Claims has exclusive subject-matter jurisdiction. Under MCL 600.6419(1)(a), the Court of Claims has exclusive subject-matter jurisdiction over claims against the state that are *ex contractu* or *ex delicto* in nature.

2. Claims that are *ex contractu* in nature arise out of a contract, including quasi-contract claims and causes of action arising from contracts implied in fact or law. An action seeking a refund of fees paid to or monies withheld by the state is properly characterized as a claim in assumpsit for money had and received and is *ex contractu* in nature. Accordingly, the Court of Claims had exclusive subject-matter jurisdiction over plaintiff's claim for a refund.

3. The Court of Claims had concurrent jurisdiction over plaintiff's request for declaratory relief under MCL 600.6419a because

the request for declaratory relief was ancillary to plaintiff's *ex contractu* claim for a refund. The Court of Claims reached the correct result, although for the wrong reason.

Affirmed.

SHAPIRO, P.J., concurring, agreed that the Court of Claims possessed subject-matter jurisdiction over plaintiff's claim for a monetary award under MCL 600.6419(1)(a), but based his conclusion on the fact that plaintiff sought monetary damages from a state agency. The Court of Appeals historically held under MCL 600.6419(1)(a) that the Court of Claims has exclusive jurisdiction over all cases seeking monetary damages from the state, and more recent caselaw has not clearly undermined that holding. MCL 600.6419a provided concurrent jurisdiction for the court to determine plaintiff's ancillary request for declaratory relief.

JURISDICTION — COURT OF CLAIMS — *EX CONTRACTU* CLAIMS — ACTIONS FOR MONEY HAD AND RECEIVED.

It is the essential nature of the claim and not the particular type of relief sought that determines whether the Court of Claims has exclusive subject-matter jurisdiction; by statute, the Court of Claims has exclusive subject-matter jurisdiction over claims against the state that are *ex contractu* or *ex delicto* in nature; an action seeking a refund of fees paid to or monies withheld by the state is properly characterized as a claim in assumpsit for money had and received and is *ex contractu* in nature and therefore within the exclusive subject-matter jurisdiction of the Court of Claims (MCL 600.6419[1][a]).

Judith K. Cunningham, Corporation Counsel, and *Mary M. Mara*, Assistant Corporation Counsel, for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Morris J. Klau*, Assistant Attorney General, for defendant.

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

JANSEN, J. Defendant appeals by leave granted the order of the Court of Claims denying its motion for summary disposition brought pursuant to MCR

2.116(C)(4).[1] We conclude that the Court of Claims relied on erroneous legal reasoning in this case. However, because the Court of Claims reached the correct result in ruling that it possessed subject-matter jurisdiction over the present controversy, we nonetheless affirm.

I

Defendant, as the agency responsible for the care and custody of children who are permanent wards of the state, has the authority to place and maintain such children who are under the control of the Michigan Children's Institute (MCI) in licensed boarding homes for children. MCL 400.207(7). Expenses related to the supervision and transportation of permanent wards are paid out of the MCI's funds subject to partial reimbursement by the county from which the public ward has been committed. *Id*. The county's liability for the costs associated with the care of a ward (commonly referred to as a "chargeback rate") is determined under the Youth Rehabilitation Services Act, MCL 803.301 *et seq*. In general, "the county from which the public ward is committed is liable to the state for 50% of the cost of his or her care . . . ." MCL 803.305(1).

The Michigan Administrative Code provides that the daily rate for the cost of caring for wards of the state must be established in September of the year before the rate is put into effect. Mich Admin Code, R 400.341. Thus, for example, in accordance with Rule 400.341, the cost of caring for MCI wards during 2007 should have been established in September 2006.

This action resulted after defendant sought to retroactively establish the daily rate for the cost of caring for

[1] Defendant's motion for summary disposition was also brought pursuant to MCR 2.116(C)(8). However, the portion of defendant's motion brought under subrule (C)(8) is not at issue in the present appeal.

wards in 2007. In a letter dated July 16, 2007, defendant notified plaintiff and other counties of specified "state ward chargeback rates for calendar year 2007." Defendant declared that the stated rates "will be effective for calendar year 2007 with a retroactive date of January 1, 2007. These rates shall remain in effect until the next scheduled revision in 2008." Then, in a subsequent letter dated July 26, 2007, defendant informed plaintiff that the chargeback rates for 2007 would be effective on June 1, 2007, and not fully retroactive as had been stated in the earlier letter.

Thereafter, in October 2007, defendant notified plaintiff and others that it had again reviewed and revised the chargeback rates for 2007. It declared new rates, which would be retroactive to August 1, 2007, and indicated that these rates would "remain in effect until the next scheduled revision on January 1, 2008."

In late 2007, plaintiff received certain statements from defendant that included charges of $79,248.22 (described as "prior year balance due") and $71,517.40 (described as "current year balance due"). These disputed charges of $79,248.22 and $71,517.40 had apparently resulted from defendant's retroactive rate increases for housing Oakland County youths in state facilities during 2007. Although the statements indicated that defendant owed plaintiff an overall reimbursement of $1,394,070.62, defendant deducted the disputed amounts, totaling $150,765.62, and remitted only $1,243,305 to plaintiff.

On January 9, 2008, plaintiff sent a letter to defendant protesting the retroactive rate increases and explaining why it believed the retroactive rate increases were illegal. Plaintiff's letter demanded that defendant "either remit the $150,765.62 wrongfully withheld from the County or provide the state's legal justification/rationale for the

withholding of these funds." According to plaintiff, defendant did not respond to its letter.

In May 2008, plaintiff filed suit against defendant in the Court of Claims. Plaintiff sought a declaration that defendant was required to establish the cost of caring for MCI wards each September, that the rates established by defendant in September could not go into effect until the following year, and that defendant was not entitled to retroactively establish or increase such rates. Plaintiff also sought a refund of the monies that defendant had withheld "as a result of [its] illegal retroactive rate increases for the cost of MCI wards . . . ."

In lieu of answering plaintiff's complaint, defendant moved for summary disposition pursuant to MCR 2.116(C)(4) and (8).[2] Defendant argued that the Court of Claims did not have subject-matter jurisdiction over the controversy because the action had not arisen out of contract or tort. Plaintiff opposed defendant's motion, arguing that the Court of Claims had exclusive jurisdiction over the matter because only the Court of Claims would have the authority to award monetary relief against defendant. Oral argument was held on October 1, 2008, and the Court of Claims took the matter under advisement.

The Court of Claims thereafter issued a written opinion and order denying defendant's motion for summary disposition. The Court of Claims ultimately concluded that it had subject-matter jurisdiction over the controversy, reasoning in relevant part:

> Plaintiff suggests *Silverman* [*v Univ of Mich Bd of Regents*], 445 Mich 209[, 516 NW2d 54] (1994) [overruled in part on other grounds by *Parkwood Ltd Dividend*

[2] As noted earlier, the portion of the motion brought pursuant to subrule (C)(8) is not at issue in the present appeal.

> *Housing Ass'n v State Housing Dev Auth*, 468 Mich 763; 664 NW2d 185 (2003)], is the supporting authority for the conclusion that the Court of Claims has exclusive jurisdiction over a declaratory action that includes monetary relief against the State. . . . Based on previous case law and MCL 600.6419(4) this Court finds that if the plaintiff seeks monetary damages from the state, jurisdiction belongs exclusively with the Court of Claims. The exception to this finding is if jurisdiction over the controversy has been specifically provided or conferred upon another court or tribunal.
>
> Defendant's contention that this court lacks jurisdiction because the Plaintiff's claim lies neither in tort nor contract, is inaccurate. The Court of Claims [sic] exclusive jurisdiction is not limited to those actions that arise in contract or tort, it also has jurisdiction over claims that are both grounded in declaratory relief *and* monetary damages. If this Court adopted Defendant's position of only granting jurisdiction over contract and tort claims, many plaintiffs, including Plaintiff in this case, would be left without any appropriate venue to bring their claim. This Court cannot adopt such a view. Therefore, jurisdiction over this controversy lies exclusively with the Court of Claims and Defendant's motion for summary judgment for lack of subject matter jurisdiction is denied.

Defendant sought leave to appeal in this Court, arguing that the Court of Claims had erred by ruling that it possessed subject-matter jurisdiction over the controversy. We granted defendant's application for leave to appeal, limited to the issues raised in the application. *Oakland Co v Dep't of Human Servs*, unpublished order of the Court of Appeals, entered February 27, 2009 (Docket No. 288812).

II

Summary disposition is proper when, among other things, "[t]he court lacks jurisdiction of the subject

matter." MCR 2.116(C)(4). We review de novo a motion for summary disposition brought pursuant to subrule (C)(4). *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008). Whether a court has subject-matter jurisdiction is a question of law that we review de novo. *Jamil v Jahan*, 280 Mich App 92, 99-100; 760 NW2d 266 (2008). We likewise review de novo issues of statutory interpretation. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10-11; 743 NW2d 902 (2008).

III

We conclude that the Court of Claims relied on erroneous legal reasoning in this case. However, we also conclude that the Court of Claims reached the correct result in ruling that it possessed subject-matter jurisdiction over the present controversy.

The Court of Claims is a legislatively created court of limited jurisdiction, and its jurisdiction is entirely statutory. *Parkwood*, 468 Mich at 767; *Bays v Dep't of State Police*, 89 Mich App 356, 362; 280 NW2d 526 (1979). The exclusive subject-matter jurisdiction of the Court of Claims is defined by MCL 600.6419, which provides in relevant part:

> (1) Except as provided in [MCL 600.6419a] and [MCL 600.6440], the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. . . . The court has power and jurisdiction:
>
> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.
>
> (b) To hear and determine any claims or demands, liquidated or unliquidated, ex contractu or ex delicto, which may be pleaded by way of counterclaim on the part

> of the state or any department, commission, board, institution, arm, or agency of the state against any claimant who may bring an action in the court of claims. . . .
>
> * * *
>
> (4) This chapter shall not deprive the circuit court of this state of jurisdiction over . . . proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court . . . .

"Additionally, MCL 600.6419a, which was added in 1984, gives the Court of Claims concurrent jurisdiction with the circuit courts over any claim for equitable and declaratory relief that is ancillary to a claim filed under § 6419[.]" *Parkwood*, 468 Mich at 768. Specifically, MCL 600.6419a provides:

> In addition to the powers and jurisdiction conferred upon the court of claims by [MCL 600.6419], the court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to [MCL 600.6419]. The jurisdiction conferred by this section is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by [MCL 600.605].[3]

We cannot agree with that portion of the lower court's opinion and order in which it stated that "[t]he Court of Claims [sic] exclusive jurisdiction is not limited to those actions that arise in contract or tort, it also has

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[3] MCL 600.605 provides that "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." See also *Parkwood*, 468 Mich at 768 n 4.

jurisdiction over claims that are both grounded in declaratory relief *and* monetary damages." As our Supreme Court has observed, "[t]he plain language of § 6419(1)(a), the primary source of jurisdiction for the Court of Claims, does not refer to claims for money damages or to claims for declaratory relief." *Parkwood*, 468 Mich at 772. Instead, the primary jurisdiction-conferring statute refers only to claims against the state that are "ex contractu and ex delicto . . . ." MCL 600.6419(1)(a); see also *Parkwood*, 468 Mich at 772. The unmistakable teaching of *Parkwood* is that the exclusive subject-matter jurisdiction of the Court of Claims turns entirely on whether a claim is *ex contractu* or *ex delicto* in nature. And despite the existence of several earlier, incorrectly decided cases to the contrary, the *Parkwood* Court made clear that whether a plaintiff seeks money damages or other monetary relief is *entirely irrelevant* to determining whether the Court of Claims possesses exclusive jurisdiction over the plaintiff's claim under MCL 600.6419(1)(a). In short, it is the essential nature of the claim—and not the particular type of relief sought—that determines whether the Court of Claims possesses exclusive subject-matter jurisdiction. For example, although the plaintiff's claim in *Parkwood* sought only declaratory relief and did not seek money damages, it came within the exclusive subject-matter jurisdiction of the Court of Claims under MCL 600.6419(1)(a) because it was based in contract and therefore *ex contractu* in nature. *Parkwood*, 468 Mich at 772.

The critical question in this case was *not* whether plaintiff's claim sought money damages or other monetary relief. Such an inquiry was irrelevant to whether the Court of Claims possessed exclusive subject-matter jurisdiction over plaintiff's claim under MCL 600.6419(1)(a). Instead, the critical question in this

case was whether plaintiff's claim against defendant was *ex contractu* or *ex delicto* in nature. For the reasons that follow, we hold that plaintiff asserted a claim seeking a refund of the monies withheld by defendant, accompanied by a prayer for declaratory relief. We conclude that plaintiff's claim seeking a refund of the monies withheld by defendant was *ex contractu* in nature and, consequently, within the exclusive subject-matter jurisdiction of the Court of Claims under MCL 600.6419(1)(a). We further conclude that the Court of Claims had concurrent jurisdiction under MCL 600.6419a to consider plaintiff's ancillary request for declaratory relief.

When ascertaining the exact nature of a plaintiff's claim, we are not bound by the plaintiff's choice of labels because this would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Instead, "the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). The essential nature of a plaintiff's claim " 'must be determined by the . . . essential facts or grievance as alleged . . . .' " *Nicholson v Han*, 12 Mich App 35, 43; 162 NW2d 313 (1968) (citation omitted). The particular type of relief sought is also a relevant consideration in determining the essential nature of a plaintiff's claim. See *Adams*, 276 Mich App at 715 (observing, among other things, that the plaintiff's claim did not sound in fraud because the plaintiff did not "seek damages for [the] allegedly fraudulent conduct").

In this case, plaintiff's complaint was simply entitled "Complaint for Declaratory Judgment" and contained no internal labels or headings identifying any specific

claims. However, the complaint did set forth detailed allegations concerning why plaintiff believed defendant's retroactive rate increases were unlawful and why plaintiff believed it was improper for defendant to retain the withheld amount of $150,765.62. It is true, as explained earlier, that plaintiff specifically sought declaratory relief with regard to the legality of defendant's retroactive rate increases. But plaintiff's complaint also sought a refund of the monies that defendant was withholding "as a result of [its] illegal retroactive rate increases for the cost of MCI wards . . . ." Upon examination of the complaint as a whole, *Adams*, 276 Mich App at 710-711, and after having reviewed plaintiff's particular allegations and the specific relief sought, it is clear to us that plaintiff's complaint set forth a claim for money had and received,[4] seeking a refund of the monies withheld by defendant. Although plaintiff also sought declaratory relief in addition to its request for a refund, we note that declaratory relief is an equitable remedy and not truly a separate claim. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

The statutory terms "ex contractu" and "ex delicto" are legal terms that have acquired particular meanings in the law. See MCL 8.3a. The term "ex delicto" is defined as " '[f]rom a delict, tort, fault, crime, or malfeasance' " and describes claims that " 'grow out of or are founded upon a wrong or tort'." *Lowery v Dep't of Corrections*, 146 Mich App 342, 347-348; 380 NW2d 99 (1985), quoting Black's Law Dictionary (4th ed), p 660 (alteration in *Lowery*). In contrast, the term "ex con-

[4] An "action for money had and received" is defined as a common-law action "by which the plaintiff could recover money paid to the defendant, the money [usually] being recoverable because (1) the money had been paid by mistake or under compulsion, or (2) the consideration was insufficient." Black's Law Dictionary (7th ed), p 29.

tractu" describes "civil actions arising out of contract." *Lowery*, 146 Mich App at 348. But the term "ex contractu" does not merely describe traditional breach-of-contract claims and claims arising from express contracts; it also encompasses quasi-contract claims and causes of action arising from contracts implied in fact and law. *Pomann, Callanan & Sofen, PC v Wayne Co Dep't of Social Servs*, 166 Mich App 342, 347 n 5; 419 NW2d 787 (1988); see also *Lim v Dep't of Transportation*, 167 Mich App 751, 754; 423 NW2d 343 (1988).

It is well settled that an action seeking a refund of fees paid to the state is properly characterized as a claim in assumpsit for money had and received. *Service Coal Co v Unemployment Compensation Comm*, 333 Mich 526, 530-531; 53 NW2d 362 (1952); *Yellow Freight Sys, Inc v Michigan*, 231 Mich App 194, 203; 585 NW2d 762 (1998), rev'd on other grounds 464 Mich 21 (2001), rev'd 537 US 36 (2002). The present-day claim for money had and received arose from the early action of *indebitatus assumpsit* and is based on the legal fiction of a promise implied in law.[5] See *Consumers Power Co v Muskegon Co*, 346 Mich 243, 255; 78 NW2d 223 (1956) (SMITH, J., dissenting), overruled in part by *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151 (1959). A claim for money had and received is *ex contractu* in nature. See *Yellow Freight*, 231 Mich App at 203; see also *Rader v Levenson*, 290 Ga App 227, 230 n 13; 659 SE2d 655 (2008); *Citizens State Bank v Nat'l Surety Corp*, 199 Colo 497, 500; 612 P2d 70 (1980); *Lang v Friedman*, 166 Mo App 354, 362; 148 SW 992 (1912); *Johnson v Collier*, 161 Ala 204, 208; 49 So 761 (1909); *Allen v Frawley*, 106 Wis

[5] "In order to afford the remedy demanded by exact justice and adjust such remedy to a cause of action, the law sometimes indulges in the fiction of a *quasi* or constructive contract, with an implied obligation to pay for benefits received." *Cascaden v Magryta*, 247 Mich 267, 270; 225 NW 511 (1929).

638, 645; 82 NW 593 (1900). We conclude that plaintiff's claim seeking a refund of the monies withheld by defendant was actually a claim for money had and received. See *Yellow Freight*, 231 Mich App at 203. Therefore, even though there was no express contract between plaintiff and defendant, plaintiff's claim was nonetheless *ex contractu* in nature. See *Pomann*, 166 Mich App at 347 n 5. Plaintiff's *ex contractu* claim against defendant for money had and received unquestionably fell within the exclusive subject-matter jurisdiction of the Court of Claims. MCL 600.6419(1)(a).

We have already explained that plaintiff's complaint also contained an associated prayer for declaratory relief. Indeed, plaintiff sought a declaration that defendant was required to establish the cost of caring for MCI wards in September, a declaration that the rates established by defendant in September could not go into effect until the following year, and a declaration that defendant was not entitled to retroactively increase such rates. Declaratory relief is equitable in nature. *Mettler Walloon*, 281 Mich App at 221; *Coffee-Rich, Inc v Dep't of Agriculture*, 1 Mich App 225, 228; 135 NW2d 594 (1965). As discussed previously, MCL 600.6419a provides that "[i]n addition to the powers and jurisdiction conferred upon the court of claims by [MCL 600.6419], the court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to [MCL 600.6419]." The declaratory relief requested by plaintiff would have facilitated plaintiff's efforts to recoup the monies withheld by defendant and would have prevented defendant from retroactively increasing the cost of caring for MCI wards in the future. In other words, plaintiff's request for declaratory relief was ancillary to its *ex contractu* claim for money had and received. The Court of Claims

therefore had concurrent jurisdiction over plaintiff's demand for declaratory relief. MCL 600.6419a.

IV

We conclude that the Court of Claims had exclusive subject-matter jurisdiction over plaintiff's *ex contractu* claim seeking a refund of the monies withheld by defendant. MCL 600.6419(1)(a). We further conclude that the Court of Claims had concurrent subject-matter jurisdiction over plaintiff's ancillary demand for declaratory relief. MCL 600.6419a. Although the Court of Claims relied on erroneous legal reasoning, it reached the correct result by denying defendant's motion for summary disposition under MCR 2.116(C)(4). It is axiomatic that we will not reverse when the lower court has reached the correct result, even if it has done so for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

We decline to consider defendant's argument that because plaintiff's claim is rooted in a decision of the Director of the Department of Human Services, plaintiff's proper recourse was to seek judicial review of that final agency decision. Defendant raised this argument for the first time in its reply brief, and the argument has therefore not been properly presented for appellate review. MCR 7.212(G); *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004).

Affirmed. No taxable costs pursuant to MCR 7.219, a public question having been involved.

DONOFRIO, J., concurred.

SHAPIRO, P.J. (*concurring*). Because I agree that the Court of Claims possessed subject-matter jurisdiction, I

concur in the result. I write separately because I conclude that the Court of Claims had jurisdiction because plaintiff sought monetary damages from a state agency.

As noted by the majority, the jurisdiction of the Court of Claims is set forth in MCL 600.6419, which provides in relevant part:

> (1) Except as provided in [MCL 600.6419a] and [MCL 600.6440], the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. . . . The court has power and jurisdiction:
>
> (a) To hear and determine *all claims and demands*, liquidated and unliquidated, ex contractu and ex delicto, *against the state and any of its departments*, commissions, institutions, arms, *or agencies*.
>
> * * *
>
> (4) This chapter shall not deprive the circuit court of jurisdiction over . . . proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court . . . . [Emphasis added.]

MCL 600.6419a then provides additional, concurrent jurisdiction to the Court of Claims for "any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to MCL 600.6419."

Plaintiff in this case made a claim or demand against defendant for a monetary award on the basis of its allegation that defendant had improperly collected money for expenses related to the supervision and transportation of wards of the state. Thus, it expressed a claim against the state pursuant to MCL 600.6419(1)(a), which would be exclusively within the jurisdiction of the Court of Claims. That plaintiff also

requested declaratory relief to prevent defendant from improperly raising rates in the future did not deprive the Court of Claims of jurisdiction, given that that request was ancillary to the request for money damages and, therefore, the Court of Claims had concurrent jurisdiction over it under MCL 600.6419a.

Michigan caselaw supports this interpretation. Initially, this Court repeatedly, and without change by our Supreme Court, held that the Court of Claims had exclusive jurisdiction over all cases involving money damages. See *Pomann, Callanan & Sofen, PC v Wayne Co Dep't of Social Servs*, 166 Mich App 342, 346; 419 NW2d 787 (1988) ("This exclusive jurisdiction [in the Court of Claims] encompasses all claims against the state and its instrumentalities for money damages.").

In 1994, our Supreme Court finally addressed the Court of Claims' jurisdiction in *Silverman v Univ of Mich Bd of Regents*, 445 Mich 209, 215; 516 NW2d 54 (1994) ("This Court has not decided a case in which [MCL 600.6419a] is at issue . . . ."), overruled in part on other grounds by *Parkwood Ltd Dividend Housing Ass'n* v *State Housing Dev Auth*, 468 Mich 763; 664 NW2d 185 (2003). *Silverman* involved a claim for both equitable relief and money damages, and the Supreme Court determined that the Court of Claims properly had jurisdiction. *Id*. at 217.

Subsequently, the Supreme Court again considered a Court of Claims jurisdictional issue in *Parkwood*, 468 Mich 763. *Parkwood* involved a claim only under contract—no money damages. Because prior caselaw had required money damages before the Court of Claims had jurisdiction, the lower courts had determined that there was no jurisdiction in light of the lack of money damages. Our Supreme Court observed, "The plain language of § 6419(1)(a), the primary source of

jurisdiction for the Court of Claims, does not refer to claims for money damages or to claims for declaratory relief." *Id.* at 772. Accordingly, it concluded that nothing in the statute *required* money damages and explicitly "disavow[ed]" any caselaw "that [has] seemingly interpreted § 6419(1)(a) as granting the Court of Claims jurisdiction over claims for money damages *only.*" *Id*. at 775 (emphasis added). It left untouched, however, the prior caselaw providing that when money damages were involved, the Court of Claims had exclusive jurisdiction.

The most recent case involving Court of Claims jurisdiction was *Duncan v Michigan*, 284 Mich App 246; 774 NW2d 89 (2009), rev'd 486 Mich 1071 (2010). In *Duncan*, this Court concluded that the claim sounded neither in contract nor tort, so that the Court of Claims was without jurisdiction. *Id*. at 287.[1] Notably, the plaintiffs in *Duncan* were not seeking money damages; they were *exclusively* seeking declaratory relief without a contract or tort claim, an action for which is explicitly reserved to the circuit courts. That is not the case here, given that plaintiff is explicitly requesting money damages.

Additionally, it makes no difference whether plaintiff receives monetary damages or a later credit or offset from future payments. An order that a credit or offset

[1] The continued viability of this holding is in question, however, given the Supreme Court's reversal "for the reasons stated in the Court of Appeals dissenting opinion." *Duncan*, 486 Mich at 1071. Because the dissent never reached the question of jurisdiction in the Court of Claims, the statements in the majority opinion may now be simply dicta, as they were unnecessary to the resolution of the case. However, to the extent that the reversal is viewed as "reversal on other grounds," the statements in the majority's published opinion may remain controlling. Nevertheless, the holding does not change the outcome of the present case because, unlike the present case, *Duncan* did not involve money damages.

be provided costs the state money and, therefore, is an award of money damages, regardless of whether it is paid or simply offset. See *Silverman*, 445 Mich at 216 n 7 ("The plaintiff phrases his request for money damages as a request for a declaratory judgment that he is entitled to a refund. That does not alter the nature of the claim—a demand for money damages."); *Parkwood*, 468 Mich at 774 n 8 ("[W]e specifically reaffirm the statements in *Silverman* recognizing that the nature of the claim, rather than how the plaintiff phrases the request for relief, controls how a court will characterize the claim.").

Accordingly, because plaintiff's claim against defendant for money damages gave the Court of Claims jurisdiction, and MCL 600.6419a provided for concurrent jurisdiction for the Court of Claims to determine the ancillary request for declaratory relief, the Court of Claims properly denied defendant's motion for summary disposition based on lack of jurisdiction.

BESIC v CITIZENS INSURANCE COMPANY OF THE MIDWEST

Docket No. 291051. Submitted July 6, 2010, at Detroit. Decided September 14, 2010, at 9:05 a.m.

Muhamed Besic, a Michigan resident, brought an action in the Wayne Circuit Court against Citizens Insurance Company of the Midwest, Clearwater Insurance Company, and Lincoln General Insurance Company, seeking first-party no-fault insurance benefits after being injured in a motor vehicle accident in Ohio, while driving his tractor-trailer hauling freight to New York. Citizens insured Besic's household vehicles, Lincoln insured the lessee of Besic's tractor, and Clearwater provided a "bobtail" policy to Besic. Clearwater filed cross-claims against Citizens and Lincoln, asserting that both were higher-priority insurers than it and thus they were required to reimburse Clearwater for any personal protection insurance (PIP) benefits it might pay. Clearwater also argued that if the policy issued by Lincoln did not expressly provide coverage, then the court should reform the policy to provide coverage because insurance companies doing business in Michigan must include PIP coverage in all automobile insurance policies. All parties filed motions for summary disposition. The court, John H. Gillis, Jr., J., granted summary disposition to Citizens and Lincoln, denied Clearwater's motion for summary disposition, and granted Besic summary disposition with respect to Clearwater only. Clearwater appealed.

The Court of Appeals *held*:

1. When a conflict arises between the terms of an endorsement and the insurance policy's form provisions, the terms of the endorsement prevail. An endorsement may grant coverage not otherwise provided or may remove the effect of particular exclusions. Besic's bobtail policy with Clearwater included a form provision excluding coverage when the vehicle was under dispatch. It also had an endorsement that excluded PIP benefits under more specific circumstances that did not exist at the time of the accident and further contained an endorsement that provided PIP benefits. Besic was entitled to PIP coverage under his policy with Clearwater.

2. Under MCL 500.3163(1), an insurer selling automobile insurance in this state must provide PIP benefits if its insured is

an out-of-state resident who suffers accidental bodily injury that occurs in Michigan and arises from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. However, that statute does not apply when a Michigan resident was injured in an out-of-state accident. Because Besic was injured in Ohio, MCL 500.3163(1) did not apply and did not obligate Lincoln to provide coverage for his injuries. Moreover, because Clearwater's policy provided PIP benefits to Besic, no basis existed for reforming the Lincoln policy to provide similar coverage.

3. Under MCL 500.3114(1), a person named in a no-fault insurance policy is entitled to PIP benefits payable in accord with that policy. However, if the person is an employee who is injured while an occupant of a vehicle owned by his or her employer, then the employee is entitled under MCL 500.3114(3) to benefits payable by the insurer of the vehicle. In the case of a self-employed person, the insurer of the business vehicle is the insurer with the highest order of priority for payments. Clearwater, as the insurer of the business vehicle that Besic occupied when he was injured, had first priority to pay PIP benefits to Besic.

Affirmed.

1. INSURANCE — ENDORSEMENTS — CONFLICTS WITH FORM PROVISIONS OF POLICIES.

When a conflict arises between the terms of an endorsement and the insurance policy's form provisions, the terms of the endorsement prevail; an endorsement may grant coverage not otherwise provided or may remove the effect of particular exclusions.

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — INJURIES OCCURRING OUT OF STATE.

Under MCL 500.3163(1), an insurer authorized to sell automobile insurance in this state must provide personal protection insurance benefits if its insured is an out-of-state resident who suffers accidental bodily injury that occurs in Michigan and arises from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle; but that statute does not apply when a Michigan resident is injured in an out-of-state accident.

3. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — PRIORITY OF INSURERS.

A person named in a no-fault insurance policy is entitled to personal protection insurance benefits payable in accord with that policy; however, if the person is an employee who is injured while an occupant of a vehicle owned by his or her employer, then the

> employee is entitled to benefits payable by the insurer of the vehicle; in the case of a self-employed person, the insurer of the business vehicle is the insurer with the highest order priority for payment of benefits (MCL 500.3114[1], [3]).

Garan Lucow Miller, P.C. (by *Daniel S. Saylor* and *Caryn A. Gordon*), for Citizens Insurance Company of the Midwest.

Sullivan, Ward, Asher & Patton, P.C. (by *Thomas L. Auth, Jr.*), for Clearwater Insurance Company.

Law Offices of Ronald M. Sangster, Jr., PLLC (by *Ronald M. Sangster, Jr.*), for Lincoln General Insurance Company.

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

PER CURIAM. The dispute before us concerns which of three insurance companies must shoulder responsibility for payment of plaintiff Muhamed Besic's first-party no-fault insurance benefits. In a summary disposition ruling, the circuit court imposed liability for all of Besic's first-party benefits on defendant Clearwater Insurance Company, which issued plaintiff a bobtail insurance policy. Clearwater appeals as of right, and we affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

In January 2007, Besic, a Michigan resident, sustained personal injuries in a motor vehicle accident in Ohio. At the time of the accident, Besic was driving a tractor-trailer rig, hauling freight from Illinois to New York. Besic owned the tractor, registered and licensed the vehicle in Michigan, and leased it to MGR Express, Inc., pursuant to a "Contractor Operating Agreement" (COA). The COA identified Besic Express, a corporation solely owned by

Besic, as the contractor and owner of the truck; however, Besic testified at his deposition that he owned the truck personally. The COA contemplated that during the term of the lease, MGR would "assume all responsibility and pay for all liability insurance" for the truck "while [Besic] is operating under the terms of this Agreement," and that Besic "has and reserves the right to contract independently for Workers' Compensation coverage, bobtail,[1] or physical damage insurance required hereunder and for health and accident or other insurance . . . ."

MGR bought liability insurance for the truck from defendant Lincoln General Insurance Company. Besic purchased bobtail insurance coverage from Clearwater. Defendant Citizens Insurance Company of the Midwest insured Besic's household vehicles.

In November 2007, Besic sued Citizens in the Wayne Circuit Court, seeking payment of first-party no-fault benefits related to the injuries he sustained in the Ohio accident. Besic subsequently amended his complaint to add Clearwater and Lincoln as defendants. In February 2008, Clearwater filed cross-claims against Citizens and Lincoln, requesting "reimbursement or recoupment . . . for the entire amounts of monies paid" by Clearwater and asserting that Citizens and Lincoln shared "a higher order of priority to pay Michigan no-fault benefits." The cross-claims also sought reformation of the Lincoln policy if the court determined that it "does not include an express provision for Michigan no-fault coverage . . . ."

All parties filed motions for summary disposition. At a September 2008 hearing, the circuit court expressed on the record its finding that the

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[1] "Generally, a 'bobtail' policy is a policy that insures the tractor and driver of a rig when it is operated without cargo or a trailer." *Integral Ins Co v Maersk Container Serv Co, Inc*, 206 Mich App 325, 331; 520 NW2d 656 (1994).

> Lincoln contract, MGR contract with Muhamed Besic doesn't require him to provide PIP [personal injury protection insurance] coverage, and they provided liability only, so the Court will grant Lincoln's motion for Summary Disposition. . . .
>
> And Clearwater's argument under the exclusions of page two subsection C, the Court finds that none of those apply. Clearwater's motion for Summary Disposition is denied.

In October 2008, the court entered an order granting summary disposition to Citizens and Lincoln, denying Clearwater summary disposition, and granting Besic summary disposition with respect to Clearwater only. Besic settled his claim against Clearwater,[2] and in March 2009 the circuit court dismissed the action with prejudice.

II. SUMMARY DISPOSITION STANDARD OF REVIEW

Clearwater challenges the circuit court's summary disposition rulings, which we review de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). The circuit court did not specify under which subrule of MCR 2.116(C) it found summary disposition appropriate, but a review of the record reflects that the court considered documentation beyond the pleadings and thus made its summary disposition rulings under MCR 2.116(C)(10). Subrule (C)(10) tests a claim's factual support. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621.

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[2] The appellate brief prepared by Citizens represents that Clearwater paid Besic $175,000 in settlement and continues to pay him personal injury protection benefits. Besic did not file a brief on appeal.

III. COVERAGE OF BESIC'S FIRST-PARTY PERSONAL INJURY PROTECTION BENEFIT CLAIM UNDER CLEARWATER'S BOBTAIL POLICY

Clearwater initially submits that its bobtail insurance policy plainly offered only limited coverage that did not apply when Besic had an accident while under dispatch, the situation in this case. Clearwater emphasizes that the bobtail policy endorsement with respect to Michigan personal injury protection (PIP) coverage[3] must be read in conjunction with the rest of the policy, which excludes coverage when the insured suffers injury while under motor dispatch.

When reviewing an insurance policy dispute, an appellate court looks " 'to the language of the insurance policy and interpret[s] the terms therein in accordance with Michigan's well-established principles of contract construction.' " *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007), quoting *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999).

> "First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity." [*Citizens Ins Co*, 477 Mich at 82, quoting *Henderson*, 460 Mich at 354.]

In deciding whether an insured is entitled to insurance benefits, we employ a two-part analysis. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). "First, we determine if the policy

[3] Personal injury protection coverage is also referred to as personal protection insurance coverage.

provides coverage to the insured." *Id*. (quotation marks and citation omitted). "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Id*. at 161. If the policy does supply coverage, "we then ascertain whether that coverage is negated by an exclusion. It is the insured's burden to establish that his claim falls within the terms of the policy." *Id*. at 172 (quotation marks and citation omitted).

The Clearwater policy contains a "Certificate of Non-Trucking Automobile Liability Insurance," which states in relevant part, "No coverage is afforded when the described vehicle(s) is (are): 1. Under motor carrier direction, control, or dispatch." The policy also incorporates an endorsement entitled "Michigan Truckers—Insurance for Non-Trucking Use," which reads:

> For the covered "auto" described in this endorsement, LIABILITY COVERAGE, Michigan Personal Injury and Property Protection coverages are changed as follows:
>
> A. LIABILITY COVERAGE does not apply while the covered "auto" is used in the business of anyone to whom it is leased or rented if the lessee has liability insurance sufficient to pay for damages in accordance with Chapter 31 of the Michigan [Insurance] Code [MCL 500.3101 *et seq*.].
>
> B. Michigan Personal Injury and Property Protection coverages do not apply to "bodily injury" or "property damage" resulting from the operation, maintenance or use of the covered "auto" in the business of anyone to whom it is leased or rented *if the lessee has Michigan Personal Injury and Property Protection coverages on the "auto."* [Emphasis added.]

As discussed in greater detail in part IV of this opinion, the lessee of Besic's truck, MGR, did not buy "Michigan Personal Injury and Property Protection"

coverage for Besic's truck. In light of the plain and unambiguous language of the Clearwater "Michigan Truckers—Insurance for Non-Trucking Use" endorsement, the Clearwater policy thus affords coverage. Clearwater essentially concedes this conclusion in its brief:

> While [Besic] relied upon this provision as creating a duty to pay personal protection ("PIP") benefits, the Endorsement's language did not create such a new duty. **Rather, the Endorsement's language serves instead to limit any such duty which may otherwise exist to pay PIP benefits under the policy to those instances where PIP coverage is not available under any other policy**. However, as explained, the duty to pay PIP benefits does not otherwise exist under the policy when the truck is under dispatch.

We reject Clearwater's contention that because the policy language in general excludes coverage while the truck is under dispatch, the endorsement should be similarly construed. "[E]ndorsements often are issued to specifically grant certain coverage or remove the effect of particular exclusions. Thus, such an endorsement will supersede the terms of the exclusion in question." 4 Holmes, Appleman on Insurance (2d ed), § 20.1, p 156. "When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail." *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 380; 460 NW2d 329 (1990). "[E]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between provisions in the main policy and the endorsement, the endorsement prevails." *Nationwide Mut Ins Co v Schmidt*, 307 F Supp 2d 674, 677 (WD Pa, 2004). The Clearwater endorsement unambiguously extends no-fault coverage under the existing circumstances be-

cause Michigan no-fault PIP coverage was otherwise unavailable under MGR's Lincoln policy.

Moreover, the Clearwater bobtail policy also included an endorsement for Michigan PIP benefits. An endorsement entitled "Michigan Personal Injury Protection" sets forth in pertinent part the following:

> A. Coverage
>
> We will pay personal injury protection benefits to or for an "insured" who sustains "bodily injury" caused by an "accident" and resulting from the ownership, maintenance or use of an "auto" as an "auto". These benefits are subject to the provisions of Chapter 31 of the Michigan Insurance Code.

In straightforward fashion, the terms of the Clearwater PIP endorsement apply to the basic facts of Besic's January 2007 accident in Ohio.

We conclude that on the issue of liability for Besic's PIP benefits, the circuit court properly (1) denied Clearwater summary disposition, (2) granted Besic summary disposition with respect to Clearwater, and (3) granted summary disposition to Citizens and Lincoln, pursuant to MCR 2.116(C)(10) and in accord with the reasoning set forth in the rest of this opinion.

IV. APPLICABILITY OF LINCOLN POLICY TO BESIC'S CLAIM FOR PIP BENEFITS

Clearwater next maintains that even if the Lincoln policy MGR purchased to cover Besic's truck does not "on its face" extend PIP coverage, this Court should imply PIP coverage under the Lincoln policy because Michigan law mandates that all insurance companies doing business in Michigan include PIP benefits in all automobile insurance policies. According to Clearwater, the Lincoln policy contemplates no-fault coverage in a policy section detailing "out of state coverage extensions." Clearwater alterna-

tively urges that, if this Court interprets the Lincoln policy language as inapplicable to the present circumstances, we should reform Lincoln's policy to offer Besic Michigan no-fault PIP benefits.

Clearwater relies on the following italicized policy language, found in the "Truckers Coverage Form, Liability Coverage" section of the Lincoln policy, in support of its position that the Lincoln policy covered Besic's no-fault PIP expenses:

> SECTION II—LIABILITY COVERAGE
>
> A. Coverage
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> * * *
>
> 2. Coverage Extensions
>
> * * *
>
> b. Out-of-State Coverage Extensions
>
> While a covered "auto" is away from the state where it is licensed we will:
>
> (1) Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. . . .
>
> (2) *Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used*. [Emphasis added.]

The emphasized language does not apply in this case because at the time of the accident Besic undisputedly

was using the covered "auto" in Ohio, a state that does not have a no-fault liability scheme. Most likely, this section of the Lincoln policy enabled the coverage to comply with laws such as MCL 500.3163(1), which contains the following relevant language:

> An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.

If Besic had been an Ohio resident injured in a Michigan crash, MCL 500.3163(1) and the "out-of-state-coverage extensions" would have compelled Lincoln to supply first-party no-fault PIP coverage. However, neither the statute nor the Lincoln policy language applies when a Michigan resident suffers a vehicle-related injury in Ohio.

Nor did Lincoln have any statutory obligation to incorporate no-fault PIP coverage into the policy it sold to MGR. Clearwater correctly observes that "[w]here an automobile insurance policy contains an exclusionary clause that was not contemplated by the Legislature, that clause is invalid and unenforceable." *Universal Underwriters Ins Co v State Farm Auto Ins Co*, 172 Mich App 342, 346; 431 NW2d 255 (1988). But Lincoln sold the policy at issue to MGR in Illinois, and not to Besic in Michigan. Furthermore, "[t]he requirements for a motor vehicle liability policy may be fulfilled by the policies of more than one insurance carrier." *State Farm Mut Auto Ins Co v Auto-Owners Ins Co*, 173 Mich App 51, 55; 433 NW2d 323 (1988). Because the Clearwater

policy supplied no-fault PIP coverage for the injuries Besic suffered in his January 2007 accident, no basis exists for reforming the Lincoln policy to similarly provide such coverage.

V. REIMBURSEMENT FOR PIP BENEFITS PAID BY CLEARWATER

Clearwater lastly avers that pursuant to MCL 500.3114, Citizens, the insurer of Besic's personal vehicles, shares responsibility to pay Besic's no-fault PIP benefits. In Clearwater's view, Citizens stands within the same order of priority as Clearwater, and thus Clearwater should receive a pro rata reimbursement for the first-party no-fault benefits it has paid Besic.

"To determine the priority of insurers liable for [no-fault PIP] benefits, the claimant must look to [MCL 500.3114]." *Auto-Owners Ins Co v State Farm Mut Auto Ins Co*, 187 Mich App 617, 619; 468 NW2d 317 (1991). The pertinent subsections of MCL 500.3114 instruct as follows:

> (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in [MCL 500.3101(1)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . .
>
> * * *
>
> (3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

MCL 500.3101(1) states, in relevant part:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway.

In *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996), the Supreme Court held that

> it is most consistent with the purposes of the no-fault statute to apply [MCL 500.3114(3)] in the case of injuries to a self-employed person. The cases interpreting that section have given it a broad reading designed to allocate the cost of injuries resulting from use of business vehicles to the business involved through the premiums it pays for insurance.

The Supreme Court explained that

> requiring both insurers to contribute to the payment of benefits would run contrary to the overall goal of the no-fault insurance system, which is designed to provide victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system. Splitting the obligation to pay would result in duplicative administrative costs, by requiring several insurers to adjust a single claim. [*Id*.]

In *State Farm Mut Auto Ins Co v Sentry Ins*, 91 Mich App 109, 114-115; 283 NW2d 661 (1979), this Court set forth the same rationale later adopted in *Celina*:

> The exceptions in [MCL 500.3114(2)] and (3) relate to "commercial" situations. It was apparently the intent of the Legislature to place the burden of providing no-fault benefits on the insurers of these motor vehicles, rather than on the insurers of the injured individual. This scheme allows for predictability; coverage in the "commercial" setting will not depend on whether the injured individual is

> covered under another policy. A company issuing insurance covering a motor vehicle to be used in a (2) or (3) situation will know in advance the scope of the risk it is insuring. The benefits will be speedily paid without requiring a suit to determine which of the two companies will pay what is admittedly due by one of them.

Besic owned the truck and worked as a self-employed independent contractor for MGR. Consistently with the Michigan Supreme Court's analysis in *Celina*, 452 Mich at 89, the priority language in MCL 500.3114(3) extends to the self-employment situation of Besic. With respect to the additional language comprising MCL 500.3114(3), Besic suffered "accidental bodily injury while an occupant of a motor vehicle owned or registered by [his] employer," given that MRG had leased Besic's truck. MCL 500.3101(2)(h) (including in its definition of "owner" "[a] person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days"). Because MCL 500.3114(3) applies to the undisputed facts of this case, it dictates that Besic "shall receive personal protection insurance benefits to which [he] is entitled from the insurer of the furnished vehicle." In light of the fact that only Clearwater extended PIP benefits to the truck involved in Besic's accident, it has first priority to pay Besic's first-party benefits.

Clearwater suggests that *Smith v Continental Western Ins Co*, 169 F Supp 2d 687 (ED Mich, 2001), compels a different result. In *Smith*, the plaintiff owned a tractor registered in Indiana, and he sustained personal injuries in a Michigan accident. *Id*. at 689. The plaintiff sought PIP benefits and sued the insurers for (1) the company "with whom Plaintiff had a long-term lease to haul; (2) the short-term lessor for whom Plaintiff hauled on the day of the accident; and (3) the company" that provided bobtail coverage for the tractor. *Id*. The

federal district court ruled that although Michigan's no-fault act applied, none of the defendants bore responsibility for paying no-fault benefits because the plaintiff's personal insurer occupied a higher priority. *Id*. at 692, 695. In reaching its decision, the district court expressly and repeatedly disclaimed any consideration of MCL 500.3114(3), the controlling insurer priority provision here. *Id*. at 694 n 3, 695. Therefore, *Smith* is readily distinguishable from the instant case.[4]

Finally, Clearwater asserts in its reply brief that "there is no record to support which entity may be properly identified as [Besic's] employer: Besic Express, Inc. or MGR Express, Inc., or both." This potential distinction among employers is immaterial. In light of the undisputed fact that Besic was self-employed at the time of the accident, *Celina*, 452 Mich at 89, and MCL 500.3114(3) remain the controlling authorities.

Affirmed. Costs to Citizens and Lincoln as the prevailing parties. MCR 7.219(A).

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[4] In any event, this Court is "not bound to follow a federal court's interpretation of state law." *Doe v Young Marines of the Marine Corps League*, 277 Mich App 391, 399; 745 NW2d 168 (2007).

HOFFMAN v BOONSIRI

Docket No. 292040. Submitted September 8, 2010, at Detroit. Decided September 14, 2010, at 9:10 a.m.

Corrine A. Hoffman brought a medical-malpractice action in the Monroe Circuit Court against Manoo Boonsiri, M.D., Manoo Boonsiri, M.D., P.C., John Doe, M.D., and Mercy Memorial Hospital System. The malpractice was alleged to have occurred from February 24 to 27, 2006. Plaintiff sent a notice of intent (NOI) to bring the action on August 9, 2007. On February 21, 2008, plaintiff sent a first amended NOI. On June 23, 2008, plaintiff filed her complaint. Defendants brought motions for summary disposition. The court, Joseph A. Costello, Jr., J., granted summary disposition in favor of defendants on the bases that plaintiff failed to file a NOI in accordance with MCL 600.2912b and the period of limitations had expired. Plaintiff appealed.

The Court of Appeals *held*:

1. There is no dispute that the first NOI did not trigger tolling under MCL 600.5856(c). A second NOI, sent with fewer than 182 days remaining in the limitations period, can initiate tolling under § 5856(c) as long as the first NOI did not initiate such tolling. The first NOI in this action did not trigger tolling, but the filing of the second NOI did initiate tolling. This case does not implicate the tacking of successive 182-day periods because the original NOI did not toll the limitations period. The amended NOI tolled the limitations period until August 21, 2008.

2. Perfect notice is not required. Deficiencies in the content of an NOI do not preclude tolling under MCL 600.5856(c).

3. The availability of tolling is not linked to the "waiting" or "no-suit" period. By providing an initial NOI that did not implicate tolling together with a second, more-perfect NOI, plaintiff provided 319 days of notice when the two waiting periods are aggregated.

4. The pertinent statutes do not indicate that plaintiff's action is barred under the circumstances of this case. Nothing in the applicable statutes precludes the aggregation of the no-suit/waiting periods involved in providing notice. Plaintiff gave

written notice not less than 182 days before she commenced the action. The order granting summary disposition in favor of defendants must be vacated and the case must be remanded to the trial court for further proceedings.

Vacated and remanded.

1. LIMITATION OF ACTIONS — MEDICAL MALPRACTICE.

A medical-malpractice action that is not commenced within the time prescribed by MCL 600.5838a is barred.

2. LIMITATION OF ACTIONS — MEDICAL MALPRACTICE — NOTICES OF INTENT TO SUE.

A second notice of intent to bring a medical malpractice action that is sent with fewer than 182 days remaining in the limitations period can initiate tolling under MCL 600.5856(c) as long as the first notice of intent to sue did not initiate such tolling.

3. LIMITATION OF ACTIONS — MEDICAL MALPRACTICE — NOTICES OF INTENT TO SUE — DEFICIENCIES IN NOTICES.

Deficiencies in the content of a notice of intent to bring a medical-malpractice action do not preclude tolling of the applicable statute of limitations under MCL 600.5856(c).

Mark Granzotto, P.C. (by *Mark Granzotto*), and Erlich, Rosen & Bartnick, P.C. (by *Jeffrey S. Cook*), for Corrine A. Hoffman.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank* and *Geoffrey M. Brown*), for Manoo Boonsiri, M.D., and Manoo Boonsiri, M.D., P.C.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Beth A. Wittman* and *Ellen Keefe Garner*) for Mercy Memorial Hospital System.

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

DONOFRIO, J. In this medical-malpractice action, plaintiff appeals as of right an order granting defendants summary disposition pursuant to MCR 2.116(C)(7) on the bases that plaintiff failed to file a notice of intent (NOI) in

accordance with MCL 600.2912b and the period of limitations had expired. The issue on appeal involves the timing of plaintiff's notices of intent and the filing of plaintiff's complaint. Because perfect notice is not required, any subsequent amended NOI filings can be aggregated with the original NOI, and plaintiff gave written notice not less than 182 days before she commenced the action, we vacate the trial court's order granting defendants' motions for summary disposition and remand for further proceedings.

I

The pertinent facts relevant to this appeal are not in dispute. Plaintiff's complaint alleges that she went to a hospital of defendant Mercy Memorial Hospital System (Mercy Hospital) because of problems with an arteriovenous fistula. Defendant Dr. Manoo Boonsiri performed surgery on February 24, 2006. While plaintiff was at Mercy Hospital, she suffered severe ischemic changes to her left hand and arm that went untreated until she was transferred to another hospital. She underwent emergency surgery, which was unsuccessful because of the delay, and now has permanent injury to her left upper extremity. The only issue on appeal involves the timing of plaintiff's notices of intent and the filing of plaintiff's complaint. The relevant dates are as follows:

February 24 to 27, 2006	= Dates of alleged malpractice
August 9, 2007	= NOI sent
February 21, 2008	= First amended NOI sent
June 23, 2008	= Complaint filed

The timing of these actions implicates plaintiff's ability to comply with both the two-year statutory limitations period and the notice waiting period. Plaintiff filed her complaint more than two years after the

alleged malpractice. Therefore, for the action to be considered timely, plaintiff must be able to obtain the benefit of the tolling of the limitations period afforded by the filing of the amended NOI. With respect to the amended NOI, however, the complaint was arguably filed prematurely because the 182-day notice waiting period had not expired. Thus, for purposes of complying with the required waiting period, plaintiff relies on the original NOI. In response, defendants argue that because plaintiff did not wait the requisite period after filing the amended NOI, she is not entitled to the tolling that would otherwise result from an amended NOI.

In the trial court, defendants[1] moved for summary disposition pursuant to MCR 2.116(C)(7), asserting that plaintiff's complaint was filed only 123 days after she sent the amended NOI. MCL 600.2912b(1) provides that a person shall not commence an action alleging medical malpractice unless the person has given written notice "not less than 182 days before the action is commenced." Citing *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), defendants argued that the prematurely filed complaint was insufficient to commence a cause of action. Defendants contended that the 182-day tolling of the limitations period that resulted from the filing of the amended NOI ended, at the latest, on August 27, 2008. According to defendants, because plaintiff failed to timely commence an action before the expiration of the limitations period, plaintiff's claims were barred and defendants were entitled to summary disposition pursuant to MCR 2.116(C)(7).

[1] Defendants' first motion for summary disposition was filed on behalf of all the defendants. Mercy Hospital filed an amended motion that raised the same arguments. Defendants Manoo Boonsiri, M.D., and Manoo Boonsiri, M.D., P.C. (the Boonsiri defendants), filed a separate motion that raised the same arguments.

In response, plaintiff contended that she complied with MCL 600.2912b(1) because she filed the complaint 319 days after she sent the original NOI, far exceeding the 182-day requirement. She contended that the amended NOI tolled the limitations period and that the complaint was filed before the limitations period expired. The Boonsiri defendants countered that although plaintiff had not added a new defendant in the amended NOI, she had added new allegations and "when you add new allegations we're entitled to another 182 days to investigate those allegations." They maintained that although *Mayberry v Gen Orthopedics, PC*, 474 Mich 1; 704 NW2d 69 (2005), did not address the situation, the case illustrated that when a second NOI is filed, a new waiting period is applied.

After entertaining oral argument on the motions, the trial court took the matter under advisement and issued a written opinion that incorporated a separate memorandum of law. The trial court stated that *Mayberry*, 474 Mich at 9-10, indicated that tolling from a second NOI only applied if the notice otherwise complied with the requirements of MCL 600.2912b. The trial court concluded that there was "no legal basis for Plaintiff's belief that when filing a second NOI the statutory requirements do not have to be followed." The trial court then compared the original and the amended NOI and noted plaintiff's contention that they were essentially the same:

> Whether or not this is true, unfortunately, the first NOI had already expired, and under the application of the *Mayberry* case, the second NOI could not be used to give the Plaintiff the ability to tack an additional or successive 182 days so as to '[enjoy] the benefit of multiple tolling periods'. *Mayberry, supra* at 6, 7 and 10; MCL 600.2912b(6).

Accordingly, the trial court granted defendants' motions for summary disposition pursuant to MCR 2.116(C)(7). Plaintiff now appeals as of right.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) (claim is barred by statute of limitations). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). Further, we review de novo a question of statutory interpretation. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009).

III

On appeal, plaintiff argues that the trial court erred by concluding that defendants were entitled to summary disposition on the ground that plaintiff failed to comply with the mandatory waiting period provided in MCL 600.2912b. Plaintiff contends that her complaint was prematurely filed if the waiting period is measured from the time that the amended NOI was filed, but not if the period is measured from the mailing of the original NOI. Plaintiff further maintains that MCL 600.2912b(1) requires a plaintiff to give written notice not less than 182 days before the action is commenced, and because she mailed the first NOI 319 days before she filed the complaint, she fully complied with MCL 600.2912b(1).

A medical-malpractice action that is not commenced within the time prescribed by MCL 600.5838a is barred. MCL 600.5838a(2). In the present case, there is no dispute that the two-year period in MCL 600.5805(6) is applicable:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued . . . the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (6) . . . [T]he period of limitations is 2 years for an action charging malpractice. [MCL 600.5805(1) and (6).]

Because plaintiff did not file a complaint within two years after the claim accrued she relies on the tolling of the statute of limitations provided in MCL 600.5856(c). MCL 600.5856(c) states as follows:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Before it was amended by 2004 PA 87, effective April 22, 2004, MCL 600.5856 provided, in pertinent part:

> The statutes of limitations or repose are tolled:
>
> * * *

> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

The referenced section, MCL 600.2912b, governs the written notice of intent to file a claim. The statute sets forth requirements with respect to the timing of the notice and its content. MCL 600.2912b(1) states:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182[2] days before the action is commenced.

Although the language of the preamendment version of MCL 600.5856(d) is very similar to the current version of MCL 600.5856(c), in *Bush*, 484 Mich at 169, our Supreme Court explained that the change clarified the focus of the operative language: "Thus, pursuant to the clear language of § 2912b and the new § 5856(c), if a plaintiff complies with the applicable notice period before commencing a medical malpractice action, the statute of limitations is tolled."

The effect of a potential plaintiff's failure to comply with the applicable notice period was addressed in *Burton*, 471 Mich 745. The *Burton* Court compared the prohibition in MCL 600.2912b(1) ("a person shall not commence an action . . . unless . . .") to the directive in MCL 600.2912d(1) that requires an affidavit of merit to be filed with a complaint. According to the Court, just as a complaint without an affidavit of merit is insufficient to commence a suit, *Scarsella v Pollak*, 461 Mich 547,

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[2] A claimant may file an action after a lesser time under certain circumstances that are not at issue in this matter.

549; 607 NW2d 711 (2000), the filing of a complaint before the expiration of the notice period is not effective to commence an action. *Burton*, 471 Mich at 753-754. "In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action." *Id*. at 754. We note that in *Burton*, the plaintiff only provided a total of 115 days of notice before filing his complaint. *Id*. at 748.

In *Ellout v Detroit Med Ctr*, 285 Mich App 695, 698; 777 NW2d 199 (2009), this Court stated that "[t]he law is abundantly clear that where a plaintiff has failed to comply with [MCL 600.2912b] by prematurely filing suit, the appropriate remedy is dismissal without prejudice." When a case is dismissed for noncompliance with the notice provisions of MCL 600.2912b, the plaintiff must still comply with the applicable statute of limitations. *Burton*, 471 Mich at 753.

Caselaw interpreting former MCL 600.5856(d) indicated that the tolling from the filing of an NOI applied only when the limitations period would otherwise expire during the notice period. In *Omelenchuk*, 461 Mich at 574, our Supreme Court concluded that the phrase "[i]f, during the applicable notice period under [MCL 600.2912b], a claim would be barred by the statute of limitations or repose" in former MCL 600.5856(d) indicated that former MCL 600.5856(d) was not applicable if the interval during which a potential plaintiff was not allowed to sue ended before the limitations period expired. The current version of MCL 600.5856(c) states, in part, that the statutes of limitations or repose are tolled "[a]t the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose . . . ." The current version essentially reordered the pertinent phrases from

the former version. Therefore, we conclude that this particular holding in *Omelenchuk* is still valid.

MCL 600.2912b(6) addresses subsequent notices and provides:

> After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified.

However, as long as an initial notice did not toll the limitations period, the tolling triggered by a second notice does not violate MCL 600.2912b(6). In *Mayberry*, 474 Mich at 3, the Court stated: "We conclude that a second notice of intent to sue, sent with fewer than 182 days remaining in the limitations period, can initiate tolling under § 5856(d) as long as the first notice of intent to sue did not initiate such tolling."

Here, the parties do not dispute that the first NOI did not trigger tolling under MCL 600.5856(c). With respect to the original notice, the interval during which plaintiff was not allowed to sue ended on February 5, 2008. The claim would not have been barred by the statute of limitations until February 24 to 27, 2008. Therefore, MCL 600.5856(c) was not applicable with respect to the original notice. Although plaintiff's first notice of intent did not trigger tolling, the filing of the second notice did initiate tolling. *Mayberry*, 474 Mich at 3.

At this point, a flaw in the trial court's analysis is apparent. The trial court stated: "[U]nder the application of the *Mayberry* case, the second NOI could not be used to give the Plaintiff the ability to tack an additional or successive 182 days so as to '[enjoy] the benefit of multiple tolling periods'. *Mayberry, supra* at 6, 7 and 10; MCL 600.2912b(6)." This case, like *Mayberry*, does

not implicate the tacking of successive 182-day periods because the original NOI did not toll the limitations period. Defendants did not contend that tolling from the second NOI would violate the prohibition on tacking. On appeal, Mercy Hospital acknowledges that the amended NOI tolled the limitations period until August 21, 2008. The Boonsiri defendants acknowledge that the first NOI did not trigger tolling under MCL 600.5856(c). Thus, it appears that the trial court may have misunderstood their argument as well as the holding of *Mayberry*.

Defendants also argue that plaintiff's complaint was filed prematurely, i.e., in violation of MCL 600.2912b, and therefore, according to *Burton*, 471 Mich 745, the complaint was ineffective to commence an action, and the period of limitations, as extended by the tolling from the amended notice, expired no later than August 27, 2008. Plaintiff asserts that she complied with the "literal requirements of § 2912b(1)" because by filing the original NOI, she gave defendants "written notice under this section not less than 182 days before the action [was] commenced." Plaintiff claims that this approach is consistent with the purpose of the mandatory waiting period. Plaintiff contends that defendants had 319 days after the original notice was sent, much more than the minimum amount of time provided by the statute, to resolve the case.

Defendant Mercy Hospital responds specifically that "the difficulty with plaintiff's argument is that plaintiff relied upon the amended notice of intent to toll the limitations period and render her complaint timely. Plaintiff should not be allowed the benefit of tolling by the amended notice of intent, while disregarding the requisite waiting period applicable to the latter notice of intent." The Boonsiri defendants similarly argue:

"Plaintiff offers no authority for her assertion that she can have the benefit of NOI tolling under MCL 600.5856(c) and *Mayberry*, without having to undertake the burden of waiting 182 (or at least 154) days to file her complaint."

Absent some basis in the statutory language, defendants' contention that the "benefit" of tolling should only be available in conjunction with the "burden" of the waiting period is essentially an attempt to invoke a concept of fairness as a basis for dismissal. But, to the extent that fairness is a relevant consideration, it clearly favors plaintiff's position. "The stated purpose of § 2912b was to provide a mechanism for 'promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . . .' " *Bush*, 484 Mich at 174, quoting Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993. Furthermore, "[t]he Legislature surely did not intend its tolling provision as a trap for the unwary . . . ." *Omelenchuk*, 461 Mich at 576 n 19. Plaintiff sent defendants notice of her intent to file a claim on August 9, 2007. Thus, she could have filed the complaint as early as February 5, 2008. She filed it on June 23, 2008. The timing of the original NOI and the complaint afforded the parties ample opportunity to examine and settle the claim without formal litigation.

Mercy Hospital argues that dismissal of the entire action is appropriate because it only had 123 days of notice with respect to the additional allegations in the amended NOI and the complaint. Mercy Hospital does not tie this argument to pertinent statutes. The original

NOI and the amended NOI include eight identical subparagraphs identifying the standard of care. These include giving "proper post operative orders . . . to the nursing staff and resident physicians regarding contacting the attending physician surgeon immediately upon observing signs and symptoms of ischemic changes . . . ." The amended NOI added the following:

> The standard of care for a surgeon faced with a patient with a failed AV fistula after recent surgery is to do the following:
>
> * * *
>
> i. That contact must be made via post operative rounds and direct communication with the nursing staff and resident physicians regarding the patient's post operative condition every six to eight hours until the patient is ready for discharge to ensure that proper blood flow has returned to the affected extremity and to ensure that if blood flow is compromised that the attending surgeon timely diagnose and treat the condition prior to permanent damage occurring.

The amended NOI added that Dr. Boonsiri breached the standard of care by

> failing to either personally see the claimant every six to eight hours post operatively and/or failing to keep in contact with the nursing staff and the resident physician every six to eight hours to assess the condition of claimant's blood flow to her extremity following her surgery.

To the extent that we may analyze Mercy Hospital's argument in terms of the applicable statutes, the argument is essentially that plaintiff's original NOI was inadequate to satisfy the requirement in MCL 600.2912b(1) that she provide "written notice under this section" because it did not contain all the information that was later included in the complaint. The

absence of these allegations in the original NOI could be viewed as a deficiency in its content. But deficiencies in the content of an NOI do not preclude tolling under MCL 600.5856(c). *Bush*, 484 Mich at 161, 170 n 26.[3] In other words, perfect notice is not required. Therefore, Mercy Hospital's argument that the purported deficiency in notice with respect to the additional allegations warrants dismissal is without merit.

The Boonsiri defendants attempt to support their position with the language of MCL 600.5856(c), which they claim indicates that tolling only exists if a waiting period also exists. The Boonsiri defendants specifically argue in their brief on appeal:

> The language of MCL 600.5856(c) expressly ties the availability of tolling to the existence of the waiting period:
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> "The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * *
>
> "(c) At the time notice is given in compliance with the applicable notice period under section 2912b, if ***during that period*** a claim would be barred by the statute of limitations or repose; but in this case, ***the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period*** after the date notice is given. [MCL 600.5856(c) (emphasis added).]"
>
> The import of this language is clear: tolling only exists because, and if, a waiting period exists. Hoffman argues, essentially, that there was no waiting period triggered by the service of her amended NOI. If this is true, however, it would mean that no tolling period was triggered, either,

[3] "Our analysis today explains that the Legislature has made it clear that a defective NOI does not preclude tolling of the statute of limitations for cases brought under [MCL 600.5856(c)]." *Bush*, 484 Mich at 170 n 26.

> since there is no "applicable notice period" to activate tolling under MCL 600.5856(c).

Thus, the Boonsiri defendants' view links the availability of tolling to the waiting period applicable in the specific case. According to their view, where there is no applicable waiting period for the second notice, there can be no tolling.

However, the Boonsiri defendants' view is incompatible with *Omelenchuk*, 461 Mich at 574-575, which addressed the meaning of "applicable period" in former MCL 600.5856(d). The *Omelenchuk* Court held that the reference to " 'a number of days equal to the number of days in the applicable notice period' " was 182 days, "a set period defined in the statute . . . ." *Omelenchuk*, 461 Mich at 574-575. The *Omelenchuk* Court considered and rejected an interpretation that the " 'applicable notice period' " is equal to the " 'no-suit' period," *id*. at 575, which the Boonsiri defendants refer to as "the waiting period."

Both this Court and our Supreme Court have reaffirmed this aspect of *Omelenchuk* in decisions addressing the current version of MCL 600.5856. In *Bush*, 484 Mich at 181 n 46, the Court stated, "We note that our holding today does not conflict with *Omelenchuk v City of Warren*, 461 Mich 567, 575; 609 NW2d 177 (2000) (holding that the statute of limitations remains tolled for the full 182 days even if the plaintiff takes advantage of the shortened waiting period)." In *Vanslembrouck v Halperin*, 277 Mich App 558, 572; 747 NW2d 311 (2008), this Court stated:

> According to defendants, the Legislature's act of amending and recodifying the former MCL 600.5856(d) at MCL 600.5856(c) was "to counter the *Omelenchuk* [C]ourt's monolithic application of 182 days of notice of intent tolling." However, like former MCL 600.5856(d), MCL

> 600.5856(c) links the tolling period to the applicable notice period. *Omelenchuk, supra,* 461 Mich at 575. MCL 600.5856(c) states: "[T]he statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period . . . ." Thus, like former MCL 600.5856(d), MCL 600.5856(c) does not link the tolling period to the period in which the claimant may not file suit. *Id*.

In light of the interpretation of "applicable notice period" in *Omelenchuk*, 461 Mich at 575, as reaffirmed in recent decisions, we reject the Boonsiri defendants' contention that the availability of tolling is linked to the "waiting" or "no-suit" period.

Defendants contend that *Mayberry*, 474 Mich 1, illustrates that after filing an amended NOI, plaintiff was required to wait before filing her complaint. In *Mayberry*, 474 Mich at 4, the pertinent events were as follows:

November 22, 1999	= Date of alleged malpractice
June 21, 2000	= NOI sent to Dr. William Kohen
October 12, 2001	= Second NOI sent to Dr. Kohen (with additional allegations) and to his professional corporation
March 19, 2002	= Complaint filed

As in the present case, the first NOI did not trigger tolling under MCL 600.5856(c) because it was filed more than 182 days before the limitations period would have expired. The principal holding of *Mayberry* was that because the original NOI did not trigger tolling, the second NOI was eligible to initiate tolling. *Mayberry*, 474 Mich at 2-3. The decision did not address the timing of the filing of the complaint, except in a footnote:

> Plaintiffs asserted in the trial court that they were obligated to wait only 154 days before bringing suit, as

> opposed to 182 days, because defendants failed to respond to the notice of intent to sue. See MCL 600.2912d(8). Defendants have not challenged plaintiffs' assertion in this Court, and we do not address this issue, which was not raised on appeal. [*Id.* at 4 n 3.]

Mercy Hospital contends, "It is evident, however, that the *Mayberry* plaintiffs were cognizant of the fact that they were required to wait either the 154-day or the 182-day waiting period after sending the second notice of intent before filing their complaint."

Mayberry is not instructive on this point. The Court declined to address the issue. Even if one could assume from the timing of the plaintiffs' filing of the complaint how the plaintiffs' counsel interpreted the pertinent statutes, that a particular medical-malpractice litigator was "cognizant" of an interpretation that required a delay in filing the complaint is of negligible persuasive value in determining the correct outcome in this case. Indeed, what the *Mayberry* plaintiffs thought—if in fact that is what they thought—does not make it so.

Additionally, our resolution does not conflict with *Burton*. In *Burton*, the plaintiff only waited 115 days before commencing his lawsuit. *Burton* did not deal with a situation such as the one in the present case where plaintiff provided the same defendants multiple notices, in essence making the NOI more perfect. Here, by providing an initial NOI that did not implicate tolling together with a second "more perfect" NOI, plaintiff provided 319 days of notice when the two waiting periods are aggregated. *Burton* is neither applicable nor instructive under these facts.

IV

In sum, we conclude that the pertinent statutes do not indicate that plaintiff's action is barred under the

circumstances of this case.[4] In fact, no statute prohibits plaintiff's procedural handling of the litigation and we cannot discern any violation of the policy evinced by the stated statutes. Nothing in the applicable statutes precludes the aggregation of the no-suit/waiting periods involved in providing notice. Therefore, defendants' contention that the filing of plaintiff's complaint did not commence the action because she did not comply with MCL 600.2912b(1) is rejected. Plaintiff gave written notice not less than 182 days before she commenced the action.

Vacated and remanded. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

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[4] While plaintiff has raised alternative arguments in favor of reversal, these arguments do not require our attention in light of our determination of the principal issue.

BATES ASSOCIATES, LLC v 132 ASSOCIATES, LLC

Docket No. 288826. Submitted May 12, 2010, at Detroit. Decided September 14, 2010, at 9:15 a.m.

Bates Associates, L.L.C., brought an action in the Wayne Circuit Court against 132 Associates, L.L.C., and the Sault Ste. Marie Tribe of Chippewa Indians, alleging that they breached a settlement agreement that the parties had reached following a dispute over the sale of a parking garage. The settlement agreement incorporated by reference a waiver of sovereign immunity and tribal-court jurisdiction by the tribe that was included in the original sale agreement and also contained a choice-of-law provision indicating that the agreement would be governed by Michigan law. The court, John H. Gillis, Jr., J., entered a preliminary injunction that required defendants to transfer title to the garage to plaintiff. Defendants filed a counterclaim alleging that they had transferred title to the garage, but plaintiff owed them $91,619.28. Plaintiff and defendants both moved for summary disposition. Defendants contended that the tribe's chief financial officer had lacked the authority to enter into the settlement agreement and that the waivers of the tribe's sovereign immunity and tribal-court jurisdiction in the agreement were invalid. The court disagreed and granted summary disposition in favor of plaintiff. Defendants appealed.

The Court of Appeals *held*:

1. The trial court correctly granted summary disposition in plaintiff's favor. An Indian tribe is subject to suit only if Congress has authorized the suit or the tribe has clearly and unequivocally waived its sovereign immunity. The settlement agreement at issue in this case incorporated the tribe's waivers of sovereign immunity and tribal-court jurisdiction set forth in the sale agreement. Because these waivers were clear and unequivocal, they were enforceable.

2. While the tribe argued that the waivers of sovereign immunity and tribal-court jurisdiction were invalid because they were not supported by a resolution of the tribe's board of directors as required by the tribe's code, that argument failed under the facts of the case. The chief financial officer had the authority to enter into the settlement agreement, there was no indication that plaintiff was aware that a tribal resolution was necessary for the

tribe to waive sovereign immunity and tribal-court jurisdiction, and the tribe initially acted as if the settlement agreement were valid. Further, the settlement agreement incorporated by reference the clear and unequivocal waivers set forth in the sale agreement and the tribe conceded that the agreement of sale was authorized by a valid tribal resolution.

Affirmed.

1. INDIANS — SOVEREIGN IMMUNITY — WAIVERS — CLEAR AND UNEQUIVOCAL WAIVERS.

An Indian tribe is subject to suit only if Congress has authorized the suit or the tribe has clearly and unequivocally waived its sovereign immunity.

2. INDIANS — TRIBAL-COURT JURISDICTION — WAIVERS — EXPLICIT WAIVERS — CHOICE-OF-LAW PROVISIONS.

The inclusion of a choice-of-law provision in a contract to which an Indian tribe is a party may explicitly waive tribal-court-jurisdiction.

Barris, *Sott*, *Denn*, *& Driker*, *P.L.L.C.* (by *Morley Witus*, *James S. Fontichiaro*, and *Jeffrey M. Stefan*), for plaintiff.

Abbott Nicholson, *P.C.* (by *George M. Malis*, *Gene J. Esshaki*, and *Christopher R. Gura*), for defendants.

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

SAAD, P.J. Defendants, 132 Associates, L.L.C., and the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe), appeal the trial court's grant of summary disposition to plaintiff, Bates Associates, L.L.C. Though both defendants filed a claim of appeal, only the Tribe challenges the trial court's judgment against it. For the reasons set forth in this opinion, we affirm.

I. FACTS

This dispute arises from the purchase of a parking garage located near the Greektown Casino in Detroit.

The Tribe is a federally recognized Indian tribal government that owned 132 Associates and Greektown Casino, L.L.C. In 2000, the casino sought a license from the Michigan Gaming Control Board to begin operations, but it lacked adequate parking. To remedy the problem, Bates agreed to assign to defendants its right to purchase a parking garage near the casino. In conjunction with this assignment, defendants agreed to make significant repairs to the garage and to give Bates an option to purchase the garage for $1 at any time within seven years after the execution of the agreement.

Bates exercised its option to purchase the garage, but title to the garage was not delivered within the seven-year option period, and the parties disputed the extent of repairs needed to render the garage in good condition. Ultimately, the parties reached a settlement agreement requiring that title to the garage be delivered to Bates and requiring 132 Associates to pay Bates a total of $2,250,000 in four installments. After defendants failed to make their installment payments and refused to turn over title to the garage, Bates filed suit, alleging breach of the settlement agreement and requesting an order requiring defendants to transfer title to the garage. The trial court entered a preliminary injunction that required defendants to transfer title to Bates by June 13, 2008. On June 23, 2008, defendants filed a counterclaim, alleging that they had transferred title to the garage to Bates, but Bates owed them $91,619.28, which it refused to pay.

Bates and defendants filed motions for summary disposition. Defendants contended that the Tribe's chief financial officer (CFO), Victor Matson, lacked authority to enter into the settlement agreement and that the waiver of sovereign immunity in the settlement

agreement was invalid. The trial court disagreed and granted summary disposition to Bates.

II. ANALYSIS[1]

The parties' settlement agreement specifically incorporated the waiver of sovereign immunity provided in § 10 of their sale agreement. The settlement agreement stated, in relevant part:

> The Tribe's waiver of sovereign immunity as provided in Section 10 of the Agreement of Sale attached to the Option Agreement dated November 3, 2000 is incorporated herein by reference with regard to any action or proceeding by Bates to enforce its rights relating to relating to [sic] this Settlement Agreement, the Tribe's guaranty, the parties' agreements, and/or Bates Garage.

Section 10 of the sale agreement provided:

> Waiver of Immunity The Seller and the Tribe (in connection with aforemented [sic] guaranty the Tribe) hereby expressly waive their sovereign immunity from suit should an action be commenced with respect to this Agreement or any document executed in connection with this Agreement of Sale. This waiver (i) is granted to Purchaser, its successor and assigns; (ii) shall be enforceable in [a] court of competent jurisdiction; and (iii) the governing law shall be the internal laws of the State of Michigan. The Seller and Tribe hereby expressly submit to and consent to the

[1] We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31.

> jurisdiction of the Federal District Court for the Eastern District of Michigan (including all federal courts to which decisions of the Federal District Court for the Eastern District of Michigan may be appealed), and the courts of the State of Michigan (including all courts to which decisions of the original jurisdiction courts of the State of Michigan may be appealed). In the event a suit is commenced, the Seller and Tribe covenant that they will not dispute the jurisdiction of the United States District Court for the Eastern District of Michigan and all federal courts to which decisions of the United States District Court for the Eastern District of Michigan may be appealed, and to the jurisdiction of the courts of the State of Michigan, and all courts to which decisions of the original jurisdiction courts of the State of Michigan may be appealed. Seller and Tribe further covenant that if a suit is commenced on or regarding the subject matter of this Agreement, it will stipulate and consent to the jurisdiction of the federal courts or State of Michigan courts, as described above.

Thus, the settlement agreement incorporated the Tribe's waiver of sovereign immunity set forth in the sale agreement, and this waiver specifically provided that it was enforceable in a court of competent jurisdiction and that laws of the state of Michigan would govern.

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v Mfg Technologies, Inc*, 523 US 751, 754; 118 S Ct 1700; 140 L Ed 2d 981 (1998). This immunity applies to a tribe's commercial contracts, whether made on or off of an Indian reservation. *Id.* at 760. "[T]o relinquish its immunity, a tribe's waiver must be 'clear.' " *C & L Enterprises, Inc v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 US 411, 418; 121 S Ct 1589; 149 L Ed 2d 623 (2001), quoting *Oklahoma Tax Comm v Citizen Band*

Potawatomi Indian Tribe of Oklahoma, 498 US 505, 509; 111 S Ct 905; 112 L Ed 2d 1112 (1991). Likewise, a waiver cannot be implied and must be unequivocally expressed. *Santa Clara Pueblo v Martinez*, 436 US 49, 58; 98 S Ct 1670; 56 L Ed 2d 106 (1978).

In *C & L Enterprises*, 532 US at 423, the Court ruled that the respondent Indian tribe had waived its immunity from suit by expressly agreeing to arbitrate disputes with the petitioner, C & L Enterprises, Inc., and by agreeing that Oklahoma law would govern such disputes. The tribe contracted with C & L for the installation of a roof on a building that the tribe owned. *Id.* at 414. The parties' contract was a standard form agreement requiring that all disputes arising out of or relating to the contract be resolved by arbitration. The contract also contained a clause stating that the contract would be governed by the law applicable in the place where the project was located. Under Oklahoma's Uniform Arbitration Act, agreements providing for arbitration in the state of Oklahoma conferred jurisdiction on any court of competent jurisdiction in the state. *Id.* at 415-416. Ultimately, an arbitrator rendered an award in C & L's favor, and C & L filed suit to enforce the award in an Oklahoma state court of general jurisdiction. *Id.* at 416. The tribe sought dismissal of the suit on the basis of its sovereign immunity, and an appellate court determined that the tribe had not waived its immunity with the requisite clarity. *Id.* at 416-417.

The United States Supreme Court disagreed. The Court held that the contract's arbitration provision required arbitration of all disputes related to the contract and that the contract's choice-of-law clause made it clear that the Oklahoma court in which C & L filed suit was a " 'court having jurisdiction' " to enforce the

arbitrator's award. *Id.* at 418-419. The Court stated that, by selecting Oklahoma law, the parties "effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration Act[.]" *Id.* at 419. The Court recognized that the tribe agreed by express contract to adhere to the dispute resolution procedures outlined in the contract. *Id.* at 420. The Court acknowledged that there was no requirement that a waiver contain the words "sovereign immunity" to be considered explicit rather than implicit. *Id.* at 420-421. Further, in response to the tribe's argument that the form contract designed for private parties without immunity could not have established a valid waiver of its tribal immunity, the Court determined that the contract was not ambiguous and recognized that the tribe itself had proposed the contract. The Court thus held that the tribe had clearly consented to arbitration and to the enforcement of the arbitrator's award in an Oklahoma state court. Accordingly, the Court concluded that the tribe had waived its sovereign immunity.[2] *Id.* at 423.

Because the settlement agreement here incorporated the Tribe's waiver of sovereign immunity set forth in the sale agreement and the waiver unequivocally provided that it was enforceable in a court of competent jurisdiction and that laws of the state of Michigan would govern, the waiver is similar to that in *C & L Enterprises*, which stated that Oklahoma law would govern the dispute and that jurisdiction was proper in any court of competent jurisdiction in the state of Oklahoma. Moreover, the waiver in this case is clearer

[2] See also *Oglala Sioux Tribe v C & W Enterprises, Inc*, 542 F3d 224, 231 (CA 8, 2008) (holding that the Indian tribe waived its sovereign immunity with respect to three contracts that contained agreements to arbitrate as well as other explicit waivers of sovereign immunity).

and more explicit than that in *C & L Enterprises* because the waiver in that case was simply an arbitration clause contained in a form agreement. In this case, neither the settlement agreement nor the sale agreement was a form agreement, and the waiver was clear and unequivocal. Further, ¶ 11 of the settlement agreement contained additional language stating that the agreement "shall be governed by and interpreted in accordance with the laws of the State of Michigan." As in *C & L Enterprises*, this choice-of-law provision explicitly waived tribal-court jurisdiction. Therefore, because the waivers of sovereign immunity and tribal-court jurisdiction were clearly and unambiguously expressed, they are enforceable. *C & L Enterprises*, 532 US at 418; *Santa Clara Pueblo*, 436 US at 58.

The Tribe argues that the purported waivers of sovereign immunity and tribal-court jurisdiction in the settlement agreement are invalid because they were not supported by a resolution of the Tribe's board of directors as required under § 44.105 and § 44.109 of the Tribe's code. We note that the United States Supreme Court has not addressed this issue and has not required anything other than clear, unequivocal language for a valid waiver. See *C & L Enterprises*, 532 US at 418; *Santa Clara Pueblo*, 436 US at 58. The Tribe argues, however, that *Memphis Biofuels, LLC v Chickasaw Nation Indus, Inc*, 585 F3d 917 (CA 6, 2009), compels reversal of the trial court's decision. We are not bound by decisions of the United States Court of Appeals for the Sixth Circuit, *State Treasurer v Sprague*, 284 Mich App 235, 241-242; 772 NW2d 452 (2009), and we are not persuaded that *Memphis Biofuels* warrants reversal.

Memphis Biofuels involved the plaintiff, Memphis Biofuels, L.L.C. (MBF), and Chickasaw Nation Industries, Inc. (CNI), a corporation wholly owned by the

Chickasaw Nation Indian tribe but an entity separate and distinct from the tribe. In 2006, MBF and CNI entered into a contract whereby CNI would deliver fuel and soybean oil to MBF for refinement and resale. During contract negotiations, MBF insisted on a contractual provision stating that CNI waived any sovereign immunity and that its waiver was valid, enforceable, and effective. *Memphis Biofuels*, 585 F3d at 918. The parties exchanged draft versions of the agreement, and one of the drafts that CNI's attorneys reviewed and approved contained two comments indicating that CNI board approval was necessary to waive immunity. *Id.* at 918-919. Ultimately, however, the parties signed the agreement without obtaining board approval. *Id.* at 919. Notably, CNI's charter required board approval in order to waive sovereign immunity. *Id.* at 921. After CNI repudiated the agreement, both parties commenced legal action. *Id.* at 919.

The Sixth Circuit acknowledged that although no resolution had been passed, both parties signed a waiver provision waiving all immunities. *Id.* at 922. The Sixth Circuit also acknowledged that MBI believed that CNI had obtained the required approval for its waiver. Nonetheless, the court held that CNI's charter controlled and that CNI's sovereign immunity remained intact without board approval waiving such immunity. *Id.*

A different result was reached in *Smith v Hopland Band of Pomo Indians*, 95 Cal App 4th 1; 115 Cal Rptr 2d 455 (2002). In that case, Smith, an architect, entered into two contracts with the defendant tribe to provide planning and architectural services. *Id.* at 3. The contracts included the American Institute of Architects standard form agreement requiring arbitration of disputes and enforcement of arbitration awards in any

court having jurisdiction. *Id.* After Smith filed suit, the tribe argued that either a duly enacted tribal ordinance or a resolution of the tribal council was required to waive the tribe's sovereign immunity. *Id.* at 4-5. Ultimately, the trial court dismissed the action on this basis. *Id.* at 5.

On appeal, the court opined that the contractual language was indistinguishable from that in *C & L Enterprises*, and that the only reasonable interpretation of the terms was that they clearly and explicitly waived sovereign immunity. *Id.* at 6. In addressing the tribe's argument that the chairperson did not have actual authority to waive sovereign immunity absent an ordinance or resolution explicitly providing for such a waiver, the court recognized that the tribe did not dispute that the chairperson had the authority to negotiate the contracts and execute the final versions that incorporated the arbitration clause and choice-of-law provision. *Id.* at 7. The court also recognized that the tribe subsequently approved the contracts by resolution and that Smith gave all members of the tribal council copies of the contracts at a meeting during which the council authorized the chairperson to negotiate and execute the contracts. *Id.* at 7-8. The court further recognized that Smith and the tribal council negotiated the contracts during a subsequent meeting and modified the contractual terms. Thus, the court held that the tribal council was fully aware of the contractual terms and was not presented with a situation in which a tribal agent signed a contract without authority to act on the tribe's behalf. *Id.* at 8. Thus, the court determined that the tribe had waived its sovereign immunity. *Id.* at 12.

The court rejected the tribe's argument that the effect of the sovereign-immunity ordinance was to require the enactment of an ordinance or resolution

specifically waiving sovereign immunity notwithstanding that the tribe had authorized one of its officials to execute the contracts and notwithstanding the tribe's subsequent approval of the contracts. *Id.* at 9. The court stated that the tribe's argument assumed that the court must apply the tribal sovereign-immunity ordinance to determine that the otherwise binding contracts were ineffective to waive sovereign immunity because the explicit waiver was made by contract rather than by ordinance or resolution. *Id.* In rejecting that argument, the court reiterated many of the reasons previously discussed, but also ruled that federal law rather than tribal law was applicable to resolve this question and that, if the court did not refer to federal law, it would not apply tribal law because the contracts specified that they were to be governed by California law. *Id.* at 10. The court thus determined that the tribe, through its chairperson and subsequent resolution by the tribal council, had executed contracts that clearly and explicitly waived the tribe's sovereign immunity. *Id.* at 12.

The facts of this case warrant a result similar to that in *Smith*. Victor Matson, as the Tribe's CFO, clearly had authority to enter into the settlement agreement, as demonstrated by the fact that he was the same person who signed the deed when title to the garage was transferred to Bates pursuant to the preliminary injunctive order compelling the transfer. Both the Tribe and Bates made changes to the settlement agreement during negotiations, and the waiver provisions remained in the final version of the agreement that the parties executed. Those provisions incorporated the waiver of sovereign immunity contained in the sale agreement and specifically provided that the settlement agreement would be governed by the laws of the state of Michigan rather than by tribal law. Unlike in *Memphis Biofuels*, there is no indication that Bates was aware

that a tribal resolution was necessary for the Tribe to waive its sovereign immunity or tribal-court jurisdiction.

During the months following the execution of the settlement agreement, neither the Tribe nor the Tribe's attorney represented that the agreement was invalid, and $49,000 was paid to Bates pursuant to the agreement. Not until after Bates filed its complaint did the Tribe contend that the settlement agreement was unenforceable. These factors show that the Tribe was aware of the settlement negotiations and authorized Matson to execute the agreement despite the waivers of sovereign immunity and tribal-court jurisdiction contained therein.

Further, although there was no tribal resolution specifically pertaining to the waivers of sovereign immunity and tribal-court jurisdiction in the settlement agreement, the Tribe conceded in the trial court that there was a tribal resolution, Resolution No. 2000-148, pertaining to the sale agreement and that § 10 of the sale agreement was incorporated into the settlement agreement. The Tribe asserted in the trial court that it had waived its sovereign immunity and tribal-court jurisdiction with respect to the sale agreement and option agreement. The Tribe contended that Resolution No. 2000-148 authorized the waivers of sovereign immunity and tribal-court jurisdiction regarding both agreements and that the only question was whether those waivers were incorporated into the settlement agreement. The Tribe argued for the first time in its motion for reconsideration in the trial court that the resolution did not waive sovereign immunity with respect to the sale agreement or the option agreement. The Tribe asserts the same argument in this Court and contends that the waivers authorized by the resolution

pertained only to a guaranty agreement with Bank One. By conceding that the waivers in the option agreement and sale agreement were valid, however, the Tribe waived any argument that they were invalid because they were not supported by a tribal resolution. A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

Accordingly, the circumstances of this case support the trial court's determination that the Tribe waived its sovereign immunity and tribal-court jurisdiction. The conduct of the parties both during the settlement agreement negotiations and after the agreement was executed support this conclusion. The settlement agreement itself contained waivers of sovereign immunity and tribal-court jurisdiction and incorporated by reference the clear and unequivocal waivers set forth in the sale agreement, which the Tribe conceded was supported by a valid resolution. In light of these facts, the trial court correctly ruled that the Tribe had waived its sovereign immunity and tribal-court jurisdiction and correctly granted summary disposition and entered judgment in Bates's favor.

Affirmed.

PEOPLE v REDDEN
PEOPLE v CLARK

Docket Nos. 295809 and 295810. Submitted July 7, 2010, at Detroit. Decided September 14, 2010, at 9:20 a.m.

Robert L. Redden and Torey A. Clark were each charged in the 43rd District Court with manufacturing 20 or more but less than 200 marijuana plants. At their preliminary examination, defendants asserted the affirmative defense provided by § 8 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26428. In support of the defense, defendants presented testimony from Eric Eisenbud, M.D., who had signed authorizations for each defendant, certifying that they were eligible for registration under the act. Eisenbud had examined defendants in March 2009, meeting with each for about a half-hour, including reviewing their medical records, interviewing them, and physically examining them. The examinations occurred after the MMMA took effect but before the Department of Community Health began issuing registry identification cards under the MMMA. Eisenbud did not identify defendants' debilitating medical conditions in his testimony or in the authorizations he signed. Nor did defendants present evidence that the amount of marijuana in their possession was not more than was reasonably necessary for medical purposes, that they were manufacturing marijuana solely for medical purposes, or that they suffered from serious or debilitating medical conditions as defined by MCL 333.26423(a)(2). Although their medical examinations had taken place before their arrests, defendants were not issued registry identification cards until after their arrests. The court, Robert J. Turner, J., dismissed the charges after finding that defendants had established the defense. On appeal, the Oakland Circuit Court, Lisa O. Gorcyca, J., reversed, holding that the district court had abused its discretion by acting as a trier of fact when it denied the bindover and dismissed the charges. The circuit court ruled that the affirmative defense needed to be addressed in the trial court and remanded the case to the district court for further proceedings. Defendants appealed.

The Court of Appeals *held*:

1. The MMMA provides two procedural avenues by which a person facing possible prosecution for violating Michigan's con-

trolled substances laws may seek to establish use of marijuana for medical purposes. Individuals may assert immunity from prosecution under MCL 333.26424 or they may assert an affirmative defense under MCL 333.26428. Thus, even though defendants did not possess registry identification cards at the time of their arrests, the defense provided by the MMMA was available to them, and the district court did not err by permitting them to raise the defense.

2. To establish the medical-purpose defense to a marijuana-related charge, a defendant without a registry identification card must satisfy the elements set forth in MCL 333.26428(a). Specifically, the defendant must show (1) the existence of a bona fide physician-patient relationship in the course of which the physician recommended the use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or the symptoms of the patient's serious or debilitating medical condition, (2) that the amount of marijuana possessed was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's condition or symptoms, (3) that the defendant's acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of the specific marijuana from which the charge arose was for the patient's medical purposes, and (4) that the patient had a serious medical condition or had a debilitating medical condition as defined by MCL 333.26423(a). There were colorable issues concerning whether a bona fide physician-patient relationship existed, whether the amount of marijuana defendants possessed was reasonable under the statute, whether the marijuana was being used for medical purposes, and whether defendants had serious or debilitating medical conditions. Thus, the district court erred by concluding that defendants satisfied the requirements of the MMMA as a matter of law, and the circuit court properly reinstated the charges.

Affirmed and remanded.

O'CONNELL, P.J., concurring, agreed with the majority's decision to affirm the circuit court's reinstatement of the charges against defendants, but would interpret the statutory defenses more narrowly. He discussed the history of the act and numerous issues surrounding the interpretation of the MMMA in an attempt to establish a framework for addressing those issues, and urged the legislative and administrative officials authorized to revise the MMMA or its regulations to take action to clarify the act's confusing and conflicting provisions. He also emphasized that the MMMA does not protect the sale of marijuana under any circumstances.

1. CONTROLLED SUBSTANCES — MEDICAL MARIJUANA — CRIMINAL DEFENSES — UNREGISTERED MEDICAL-MARIJUANA USERS.

The Michigan Medical Marihuana Act provides two procedural avenues by which a person facing possible prosecution for a marijuana-related crime may seek to establish use of marijuana for medical purposes; individuals may assert immunity from prosecution under MCL 333.26424 or they may assert an affirmative defense under MCL 333.26428.

2. CONTROLLED SUBSTANCES — CRIMINAL DEFENSES — MEDICAL MARIJUANA — UNREGISTERED MEDICAL-MARIJUANA USERS.

To establish the medical-purpose defense to a marijuana-related charge under the Michigan Medical Marihuana Act, a defendant without a registry identification card must show (1) the existence of a bona fide physician-patient relationship in the course of which the physician recommended the use of marijuana to treat or alleviate the patient's serious or the debilitating medical condition or the symptoms of the patient's serious or debilitating medical condition, (2) that the amount of marijuana possessed was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's condition or symptoms, (3) that the defendant's acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of the specific marijuana from which the charge arose was for the patient's medical purposes, and (4) that the patient had a serious medical condition or had a debilitating medical condition as defined in the act (MCL 333.26423[a], 333.26428[a]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for the people.

Robert Mullen and Associates, PLLC (by *Robert S. Mullen*), for defendants.

Amicus Curiae:

Dykema Gossett PLLC (by *Shaun M. Johnson* and *Nadav Ariel*), *Daniel S. Korobkin*, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union Fund of Michigan.

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

METER, J. In this case involving the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., defendant Robert Lee Redden and defendant Torey Alison Clark appeal by leave granted a December 10, 2009, circuit court order reversing for each defendant the district court's dismissal of a single count of manufacturing 20 or more but less than 200 marijuana plants, MCL 333.7401(2)(d)(*ii*). We affirm the circuit court's decision to reinstate the charges.

I. FACTS

This case arose from the execution of a search warrant at defendants' residence in Madison Heights, which resulted in the discovery of approximately 1½ ounces of marijuana and 21 marijuana plants. Officer Kirk Walker and Officer Mark Moine of the Madison Heights Police Department testified that in the evening of March 30, 2009, they arrived at the residence with three other officers to execute a search warrant for the purpose of looking for marijuana and other illegal substances.

Defendants and another unidentified individual were found in the residence and were secured by the officers. The officers found proof of residency for defendants and $531 in cash. The officers also found three bags of marijuana in a bedroom. In addition, they found 21 marijuana plants, which were all between three and four inches tall, on the floor of a closet in the same bedroom. Field tests of these items were positive for marijuana. The officers did not find any scales, small plastic bags, or packaging materials in the residence.

At some point during the search, Redden stated that he was in pain. Defendants also each turned over

documents regarding their use of marijuana for medical purposes. The documents, which were dated March 3, 2009, for Redden, and March 4, 2009, for Clark, were admitted into evidence. Each document stated:

> I, Eric Eisenbud, MD, am a physician, duly licensed in the State of Michigan. I have completed a full assessment of this patient's medical history, and I am treating this patient for a terminal illness or a debilitating condition as defined in Michigan's medical marijuana law. I completed a full assessment of this patient's current medical condition. This assessment was made in the course of a bona fide physician-patient relationship. I have advised the patient about the potential risks and benefits of the medical use of marijuana. I have formed my professional opinion that the potential benefits of the medical use of marijuana would likely outweigh any health risks for the patient. This patient is LIKELY to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate a serious or debilitating medical condition or symptoms of the serious or debilitating medical condition.

The MMMA went into effect on December 4, 2008, but, according to Walker, the state of Michigan did not begin issuing registry identification cards until April 4, 2009. The Michigan Department of Community Health issued medical-marijuana registry identification cards to each defendant on April 20, 2009, but this was after the search in this case took place.

In the course of the preliminary examination, defendants asserted the affirmative defense contained in § 8 of the MMMA, MCL 333.26428.[1] In support of the

[1] MCL 333.26428, which is quoted in its entirety later in this opinion, states that a medical-purpose defense shall be presumed valid if, among other things,

> [a] physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course

defense, defendants presented testimony from Eric Eisenbud, M.D., who testified that he had attended the University of Colorado's medical school and had been a physician for 37 years. He was licensed to practice in seven states, including Michigan, and was board-certified in ophthalmology. Dr. Eisenbud also had worked in the past as an emergency room practitioner and a family practitioner. At the time of the preliminary examination, Dr. Eisenbud had worked for the past 19 months for The Hemp and Cannabis Foundation (THCF) Medical Clinic. He testified that he is "not from Michigan" and was currently working in six out of the seven states in which he was licensed to practice medicine, although he later suggested that he was working in all seven states.[2]

Dr. Eisenbud testified that defendants were his patients and that he examined each of them on March 3, 2009, when both were seeking to be permitted to use marijuana under the MMMA. A clinic technician screened defendants before their appointment in a telephone interview and by reviewing their medical records. Dr. Eisenbud met with each defendant for about a half-hour, spending 5 minutes reviewing the medical records and about 10 minutes on the physical examination; he also interviewed them. During their 10-minute physical examinations, Dr. Eisenbud examined both defendants' general appearance and skin, listened to their lungs, examined their abdomens, ex-

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of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition[.] [MCL 333.26428(a)(1).]

[2] We note that Dr. Eisenbud did not indicate where his "home base" is, he did not indicate where his examinations of defendants took place, and he did not indicate where the TCHF Medical Clinic is located.

amined their heads and necks, did a neurological and cardiovascular assessment, and assessed their mental health.

Dr. Eisenbud testified that he signed the authorization for each defendant in his professional capacity because each qualified under the MMMA and each would benefit medically from using marijuana. He opined that his relationship with each defendant was a bona fide physician-patient relationship because he interviewed defendants, examined them, and looked at their medical records in order to gain a full understanding of their medical problems. Dr. Eisenbud acknowledged that the THCF Medical Clinic did not require patients to bring their complete medical records. The records from Redden were from two years before his examination by Dr. Eisenbud, and Clark's records were from a year before her examination by Dr. Eisenbud.

Regarding Redden, Dr. Eisenbud concluded that he had a debilitating condition that caused pain, satisfying the MMMA's requirements. Regarding Clark, Dr. Eisenbud concluded from her medical records and interviewing her that she suffered from nausea. Dr. Eisenbud did not testify regarding what caused Redden's pain or Clark's nausea. Dr. Eisenbud only examined each defendant once. He viewed the only risk of defendants' using marijuana as related to driving; he indicated that they should not drive within four hours of using it.

Dr. Eisenbud testified that defendants had not consulted with any other doctors regarding medical-marijuana authorization before their appointments with him. According to Dr. Eisenbud, both defendants were using other narcotics for their conditions, and he opined that access to marijuana would give them the opportunity to wean themselves off of those narcotics.

The parties stipulated that Redden had two previous convictions for possession of marijuana with intent to distribute.

During the preliminary examination, the prosecution argued that defendants were not entitled to assert the affirmative defense from § 8 of the MMMA because neither had a registry identification card at the time of the offense as required by § 4(a) of the MMMA, MCL 333.26424(a).[3] The prosecution acknowledged that defendants could not have obtained a card previously because the state had yet to begin issuing them. However, the prosecution contended that defendants were required to abstain from marijuana use until they were able to obtain a card. Defendants argued that the plain language of § 8 of the MMMA did not require possession of a card.

The prosecution argued that under the probable-cause standard, the evidence showed that defendants were engaged in manufacturing marijuana. The prosecution contended that defendants had failed to comply with § 8 of the MMMA because they had not shown a bona fide patient-physician relationship with Dr. Eisenbud and also had failed to establish that they possessed

[3] 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.

an amount of marijuana that was not more than was reasonably necessary to ensure uninterrupted availability for the purpose of treating their conditions. Defendants argued that they met the requirements of § 8 because each had a signed authorization from a licensed physician with whom he or she had a bona fide physician-patient relationship and who concluded that each had conditions covered under the MMMA. Defendants also argued that the amount of marijuana was reasonably necessary.

II. LOWER-COURT RULINGS

The district court noted that the MMMA "is probably one of the worst pieces of legislation I've ever seen in my life" and went on to state:

> [S]ection 8 says section 4 doesn't really have any meaning. If you don't have a card and you happen to be arrested, just make sure you have a doctor who will testify in court that you needed medical marijuana in order to have that case dismissed.
>
> The burden's on defendant at the evidentiary hearing to have section 8 apply to show what a reasonable amount of marijuana is. It doesn't say what a reasonable amount is. It would seem practical to me that they would have included the same amount that was in section 4 if they believed that was a reasonable amount. But, instead, they just leave it to, I guess, every other judge's decision as to what they think is reasonable.
>
> It—it's just one of the worst pieces of legislation I've ever seen. . . . [I]t appears that section 8, the intent of it is to allow anyone who possesses marijuana with a doctor's certification, I guess at the time of a hearing, that the case would have to be dismissed. Because it very clearly says in section [8]b that the charges shall be dismissed following an evidentiary hearing where the person shows the ele-

> ments listed in subsection A. Well, one of the elements in subsection A is possessing a reasonable quantity of marijuana.
>
> I still don't know what a reasonable quantity of marijuana is unless I go to section 4. Section 4 says, 2-point-5 ounces, I believe, 12 plants, but you also have to have a valid registration card.
>
> So, these people possessed no registration card, but yet they want the benefit of section 4 to apply to section 8.

The district court also noted that although Dr. Eisenbud testified regarding defendants' legitimate need to use marijuana for medical purposes, there was no testimony regarding what was a reasonably necessary amount for defendants to possess. The district court concluded that it would simply apply the amount of 2.5 ounces and 12 plants set by § 4 as what was reasonably necessary, and it granted defendants' motion to dismiss, explaining:

> For that reason, I believe that section 8 entitles the defendants to a dismissal, even though they did not possess the valid medical card, because section 8 says if they can show the fact that a doctor believed they were likely to receive the therapeutic benefit, and this doctor testified to that. And Doctor Eisenbud is a physician, licensed by the State of Michigan. And that's the only requirement that the statute has. You don't have to be any type of physician, you just have to be a licensed physician by the State of Michigan.
>
> So, based on that, I find section 8 does apply. And I believe I'm obligated to dismiss this matter based on section 8 of the statute.

Regarding the prosecution's request for a clarification of whether the doctor's testimony rose to the level of establishing a bona fide physician-patient relationship, the district court stated:

> Based on his testimony, he indicated that he—he read their medical records, he saw them, and I think his total time was about a half an hour totally spent with them, which, based on my own personal experience, I don't find inconsistent with my own doctor. So I guess that's a bona fide relationship.

The district court entered an order of dismissal on July 17, 2009.

The prosecution appealed the order of dismissal in the circuit court. On December 18, 2009, the circuit court issued an opinion and order reversing the district court's order and remanding the case to the district court for further proceedings. The circuit court ruled that the district court had abused its discretion by not binding defendants over for trial because it had improperly acted as a trier of fact. The circuit court ruled that, in this case, the affirmative defense must be addressed in the trial court in order for proper discovery and rebuttal to take place.

The circuit court also considered questionable the issue regarding whether defendants should be allowed to raise the affirmative defense at all, because defendants did not have valid registry identification cards as required by § 4 of the MMMA, together possessed more than the amount of marijuana permitted under § 4, and did not keep their marijuana plants in "an enclosed, locked facility," which is also required under § 4.

The circuit court then emphasized that there was a disputed question regarding whether Dr. Eisenbud had a bona fide physician-patient relationship with defendants. The circuit court concluded:

> [T]here was competent evidence in support of the bindover. For the district judge to deny the bindover was an abuse of discretion. Specifically, the district judge failed to properly exercise his judgment by relying solely on Dr.

Eisenbud's testimony, and by ignoring the evidence presented by the People regarding Defendants' actions that showed they did not meet the criteria of the affirmative defense. The evidence in support of the affirmative defense was not developed sufficiently to support the district judge's decision to deny the bindover.

III. A REGISTRY IDENTIFICATION CARD IS NOT REQUIRED FOR A § 8 DEFENSE

Defendants argue that the circuit court erred by ruling that because defendants did not obtain registry identification cards in order to satisfy the conditions of § 4 of the MMMA, they could not assert the affirmative defense contained in § 8.[4]

A. STANDARD OF REVIEW

This issue presents a question of statutory interpretation. We review de novo issues of statutory interpretation. *People v Stone Transp, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000). Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The MMMA was enacted as a result of an initiative adopted by the voters. "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 con-

[4] The circuit court's ruling was somewhat ambiguous with regard to this issue; it stated that "it is questionable whether Defendants are entitled to assert the affirmative defense contained in the MMMA."

sider 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).

B. ANALYSIS

This issue involves §§ 4, 7, and 8 of the MMMA. Section 4 provides, in relevant part:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, 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.
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> * * *
>
> (c) A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.
>
> (d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:
>
> (1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.[5] [MCL 333.26424.]

Section 8 provides:

(a) Except as provided in section 7 [MCL 333.26427], a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

(1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;

(2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or

[5] It is not clear how the immunity from arrest provided in § 4(a) interplays with the rebuttable presumption in § 4(d)(2). However, that issue is not before the Court today.

> debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
>
> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).
>
> (c) If a patient or a patient's primary caregiver demonstrates the patient's medical purpose for using marihuana pursuant to this section, the patient and the patient's primary caregiver shall not be subject to the following for the patient's medical use of marihuana:
>
> (1) disciplinary action by a business or occupational or professional licensing board or bureau; or
>
> (2) forfeiture of any interest in or right to property. [MCL 333.26428.]

As an initial matter, the plain language of § 8 does not place any restriction on defendants' raising of the affirmative defense. Nevertheless, the prosecution argues that the affirmative defense under § 8 is unavailable to defendants because they did not possess valid registry identification cards at the time of the offense, in violation of § 4. The prosecution bases its position on the language in § 8(a) that provides: "*Except as provided in section 7*, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid . . . ." MCL 333.26428(a) (emphasis added).

Section 7(b) provides a host of instances for which the protection of the affirmative defense under § 8 would not be permitted, but none of those situations is at issue in this case. See MCL 333.26427(b).[6] However, the prosecution points to § 7(a), which provides that "[t]he medical use of marihuana is allowed under state

[6] Section 7 states:

law to the extent that it is carried out in accordance

(a) The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act.

(b) This act shall not permit any person to do any of the following:

(1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.

(2) Possess marihuana, or otherwise engage in the medical use of marihuana:

(A) in a school bus;

(B) on the grounds of any preschool or primary or secondary school; or

(C) in any correctional facility.

(3) Smoke marihuana:

(A) on any form of public transportation; or

(B) in any public place.

(4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.

(5) Use marihuana if that person does not have a serious or debilitating medical condition.

(c) Nothing in this act shall be construed to require:

(1) A government medical assistance program or commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marihuana.

(2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana.

(d) Fraudulent representation to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution shall be punishable by a fine of $500.00, which shall be in addition to any other penalties that may

with the provisions of this act." MCL 333.26427(a). The prosecution contends that this section justifies its position that § 4 must be adhered to in order for a defendant to invoke § 8 because the affirmative defense is only available to a defendant who complies with the other provisions of the MMMA.

However, as defendants argue, this position ignores that the MMMA provides two ways in which to show legal use of marijuana for medical purposes in accordance with the act. Individuals may either register and obtain a registry identification card under § 4 or remain unregistered and, if facing criminal prosecution, be forced to assert the affirmative defense in § 8.

The plain language of the MMMA supports this view. Section 4 refers to a "qualifying patient who has been issued and possesses a registry identification card" and protects a qualifying patient from "arrest, prosecution, or penalty in any manner . . . ."[7] MCL 333.26424(a). On the other hand, § 8(a) refers only to a "patient," not a qualifying patient, and only permits a patient to "assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ." MCL 333.26428(a). Thus, adherence to § 4 provides protection that differs from that of § 8. Because of the differing levels of protection in §§ 4 and 8, the plain language of the statute establishes that § 8 is applicable for a patient who does not satisfy § 4.

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apply for making a false statement or for the use of marihuana other than use undertaken pursuant to this act.

(e) All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act. [MCL 333.26427.]

[7] A "[q]ualifying patient" is defined as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h).

The language of the ballot proposal itself supports this interpretation. The ballot proposal, Proposal 08-1, stated that the law would do the following:

> • Permit physician approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.
>
> • Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility.
>
> • Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.
>
> • *Permit registered and unregistered patients* and primary caregivers *to assert medical reasons for using marijuana* as a defense to any prosecution involving marijuana. [Emphasis added.]

The ballot proposal explicitly informed voters that the law would permit registered *and* unregistered patients to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana. The language supports the view that registered patients under § 4 and unregistered patients under § 8 would be able to assert medical use of marijuana as a defense. Accordingly, we hold that the district court did not err by permitting defendants to raise the affirmative defense even though neither satisfied the registry-identification-card requirement of § 4.[8]

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[8] Although defendants do not raise this as an issue on appeal, the prosecution argues that a § 8 defense was not viable because the marijuana in question was not kept in an "enclosed, locked facility." We note that the language concerning an "enclosed, locked facility" is set forth in the context of § 4, not in the context of § 8. MCL 333.26424(a). Nevertheless, as with the discovery issue mentioned in footnote 11, we decline to address this issue without the benefit of full briefing by the parties. Presumably further proceedings will take place with regard to this issue.

IV. THE CIRCUIT COURT PROPERLY REVERSED THE BINDOVER DECISION

Defendants next contend that the circuit court erred by holding that the district court was precluded from ruling that defendants' manufacturing marijuana was permitted under the MMMA. We find no basis on which to reverse the circuit court's disposition because there are indeed triable issues in this case and the district court improperly acted as a trier of fact in denying the bindover.

A. STANDARD OF REVIEW

"A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo for error, but a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). When reviewing the bindover decision, a circuit court must consider the entire record of the preliminary examination and not substitute its judgment for that of the district court. *Id*. at 312-313. This Court reviews de novo the bindover decision to determine whether the district court abused its discretion, giving no deference to the circuit court's decision. *Id*. at 313.

B. ANALYSIS

"The primary function of a preliminary examination is to determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it." *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001). Probable cause is established by evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously enter-

tain a reasonable belief of the accused's guilt." *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003) (citation and quotation marks omitted). In order to establish that a crime has been committed, the prosecution need not prove each element beyond a reasonable doubt, but must present some evidence of each element. See *id*. If the evidence conflicts or raises a reasonable doubt concerning the defendant's guilt, the defendant should nevertheless be bound over for trial, at which the trier of fact can resolve the questions. *Id*. at 128.

This Court has recognized "that affirmative defenses in criminal cases should typically be presented and considered at trial and that a preliminary examination is not a trial." *People v Waltonen*, 272 Mich App 678, 690 n 5; 728 NW2d 881 (2006). In *Waltonen*, this Court went on to note that in a situation in which the defense is complete and there are no conflicting facts regarding the defense, it could be argued that there would be no probable cause to believe a crime had been committed. *Id*.

The district court must consider not only the weight and competency of the evidence, but also the credibility of the witnesses, and it may consider evidence in defense.[9] *People v King*, 412 Mich 145, 153; 312 NW2d 629 (1981). As noted, however, the district court cannot discharge a defendant if the evidence conflicts or raises reasonable doubt concerning a defendant's guilt because this presents an issue for the trier of fact. *Id*. at 153-154.

There was evidence in this case that the defense was *not* complete, cf. *Waltonen*, 272 Mich App at 690 n 5, and

[9] With regard to preliminary examinations, MCL 766.12 permits "witnesses for the prisoner, if he [has] any, [to] be sworn, examined and cross-examined," and MCR 6.110(C) permits "[e]ach party [to] subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination."

there were colorable issues for the trier of fact, see *King*, 412 Mich at 153-154. Specifically, we conclude that there were colorable issues concerning whether a bona fide physician-patient relationship existed, whether the amount of marijuana defendants possessed was reasonable under the statute, whether the marijuana in question was being used for medical purposes, and whether defendants suffered from serious or debilitating medical conditions.

1. BONA FIDE PHYSICIAN-PATIENT RELATIONSHIP

MCL 333.26428(a)(1) states that a medical-purpose defense shall be presumed valid if, among other requirements,

> [a] physician has stated that, in the physician's professional opinion, *after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship*, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition[.]

We conclude that there was evidence in this particular case that the doctor's recommendations did not result from assessments made in the course of bona fide physician-patient relationships.[10] Dr. Eisenbud testified that he was board-certified in ophthalmology. He answered, "That's right," when asked the following ques-

[10] We reject defendants' argument that the prosecution waived the issue concerning whether a bona fide physician-patient relationship existed. First, the prosecution clearly did raise the issue below. Second, the district court had a duty to determine whether there was an issue for trial; in doing so, it was obligated to review § 8 in its entirety to determine whether any triable issues existed.

tion: "So, your sole employment, at this point, is to review people to see whether or not you think they can have marijuana under the Michigan Medical Marijuana—or any other medical marijuana law, correct?" He testified that he saw Clark and Redden once each and was currently working in at least six states. He refused to divulge what defendants' debilitating medical conditions were. Dr. Eisenbud indicated that he was not scheduled to see defendants again until they were due to renew their documentation for using marijuana for medical purposes.

The MMMA does not define the phrase "bona fide physician-patient relationship." When words or phrases are not defined in a statute, a dictionary may be consulted. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). *Random House Webster's College Dictionary* (1997) defines "bona fide" as "1. made, done, etc., in good faith; without deception or fraud. 2. authentic; genuine; real." We do not intend to legislate from the bench and define exactly what must take place in order for a bona fide physician-patient relationship to exist. We do conclude, however, that the specific facts in this case, as set forth in the previous paragraph, were sufficient to raise an issue for the trier of fact concerning whether the doctor's recommendations resulted from assessments made in the course of bona fide physician-patient relationships between Dr. Eisenbud and each defendant. Indeed, the facts at least raise an inference that defendants saw Dr. Eisenbud not for good-faith medical treatment but in order to obtain marijuana under false pretenses. Accordingly, the district court erred by finding as a matter of law that defendants had satisfied all the requirements for a § 8 defense.

2. AMOUNT OF MARIJUANA POSSESSED

MCL 333.26428(a)(2) states that the § 8 affirmative defense will not be presumed valid unless

> [t]he patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition . . . .

There was no testimony or evidence presented regarding whether the amount of marijuana possessed by defendants was "not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's . . . condition or symptoms . . . ." *Id*. Defendants were found in possession of approximately 1½ ounces of marijuana and 21 marijuana plants. The district court addressed this element of the affirmative defense and concluded that because the amount of marijuana, when divided between defendants, was less than that of the 2½ ounces and 12 marijuana plants permitted under § 4, this portion of the affirmative defense was satisfied.

However, the plain language of the statute does not support that the amount stated in § 4 is equivalent to the "reasonably necessary" amount under § 8(a)(2). Indeed, if the intent of the statute were to have the amount in § 4 apply to § 8, the § 4 amount would have been reinserted into § 8(a)(2), instead of the language concerning an amount "reasonably necessary to ensure . . . uninterrupted availability . . . ." MCL 333.26428(a)(2). Without any evidence on this element of the affirmative defense, the district court could not have properly found the affirmative defense established as a matter of law. There was a colorable question of fact concerning whether the amount possessed was in accordance with the statute.

3. PURPOSE OF THE MARIJUANA IN QUESTION

MCL 333.26428(a)(3) indicates that, for the medical-purpose defense to be valid, evidence must show that

> [t]he patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

There was testimony and evidence that Redden and Clark could benefit from the medical use of marijuana. However, although an inference could be made that the specific marijuana they allegedly manufactured was being manufactured for medical purposes, there was no explicit testimony or other evidence establishing this fact. Therefore, we find that there was considerable doubt concerning whether defendants satisfied this portion of the defense, see *King*, 412 Mich at 153-154, and the district court therefore should not have concluded that the defense was established as a matter of law.

4. SERIOUS OR DEBILITATING MEDICAL CONDITIONS

Dr. Eisenbud did not identify the nature of defendants' debilitating medical conditions beyond stating that Redden had "pain" and Clark had "nausea." Section § 7(b)(5) states that the MMMA "shall not permit any person to . . . [u]se marihuana if that person does not have a serious or debilitating medical condition." MCL 333.26427(b)(5). Section 3, the definitional section of the MMMA, states in relevant part:

> (a) "Debilitating medical condition" means 1 or more of the following:

(1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.

(2) A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.

(3) Any other medical condition or its treatment approved by the department, as provided for in [MCL 333.26425(a)]. [MCL 333.26423(a).]

Section 3 does not define the phrase "serious medical condition." See MCL 333.26423.

In his written documents, Dr. Eisenbud stated that each defendant was likely to receive benefit from using marijuana to "treat or alleviate a serious or debilitating medical condition . . . ." However, he stated only that he was treating each defendant for "a terminal illness or a debilitating condition as defined in Michigan's medical marijuana law." He then stated at the preliminary examination that Redden had a "debilitating condition." When asked what the condition was, he replied "pain." Dr. Eisenbud stated that Clark's debilitating condition was "nausea."

We conclude that defendants did not establish at the preliminary examination as a matter of law that they had serious or debilitating medical conditions as required by the MMMA. With regard to the phrase "serious medical condition," *Random House Webster's College Dictionary* (1997) defines "serious," in this context, as "weighty, important, or significant" and "giving cause for apprehension; critical or threatening[.]" Without knowing the na-

ture of defendants' medical conditions, it is not possible to determine whether they are "serious." With regard to the phrase "debilitating medical condition," MCL 333.26423(a)(2) indicates that this phrase includes "[a] chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: . . . severe and chronic pain; severe nausea . . . ." Dr. Eisenbud indicated that Redden suffered merely from "pain" and that Clark suffered merely from "nausea." This evidence was not sufficient to satisfy the definition set forth in MCL 333.26423(a)(2). The district court therefore erred by concluding that defendants satisfied the requirements of the MMMA as a matter of law. Whether each defendant suffered from a serious or debilitating medical condition is yet another matter for further proceedings.[11]

The circuit court's decision to reverse the district court's bindover ruling is affirmed, and this case is remanded for further proceedings. We do not retain jurisdiction.

OWENS, J., concurred.

O'CONNELL, P.J. (*concurring*). I concur with the majority's decision to affirm the circuit court's decision to reinstate the charges against defendants, but write separately because I interpret the statutory defenses at issue more narrowly than does the majority, and also to elaborate on issues raised in the briefs and at oral argument but not fully addressed by the majority opinion.

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[11] Defendants tangentially raise the issue regarding whether the prosecution is entitled to discovery of their medical records. The prosecution does not substantively address this argument in its appellate brief. We find that this issue is not currently ripe for review and decline to address it without the benefit of full briefing by the parties. The circuit court was evidently cognizant of the implications of further discovery, and presumably further proceedings will occur with respect to it.

On November 4, 2008, the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, was passed by initiative and went into effect soon thereafter. It is without question that this act has no effect on federal prohibitions of the possession or consumption of marijuana.[1] The Controlled Substances Act, 21 USC 801 *et seq.*, classifies marijuana as a schedule 1 substance, 21 USC 812(c)(10), meaning that Congress recognizes no acceptable medical uses for it, and its possession is generally prohibited. See *Gonzales v Raich*, 545 US 1, 27; 125 S Ct 2195; 162 L Ed 2d 1 (2005); *United States v Oakland Cannabis Buyers' Coop*, 532 US 483, 491; 121 S Ct 1711; 149 L Ed 2d 722 (2001). As a federal court in Michigan recently recognized, "It is indisputable that state medical-marijuana laws do not, and cannot, supercede federal laws that criminalize the possession of marijuana." *United States v Hicks*, 722 F Supp 2d 829, 833 (ED Mich, 2010), citing *Gonzales*, 545 US at 29 ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."), *United States v $186,416.00 in US Currency*, 590 F3d 942, 945 (CA 9, 2010) ("The federal government has not recognized a legitimate medical use for marijuana, however, and there is no exception for medical marijuana distribution or possession under the federal Controlled Substances Act"), *United States v Scarmazzo*, 554 F Supp 2d 1102, 1109 (ED Cal, 2008) ("Federal law prohibiting the sale of marijuana is valid, despite any state law suggesting medical necessity for marijuana"), and *United States v Landa*, 281 F Supp 2d 1139, 1145 (ND Cal, 2003) ("[O]ur Congress has flatly outlawed marijuana in this

[1] "Marijuana" and "marihuana" are both acceptable spellings for the name of this drug. The spelling "marihuana" is used in the Public Health Code, MCL 333.1101 *et seq.*, but "marijuana" is the more commonly used spelling and so will be used throughout this opinion.

country, nationwide, including for medicinal purposes."). Accordingly, "the MMMA has no effect on federal law, and the possession of marijuana remains illegal under federal law, even if it is possessed for medicinal purposes in accordance with state law." *Hicks*, 722 F Supp 2d, at 833, citing *Gonzales*, 545 US at 27 ("The [Controlled Substances Act] designates marijuana as contraband for any purpose[.]").

Further, the MMMA does not create any sort of affirmative *right* under state law to use or possess marijuana. That drug remains a schedule 1 controlled substance under the Public Health Code, MCL 333.7212(1)(c), meaning that "the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision," MCL 333.7211. The MMMA does not repeal any drug laws contained in the Public Health Code, and all persons under this state's jurisdiction remain subject to them. Accordingly, mere possession of marijuana remains a misdemeanor offense, MCL 333.7403(2)(d), and the manufacture of marijuana remains a felony, MCL 333.7401(2)(d).

Perhaps surprisingly, the purpose of the MMMA is a bit less revolutionary than one might suspect. MCL 333.26422(b) states as follows:

> Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.

The MMMA does not codify a *right* to use marijuana; instead, it merely provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law. Although these individuals are still violating the Public Health Code by using marijuana, the MMMA sets forth particular circumstances under which they will not be arrested or otherwise prosecuted for their lawbreaking. In so doing, the MMMA reflects the practical determination of the people of Michigan that, while marijuana is classified as a harmful substance and its use and manufacture should generally be prohibited, law enforcement resources should not be used to arrest and prosecute those with serious medical conditions who use marijuana for its palliative effects.[2]

Accordingly, the MMMA functions as an affirmative defense to prosecutions under the Public Health Code, allowing an individual to use marijuana by freeing him or her from the threat of arrest and prosecution if that individual meets *all* the requirements of the MMMA, while permitting prosecution under the Public Health Code if the individual fails to meet any of the requirements set forth by the MMMA.[3] See MCL 333.26422(b); MCL 333.26427(e).

The problem, however, is that the MMMA is inartfully drafted and, unfortunately, has created much

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[2] Again, all individuals who possess, use, or manufacture marijuana in this state, including qualifying patients who have been issued a valid registry identification card and their primary caregivers, are violating the federal Controlled Substances Act and are still subject to arrest and punishment for doing so.

[3] Of course, because the MMMA protects against enforcement of the Public Health Code under only limited circumstances, an individual who is using marijuana must satisfy *all* the requirements of the MMMA or else remain subject to arrest and prosecution for violating the Public Health Code.

confusion regarding the circumstances under which an individual may use marijuana without fear of prosecution. Some sections of the MMMA are in conflict with others, and many provisions in the MMMA are in conflict with other statutes, especially the Public Health Code. Further, individuals who do not have a serious medical condition are attempting to use the MMMA to flout the clear prohibitions of the Public Health Code and engage in recreational use of marijuana. Law enforcement officers, prosecutors, and trial court judges attempting to enforce both the MMMA and the Public Health Code are hampered by confusing and seemingly contradictory language, while healthy recreational marijuana users incorrectly view the MMMA as a de facto legalization of the drug, seemingly unconcerned that marijuana use remains illegal under both state and federal law.

In this opinion, I will attempt to cut through the haze surrounding this legislation. In so doing, I note that neither my opinion nor the majority's opinion constitutes an attempt to *make* the law. We are simply interpreting an act passed by the people of this state. It is up to the Legislature to revise this act as it sees fit.[4]

[4] I have no doubt that in the minds of some voters in this state, legalizing marijuana would be good public policy. Others who approved this act were under the impression that the act's specific purpose was limited to permitting the medical use of marijuana by registered patients with debilitating medical conditions. Still others voted against this change in the law. Whether decriminalizing the medical use of marijuana is a good or bad idea for this state is a question of public policy for our state legislators, the executive branch, and the citizenry to ponder. It is not for the courts to set public policy. This Court's responsibility is simply to interpret this act. Citizens of this state wishing for revision of the MMMA should take such appropriate action as attending the public hearings on pertinent pending legislation or communicating with their elected representatives.

I. GUIDANCE IS NEEDED

In light of the majority opinion's resolution of the issues in this case, one might ask why this concurrence is of any importance. The answer is simple: delay and neglect in addressing the proper scope and application of the MMMA invites and perpetuates error. Judges bear the responsibility of applying, interpreting, and shaping the law, and we neglect this responsibility when we fail to explain, with well-reasoned analysis, our agreement or disagreement with pertinent points of law. Failure to engage in the debate hinders our hunt for a statute's intended purpose and generally stifles the formation of sound legal principles. If we all gently withdrew our voices from the arena of competing ideas, then mistakes would go unchallenged, and the process of correction could suffer nearly insurmountable setbacks.

This case proves the rule. At oral argument and in their briefs, both parties raised numerous questions regarding the proper interpretation of the provisions of the MMMA. It was made clear that many provisions of this act are subject to multiple interpretations and that obfuscating words and phrases in the MMMA have caused much confusion on the part of both law enforcement officials and defense attorneys wishing to advise their clients of their rights and protections under the law. Defense counsel was particularly concerned that the law was not specific enough for him to advise his clients on both the strictures of the MMMA and the ramifications of certain provisions. The prosecuting attorney noted that he was unable to advise municipalities, townships, the police, and others regarding whether particular conduct was permitted or prohibited under the act. More generally, in the absence of clear direction from the appellate courts, many citizens be-

lieve that the MMMA supports and legitimizes the marijuana business.

As defense counsel emphasized at oral argument this Court could take a case-by-case approach to resolving all the issues found in the MMMA, addressing particular provisions piecemeal and in isolation over years and leaving defendants, prosecutors, law enforcement, entrepreneurs, cities, municipalities, townships, and others in a state of confusion for a very, very long time.[5] Or, in one well-thought-out opinion, it could interpret the essential provisions of this act, providing a framework for future application of the new statute and giving fair notice to all regarding the scope of acceptable conduct under the MMMA. Counsel for both parties advised this Court against interpreting the MMMA in a piecemeal fashion because of the confusion that would persist. I agree, and this opinion is my attempt to establish the framework for the law and address those issues not resolved by the majority opinion.

I also agree with counsel that it is the responsibility of this Court to interpret this law in a way that gives

[5] Under this piecemeal approach, each case would address a separate, specific issue involving the MMMA. The lower courts of all 83 Michigan counties would then opine on each issue (in some cases arriving at different results). The cases would be appealed to this Court, which would in response issue published opinions binding all trial courts in the state. While this may be an efficient and orderly process for some areas of the law, I suspect that the confusion regarding the circumstances under which an individual using or possessing marijuana is protected from arrest or conviction could result in some citizens losing both their liberty and their property. I am reminded of a statement often attributed to the eighteenth-century British statesman Edmund Burke: "All that is necessary for the triumph of evil is for good men to do nothing." In this case, the evil at issue is the loss of liberty or property suffered by individuals who honestly believe that they are in compliance with the MMMA at the hands of prosecutors and law enforcement officials who honestly believe that they are properly enforcing the clear provisions of the Public Health Code.

fair notice to all concerned regarding what conduct is allowed and what conduct is prohibited under this law. Without some guidance from the appellate courts, the lower courts will continue to stumble about. The system of justice will become hopelessly unpredictable and intolerably frustrating for the people it was established to serve. Right or wrong, we all have the duty to interpret the law to the best of our abilities. Any delay in this process frustrates those citizens who are making a good faith effort to adhere to the law.

II. ONE STATUTE, COMPETING GOALS

Proposal 1 on the 2008 ballot, which presented the MMMA to the people of this state for a vote, described the proposed MMMA as purporting to do the following:

> • Permit physician approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.
>
> • Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility.
>
> • Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.
>
> • Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.

Yet in its summary of the intended effect of the MMMA, this ballot proposal obfuscated the more confusing and contradictory aspects of the actual legislation. The

statutory language creates a maze for the reader, making the statute susceptible to multiple interpretations.

The MMMA is based on model legislation provided by the Marijuana Policy Project (MPP), a lobbying group based in Washington, D. C., and organized to decriminalize both the medical *and* recreational uses of marijuana. The statutory language of the MMMA was drafted by Karen O'Keefe, the director of state policies at the MPP in Washington, D.C.[6] Interestingly, the confusion caused by reading the statute piecemeal and out of context has seemed to work to the advantage of those who share the MPP's wish for outright legalization of marijuana. Taking advantage of the confusion from the MMMA, proponents of liberalized marijuana regulations claim that the MMMA legalizes shops that sell marijuana, collective growing facilities, and the cultivation and sale of marijuana as a commercial crop. Further, those individuals who primarily wish to use marijuana recreationally are taking advantage of "pot docs" who will give them written certifications for the medical use of marijuana without bothering to establish either a bona fide physician-patient relationship or the existence of a terminal or debilitating medical condition.

In looking at the specific provisions of the MMMA, it is important to remember that this act is based on a premise—namely, that marijuana can be used for medical purposes—that is in obvious contravention to the Public Health Code. By classifying marijuana as a schedule 1 controlled substance under the Public

[6] On its website, the MPP advertises its involvement in the ballot initiative, noting, "Michigan passed MPP's ballot initiative to permit terminally and seriously ill patients to use medical marijuana with their doctors' approval . . . ." Marijuana Policy Project, Our History <http://www.mpp.org/about/history.html> (accessed September 10, 2010).

Health Code, the people of this state, through their elected representatives, have determined that marijuana "has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." MCL 333.7211. This clearly contravenes the rationale for the MMMA, which indicates that provisions should be made to permit seriously ill individuals to use marijuana for medical purposes without fear of arrest because "[m]odern medical research . . . has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions." MCL 333.26422(a).

The obvious solution to this problem would simply be to amend the Public Health Code to make marijuana a schedule 2 or schedule 3 controlled substance.[7] With such an amendment, state law would not prohibit a licensed prescriber from prescribing marijuana if, in the prescriber's professional opinion, the drug would effectively treat the pain, nausea, and other symptoms associated with certain debilitating medical conditions. MCL 333.7303a. Curiously, however, the MMMA has no provisions to repeal the contradictory portions of the Public Health Code or to ensure the controlled, monitored distribution of marijuana to seriously ill individuals in accordance with the well-tested provisions of the

[7] A substance may be included in schedule 2 if the substance has a high potential for abuse and that abuse may lead to severe psychic or physical dependence, but the substance also has "currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions." MCL 333.7213. A substance may be included in Schedule 3 if the substance has a potential for abuse less than a schedule 1 or schedule 2 controlled substance and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence, but the substance also has "currently accepted medical use in treatment in the United States." MCL 333.7215.

Public Health Code.[8] Instead, it creates a new system, untested in this state, in which a physician merely "certifies" that an individual would likely "benefit" from using marijuana to alleviate pain, nausea, or other symptoms, while leaving it to the patient to register under the act and to self-regulate the quality and quantity of marijuana the patient uses.

Accordingly, the confusing nature of the MMMA, and its susceptibility to multiple interpretations, creates an untoward risk for Michiganders.[9] Reading the statute carelessly or out of context could result in jail or prison time for many of our citizens. Until our Supreme Court and the Legislature clarify and define the scope of the MMMA, it is important to proceed cautiously when seeking to take advantage of the protections in it. Those citizens who proceed without due caution will become test cases and may lose both their property and their liberty.[10]

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[8] Critics might argue that reclassifying marijuana under the Public Health Code would be ineffective because it would require doctors to ignore federal provisions banning them from prescribing marijuana. Yet it is important to remember that the entirety of the MMMA stands in conflict with federal law. Accordingly, such criticism would less likely stem from a desire to adhere to federal law than from a desire to steer the risk associated with breaking federal law away from those perceived as less willing to take that risk. The Catch-22 here is that doctors would not, and should not, put their medical licenses at risk.

[9] At the preliminary examination in this matter, the learned Judge Robert Turner, a veteran of many years on the bench, stated that the MMMA "is one of the worst pieces of legislation I have ever seen in my life." In interpreting this act, Judge Turner assumed that the sole purpose of it was to set forth the rules and regulations for the medical use of marijuana in Michigan, but it is becoming increasingly clear that the act is being used as a subterfuge to legalize marijuana in Michigan. It is well crafted in its obfuscations, ambiguous language, and confusingly overlapping sections.

[10] Until our Supreme Court provides a final comprehensive interpretation of this act, it would be prudent for the citizens of this state to avoid

III. THROUGH THE MAZE

The MMMA consists of 10 sections detailing the protections, procedures, and defenses surrounding the medical use of marijuana in this state. However, much of the confusion caused by the MMMA arises from difficulty understanding the interplay among §§ 4, 7, and 8. Section 4 addresses the protections afforded to qualifying patients, caregivers, and others under the act:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, 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.
>
> (b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through

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all use of marijuana if they do not wish to risk violating state law. I again issue a stern warning to all: please do not attempt to interpret this act on your own. Reading this act is similar to participating in the Triwizard Tournament described in J.K. Rowling's *Harry Potter and the Goblet of Fire*: the maze that is this statute is so complex that the final result will only be known once the Supreme Court has had an opportunity to review and remove the haze from this act.

the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:

(1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and

(3) any incidental amount of seeds, stalks, and unusable roots.

(c) A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:

(1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

(e) A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substances.

(f) A physician 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 the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau, solely for providing written certifications, in the course of a bona fide physician-patient relationship and after the physician has completed a full assessment of the qualifying patient's medical history, or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition, provided that nothing shall prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions.

(g) A person 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 providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana.

(h) Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited.

(i) A person 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, solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

(j) A registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States that allows the medical use of marihuana by a visiting qualifying patient, or to allow a person to assist with a visiting qualifying patient's medical use of marihuana, shall have the same force and effect as a registry identification card issued by the department.

(k) Any registered qualifying patient or registered primary caregiver who sells marihuana to someone who is not allowed to use marihuana for medical purposes under this act shall have his or her registry identification card revoked and is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both, in addition to any other penalties for the distribution of marihuana. [MCL 333.26424.]

The unusual structure of this section reflects the intent of the MMMA as set forth in MCL 333.26422(b). Instead of describing an affirmative right to grow, possess, or use marijuana, § 4 simply indicates that registered qualifying patients, primary caregivers, and physicians are protected from arrest, prosecution, or penalty if they meet the specific requirements set forth.[11]

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[11] Most legislation either grants rights and privileges to citizens by stating that a person may do a certain activity or it makes certain activity illegal. In either circumstance, the statute affirmatively indicates what an individual may or may not do. The MMMA does the opposite; instead of granting a right or implementing a prohibition, the statute leaves the underlying prohibition of the manufacture, possession, or use of marijuana intact and states that individuals meeting certain criteria "shall not be subject to arrest, prosecution, or penalty" for using, possessing, or growing marijuana under specified circumstances. As a result, this state finds itself in the unusual position of having a statute that precludes enforcement, in certain circumstances, of another statute that makes certain activity illegal. Needless to say, this decision to use one statute to undercut the enforceability of another statute, instead of simply redefining the circumstances under which marijuana use and possession are legal in this state, greatly adds to the confusion that surrounds this act.

A closer look at the pertinent subsections of § 4 further shows this to be the case. Section 4(a) specifies that a qualifying patient with a registry identification card is not subject to arrest, prosecution, or penalty "for the medical use of marihuana in accordance with this act . . . ." MCL 333.26424(a). MCL 333.26423(h) defines a "qualifying patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition." Accordingly, even if a qualifying patient has a registry identification card, that patient is entitled to protection under the MMMA only if he or she has also been diagnosed with a debilitating medical condition. In order to "diagnose" a patient, a physician must "determine the identity of (a disease, illness, etc.) by a medical examination." *Random House Webster's College Dictionary* (2001). Accordingly, regardless of whether an individual has a registry identification card, that individual is not a "qualifying patient" under the MMMA and, therefore, is not entitled to the act's protections unless a physician has determined that the patient suffers from an identifiable debilitating condition.[12]

Under § 4(a), a qualifying patient may engage in the "medical use" of marijuana without fear of arrest. Interestingly, the term "medical use," as defined by the MMMA, is much broader than one would anticipate. MCL 333.26423(e) defines the term "medical use" as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transpor-

[12] Thus, an individual is not entitled to protection under the MMMA if a physician has acknowledged only that the individual suffers from *symptoms* of a disease or illness (such as pain, nausea, or anxiety) but has not actually diagnosed that person as having a debilitating disease or illness. Also, the term "medical use" is only employed in specific sections of this act, while the term "use" is employed in other sections, thereby suggesting two separate meanings for the term "use" within the act.

tation 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." The definition of "medical use" is unexpectedly broad: although a qualifying patient may not sell marijuana, just about anything else an individual can do with marijuana would be considered *medical use* under the MMMA.[13]

Section 4(a) also provides that a qualifying patient is not subject to arrest, prosecution, or penalty for the medical use of marijuana if that patient has no more than 12 marijuana plants in an enclosed, locked facility. MCL 333.26424(a). Alternatively, the qualifying patient may designate a primary caregiver to grow up to 12

[13] An example of this conflict is § 4(a) and § 7(b)(2) of the act. Section 4(a) allows 18-year-old high school students to grow and use marijuana if they are properly registered with the state. MCL 333.26424(a). Section 4(a) also states that as long as he or she is a qualifying patient who has a registry card, the student "shall not be subject to arrest, prosecution, or penalty in any manner" whatsoever. *Id*. Reading § 4(a) in isolation allows 18-year-old students to possess marijuana in our schools without being subject to arrest, prosecution, or penalty in any manner whatsoever. Conflicting with § 4(a) is § 7(b)(2)(B), which provides that one may not possess marijuana on the grounds of any preschool or primary or secondary school. MCL 333.26427(b)(2)(B).

Sections 4(b) and 7(b)(5) are also in conflict. Section 7(b)(5) states that a person may not use marijuana if that person does not have a serious or debilitating medical condition. MCL 333.26427(b)(5). Section 4(b) allows primary caregivers to assist qualifying patients. MCL 333.26424(b). Nothing in § 4(a) or (b) allows primary caregivers to use marijuana, unless they qualify under § 4(a). The conflict arises because the act allows primary caregivers to grow marijuana, but it prohibits those who are not "qualifying patients" to use marijuana. I note that caregivers receive registration cards under the statute but are not required to have a "written certification" stating they have a debilitating condition. The only logical conclusion is that "primary caregivers" who do not possess a "qualifying patient" registry card are not permitted to use marijuana under the MMMA.

plants in an enclosed, locked facility. However, because the statute provides that a qualified patient may be in possession of the specified number of marijuana plants only if the patient has not designated a primary caregiver to grow marijuana for him or her, if the qualified patient has made such a designation, the statute provides that qualified patient no protection from arrest if found in the possession of any marijuana plants.

Section 4(b) specifies the circumstances in which a registered primary caregiver is protected from arrest. MCL 333.26424(b). MCL 333.26423(g) defines a "primary caregiver" as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." Section 4(b) specifies that a registered primary caregiver may assist *only* a qualifying patient[14] *to whom he or she is connected through the registration process* with the medical use of marijuana. Accordingly, a primary caregiver may not assist *any* qualifying patient in the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marijuana unless *that* caregiver is connected to *that* qualifying patient

[14] The act uses both the terms "qualifying patient" and "patient." While qualifying patients enjoy greater protections under § 4 than patients do under § 8, both qualifying patients and patients must follow all the provisions of the act, including the requirement that all patients growing marijuana do so in an enclosed, locked facility. Growing marijuana in the backyard thus subjects the grower and the homeowner to the penalties found in the Public Health Code. This requirement is consistent with the language of the ballot proposal. Whether each patient's 12 marijuana plants must be grown in a separate locked facility is an issue best left for another day. Those caregivers who commingle various patients' plants in one facility may look forward to becoming test cases. Primary caregivers may have only five patients and, if the qualifying patient designates him- or herself as his or her own caregiver, then that caregiver is allowed only four additional patients. MCL 333.26426(d).

through registration with the Department of Community Health (DCH). Section 6(d) specifies that "each qualifying patient can have no more than 1 primary caregiver, and a primary caregiver may assist no more than 5 qualifying patients with their medical use of marihuana." MCL 333.26426(d). Accordingly, no primary caregiver who wishes to benefit from the protections offered by the MMMA may assist more than five qualifying patients in acquiring, possessing, cultivating, manufacturing, using, internally possessing, delivering, transferring, or transporting marijuana, presuming that the five qualifying patients in question are connected to that caregiver through the department's registration process.[15] Any assistance that any primary caregiver provides on behalf of any qualifying patient to whom that caregiver is *not* connected by the registration process is not subject to the protections of the MMMA.

Similarly, a primary caregiver may not possess more than "12 marihuana plants kept in an enclosed, locked facility" for each qualifying patient to whom the caregiver is connected through the registration process and who has that patient's permission to cultivate the allotment of marijuana plants. MCL 333.26424(b)(2). MCL 333.26423(c) defines an "enclosed, locked facility"

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[15] Many Michiganders are faced with the often unwelcome intrusion of medical-marijuana dispensaries in their communities, and local governments are faced with the difficult task of determining whether they are obliged to allow such dispensaries to operate in their communities. Yet, interestingly, under a proper reading of § 4(b), the operation of a dispensary would make little economic sense, because in order to abide by the provisions of the MMMA, the dispensary would have to be operated entirely by one individual, and could have, at most, five customers. This is because, first, the MMMA has no provision for the sale of marijuana and, second, a primary caregiver is permitted to receive compensation only for the costs associated with assisting a qualifying patient to whom he or she is connected through registration with the DCH.

as "a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient." Although it is unclear from the statute whether each grouping of 12 plants must be in a separate enclosed, locked facility,[16] it *is* clear that under no circumstances may a primary caregiver be in possession of more than a total of 60 marijuana plants, presuming that the primary caregiver acts in that capacity for the statutory maximum of five qualifying patients, all of whom have given the caregiver the authority to cultivate marijuana for them. Because a qualified patient who has designated a primary caregiver to cultivate marijuana for him or her may not him- or herself have possession of any marijuana plants, the primary caregiver is the only individual permitted to be in possession of the qualifying patient's marijuana plants under this circumstance. Accordingly, this means that each set of 12 plants permitted under the MMMA to address the purported medical needs of a particular qualifying patient must be kept in an enclosed, locked facility that can only be accessed by one individual, either the qualifying patient or the qualifying patient's primary caregiver; any other individual with access to the marijuana plants designated for a particular quali-

[16] Anyone growing more than 12 plants in one separate enclosed, locked facility should not complain or be surprised when or if a federal drug enforcement agent appears. Again, under federal law, cultivating marijuana is illegal. Growing large quantities of marijuana in an enclosed, locked facility is the same as waving a red flag in front of a 3,000-pound bull. Any questions in this regard are quickly answered by reading the Gus Burns article in the April 22, 2010, *Saginaw News*, *Federal agents and sheriff's deputies say seized marijuana in Saginaw County was illegal and not medicine*. <http://www.mlive.com/news/saginaw/index.ssf/2010/04/federal_agents_and_sheriffs_de.html> (accessed September 13, 2010). Caregivers who do not want to become a test case should proceed with caution. No clear, reliable, or lasting resolution to this conflict between state and federal law seems in view.

fying patient would be considered in possession of marijuana and subject to arrest and prosecution for violating the Public Health Code.[17]

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[17] It is important to remember that under the laws of this state, "[a] person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992). "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance." *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005). The "essential" element is that a defendant has "dominion or right of control over the drug with knowledge of its presence and character." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003) (quotation marks and citation omitted). "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence . . . and the reasonable inferences that arise from the evidence" are required to prove that a defendant had constructive possession. *People v Brown*, 279 Mich App 116, 136-137; 755 NW2d 664 (2008). Accordingly, an individual who places himself in the proximity of marijuana is at risk of being charged with possession of the substance.

In light of these rules concerning what constitutes possession, the MMMA places the entire burden of cultivating a particular qualifying patient's marijuana plants on one individual (either the qualifying patient or his or her primary caregiver). No other individual can legally even water the plants or enter the enclosed, locked facility to turn on a grow light without risking arrest and prosecution for violating the Public Health Code. This means that primary caregivers and qualifying patients cannot legally form a cooperative and grow marijuana in a shared facility without violating the MMMA and thus being subject to arrest and prosecution under the Public Health Code.

Presumably the drafters affiliated with the Marijuana Policy Project agree. Diane Byrum, a spokesperson for the proposal indicated that "[t]he Michigan proposal wouldn't permit the type of cooperative growing that allows pot shops to exist in California. Those kinds of operations are what have faced federal crackdowns." Satyanarayana, *Is Marijuana Good Medicine?* Detroit Free Press, October 25, 2008, available at <http://www.freep.com/article/20081025/NEWS15/810250341/Is-marijuana-good-medicine> (accessed September 10, 2010). Accordingly, before the November 2008 vote on this ballot proposal, even the drafters of the MMMA were unequivocal that the statute would not permit marijuana growing cooperatives in Michigan.

Section 4(e) permits a registered primary caregiver to receive compensation for the costs associated with assisting a registered qualifying patient in the medical use of marijuana. MCL 333.26424(e). However, under § 4(b), a registered primary caregiver may assist only a registered qualifying patient to whom he or she is connected through registration with the DCH. MCL 333.26424(b). Accordingly, §§ 4(b) and 4(e) can only be reconciled by concluding that the primary caregiver's "compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana" will come from only a registered qualifying patient to whom he or she is connected through the department's registration process.[18] MCL 333.26424(e). Because a primary caregiver may assist only the five or fewer qualifying patients to whom the caregiver is connected through the registration process, there is no circumstance under the MMMA in which the primary caregiver can provide assistance to any *other* qualifying patient, and receive compensation in exchange, without being subject to arrest and prosecution under the Public Health Code.[19]

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[18] Stated another way, only the person the qualifying patient names as his or her primary caregiver on the registration form can receive compensation for associated costs, and that compensation can only be received from the "qualifying patient to whom he or she is connected through the department's registration process . . . ." MCL 333.26424(b).

[19] A familiar example may help clarify how the provisions of the MMMA are connected to each other. Michigan has statutory qualifications for persons entering into a state of matrimony. See MCL 551.1 (restricting marriage to couples of opposite gender); MCL 551.3 (disqualifying couples who are of specified, close degrees of familial affinity). There is also a registration requirement in the form of a marriage license. MCL 551.2. Married couples have many statutory rights and duties. See, e.g., MCL 205.93(3)(a) (the right to transfer property and free from use tax); MCL 600.2162 (the right to not testify against a spouse); MCL 552.7 (authorizing actions for separate maintenance). The registration, or licensing, requirement inheres in all statutory references to marriage,

In addition, a primary caregiver may receive compensation for only the *costs* associated with assisting a registered qualifying patient in the medical use of marijuana. *Id*. This simply means that the primary caregiver may receive reimbursement for monetary expenses incurred in the course of assisting the qualifying patient in the medical use of marijuana. The statute does not authorize compensation for the labor involved in cultivating marijuana or for otherwise assisting the qualifying patient in its use, nor does it indicate that the primary caregiver may profit financially from this role.

Section 4(f) protects a physician from arrest for providing written certifications *if* the certifications were provided in the course of a bona fide physician-patient relationship *and* if the physician first completed a full assessment of the qualifying patient's medical history. MCL 333.26424(f). Unfortunately, the statute does not indicate how the existence of an authentic physician-patient relationship can be discerned. However, a fact-finder might wish to ask certain questions when determining whether the physician-patient relationship was authentic, including (a) whether the physician signing the written certification form was the patient's primary caregiver, (b) whether the patient had an established history of receiving medical care from that physician, (c) whether the physician diagnosed a

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and thus there is no need to repeat it with each statutory mention. For example, MCL 206.311(3) authorizes the filing of joint tax returns by "husband and wife," but does not reiterate that this concerns couples licensed to marry each other. To conclude that any married person, qualified and registered under the laws of this state, may file jointly with any other married person, so qualified and registered, would be nonsensical and lead to an absurd result. As the statutory registration, or licensing, requirement carries through all marriage law, so should the registration requirement of the MMMA be understood as carrying through all provisions of that act.

particular debilitating medical condition instead of simply stating that a patient's reported symptoms must be the result of some such unidentified condition, (d) whether the physician was paid specifically to sign the written certification, and (e) whether the physician has a history of signing an unusually large number of certifications. Needless to say, those doctors hired specifically to sign certification forms are suspect and deserve special scrutiny by prosecutors, the DCH, and the legislative oversight committees of both the House and Senate.[20]

Section 4(f) also indicates that

> [a] physician shall not be subject to arrest . . . for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition . . . ." [MCL 333.26424(f)]

This provision does not create an alternative scenario under which a physician may issue a written certification to a patient in the absence of a bona fide physician-patient relationship with that patient or a full assessment of the patient's medical history. Instead, this provision merely provides a physician with additional protection from legal penalties, or disciplinary action by

[20] The DCH should keep track of the number of certification forms each doctor signs. If it is determined that certain doctors are collecting money for routinely signing the forms, those doctors should be disqualified from participation in the Michigan medical marihuana program. It is beyond question that one doctor treating 100, 500, or 1,000 terminally ill patients in the course of 10-minute examinations has *not* been acting pursuant to bona fide physician-patient relationships. A revolving-door, rubber-stamp, assembly-line certification process does not constitute activity "in the course of a bona fide physician-patient relationship," especially when the doctor fails to set any medical boundaries for his or her patients and fails to monitor the patient's progress on a regular basis.

a professional licensing board if the physician opines in general that an individual might benefit from the medical use of marijuana.

Section 4(i) provides that "[a] person shall not be subject to arrest . . . solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i). In a possible attempt at chicanery, the drafters of the act thus slipped into this subsection the term "*person*," instead of discussing the protections and responsibilities of a "caregiver" or "qualifying patient." Reading § 4(i) in isolation could cause one to conclude that it constitutes a nullification of all provisions in the Public Health Code that punish individuals who come in contact with marijuana. However, when reading § 4(i) in context, it is clear that it is not, and is not intended to function as, a permission slip to manufacture or sell marijuana in Michigan. First, because the MMMA does not grant *rights* to anyone, the use of the word "person" instead of the more specific terms "qualifying patient" and "primary caregiver" does not constitute an expansion of any rights. Instead, although a "person" may not be subject to arrest under § 4(i) for "assisting a registered qualifying patient with using or administering marihuana," it is clear that this protection does not extend to assisting a registered qualifying patient in the *medical use* of marijuana as defined by MCL 333.26423(e). Instead, this protection from arrest only extends to providing assistance in "using or administering" marijuana, which is much more limited. Such assistance would be in the nature of holding or rolling a marijuana cigarette, filling a pipe, or preparing marijuana-laced brownies for the qualifying patient suffering from a terminal

illness or a debilitating condition. Section 4(i) does not protect persons generally from arrest for acquiring, possessing, cultivating, manufacturing, delivering, transferring, or transporting marijuana on behalf of the qualifying patient.

Finally, § 4(k) imposes a penalty on those registered qualifying patients or registered primary caregivers who sell marijuana to "someone who is not allowed to use marihuana for medical purposes under this act . . . ." MCL 333.26424(k). The penalty is severe: a violator faces up to two years in prison or a fine of up to $2,000, or both. However, that this subsection specifies a particular punishment for a specific type of violation does not mean that, by default, the sale of marijuana to someone who *is* allowed to use marijuana for medical purposes under this act is permitted. The MMMA does *not* give any individual permission to sell marijuana in the state of Michigan for any purpose. Instead, the MMMA merely identifies circumstances under which qualifying patients and primary caregivers are protected from arrest and prosecution for the "medical use" of marijuana. If the drafters of this statute had wanted to legalize the sale of marijuana to qualifying patients from primary caregivers or other qualifying patients, they would have included the term "sale" in the definition of "medical use." MCL 333.26423(e). They did not and, therefore, the sale of marijuana is not a permitted activity under § 4.[21] Stated differently, the

[21] As explained earlier, § 4(e) permits a primary caregiver to receive compensation for the *costs* associated with assisting a registered qualifying patient to whom he or she is connected through the DCH's registration process. Again, this means that the primary caregiver may receive reimbursement for monies paid in the course of assisting the qualifying patient in the medical use of marijuana, but may not receive compensation or otherwise profit from the labor involved in cultivating marijuana or otherwise assisting the qualifying patient in its medical use.

MMMA does not legalize the sale of marijuana to any individual, even one registered as a qualifying patient.[22]

Section 7 of the act is very specific about use of marijuana for medical purposes. It provides as follows:

> (a) The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act.
>
> (b) This act shall not permit any person to do any of the following:
>
> (1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.
>
> (2) Possess marihuana, or otherwise engage in the medical use of marihuana:
>
> (A) in a school bus;
>
> (B) on the grounds of any preschool or primary or secondary school; or
>
> (C) in any correctional facility.
>
> (3) Smoke marihuana:
>
> (A) on any form of public transportation; or
>
> (B) in any public place.
>
> (4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.
>
> (5) Use marihuana if that person does not have a serious or debilitating medical condition.
>
> (c) Nothing in this act shall be construed to require:
>
> (1) A government medical assistance program or commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marihuana.

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[22] Accordingly, I can find no circumstance under which the MMMA *legalizes* the sale of marijuana by medical-marijuana dispensaries. The statute simply does not permit that activity.

(2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana.

(d) Fraudulent representation to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution shall be punishable by a fine of $500.00, which shall be in addition to any other penalties that may apply for making a false statement or for the use of marihuana other than use undertaken pursuant to this act.

(e) All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act. [MCL 333.26427.]

When interpreting § 7, it is important to remember that an individual acquires protection from arrest and prosecution under this act only if suffering from serious or debilitating medical condition. A person without such a condition, as defined by the act and diagnosed by a physician, is prohibited from using marijuana and remains subject to the penalties set forth in the Public Health Code. Section 7(b)(5) acts as an affirmative defense to a prosecution under the Public Health Code, meaning that the defendant has the responsibility of establishing that he or she was suffering from a serious or debilitating medical condition as a prerequisite to establishing a medical-marijuana defense. Once the defendant has presented sufficient evidence to establish the existence of a sufficiently serious medical condition, the prosecution may seek to rebut it, including by cross-examination of the defendant's physician regarding whether the defendant had a serious or debilitating medical condition. Of course, the prosecution may also call medical expert witnesses to rebut the defendant's evidence.

A defendant asserting the medical-marijuana defense bears the burden of establishing the existence of a

qualifying medical condition; a mere assertion is not sufficient.[23] Further, it logically follows that a defendant resorting to that defense by placing into evidence his or her medical condition necessarily waives any physician-patient privilege that would otherwise limit a prosecutor's prerogative to question the defendant's physician or examine pertinent medical records.

In the present case, both defendants contend that they are entitled to assert an affirmative defense under § 8 of the MMMA. Section 8 addresses affirmative defenses for patients and caregivers under the act. It reads as follows:

> (a) Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:
>
> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;

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[23] Although most qualifying patients and primary caregivers apparently believe that they are immune from arrest or prosecution if they possess registry identification cards, the MMMA makes no such provision. Instead, the act leaves a qualifying patient or primary caregiver subject to criminal proceedings for any conduct not for the purposes of alleviating the qualifying patient's debilitating medical condition or its symptoms. MCL 333.26424(a) and (b); MCL 333.26427(b)(5). In my opinion, all certification forms should include a warning that, even though the patient has a registry identification card, the patient could still be prosecuted for conduct that is not in strict accordance with the provisions of the MMMA.

(2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

(b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

(c) If a patient or a patient's primary caregiver demonstrates the patient's medical purpose for using marihuana pursuant to this section, the patient and the patient's primary caregiver shall not be subject to the following for the patient's medical use of marihuana:

(1) disciplinary action by a business or occupational or professional licensing board or bureau; or

(2) forfeiture of any interest in or right to property. [MCL 333.26428.]

In this section, the act speaks for the first time in terms of a patient instead of a qualifying patient. The purpose of § 8 is to establish an affirmative defense for those marijuana users and growers who are not registered with the state. Read out of context and with a limitless imagination, one could conclude that qualifying patients, patient caregivers, physicians, or persons in general may not be arrested or prosecuted for any actions involving marijuana, i.e., the act in essence legalizes marijuana in Michigan. But, as I have previ-

ously stated, the language of the ballot proposal and a contextual reading of the act belie this premise.

In order for defendants to assert an affirmative defense under § 8(a)(1), they must first establish that Dr. Eric Eisenbud, the physician who signed their medical-marijuana authorizations, treated them *in the course of a bona fide physician-patient relationship*, and they must further establish under § 7(b)(5) that they have a *serious or debilitating condition*. Both defendants have failed to establish either prerequisite to asserting a § 8 affirmative defense.

At issue is the phrase, "in the course of a bona fide physician-patient relationship." This phrase has three components: *physician-patient relationship*, *bona fide*, and *in the course of*. When construing a statute, a court should presume that every word has some meaning; a construction rendering some part nugatory or surplusage should be avoided. *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). "Physician-patient relationship" clearly means that a patient must have the traditional doctor-patient relationship. Use of the qualifier "bona fide" indicates that the drafters of this act were concerned about such doctors as the one in Livingston County described in part IV of this opinion who routinely sell written certifications for profit, rather than provide them for any genuine medical reason. Any such doctor is not engaging in the good-faith practice of medicine, and any such certifications must be disallowed under this act.[24] "In the course of"

[24] Some seek marijuana for treatment of depression and anxiety disorders. At the very least, the progress of such treatments should be carefully monitored by a doctor. But the MMMA appears to discard the concept of any monitoring within the "bona fide" physician-patient relationship. If monitoring of patients is not taking place, how can the physician-patient relationship be a bona fide one? Should the medical profession step forward on this issue? I note that the medical profession generally opposed the

clearly means that the bona fide relationship has been in existence beyond just one occasion. An individual who visits a doctor for the first time for the sole purpose of obtaining certification for the medical use of marijuana, especially after an arrest on drug charges, does not satisfy the requirement that the certification come about *in the course of a bona fide physician-patient relationship*. Conversely, a primary-care physician who has long been treating a patient suffering from a terminal illness or a serious or debilitating condition is certainly acting *in the course of a bona fide physician-patient relationship*.

Certain protocols must be adhered to, or elements met, before a bona fide physician-patient relationship can be established. Among these are the following: the physician must create and maintain medical records; the physician must have a complete understanding of the patient's medical history; specific medical issues must be identified and plans developed to address each; treatment must be conducted in a professional setting; the physician must, when appropriate, set boundaries for the patient; and the physician must monitor the patient's progress. Important for the treatment of most medical conditions, especially those involving chronic pain, is continuity of treatment. Some chronic-pain patients with serious or debilitating conditions need constant monitoring for their own safety. I note that, in the present case, while some of these protocols or elements were present in Dr. Eisenbud's treatment of defendants, others were lacking in both substance and process.

In order to have a bona fide physician-patient relationship, a legal duty must be established between the physi-

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MMMA because, as one official put it, " 'it's not in the public health interest to see people smoke.' " Satyanarayana, n 17 *supra*, quoting Donald Allen, director of the Office of Drug Control and Policy.

cian and his or her patient. If no duty arises from the relationship, then no legally recognizable physician-patient relationship exists. Only once a physician-patient relationship is established and a treatment plan is instituted may a physician be held liable for malpractice under Michigan law. However, by insulating a physician from "prosecution, or penalty in any manner," including "civil penalty" in connection with that physician's certification of a patient for the medical use of marijuana, § 4(f) leaves a physician so acting unaccountable in the matter to society and to his or her patient. MCL 333.26424(f). It is problematic to classify as bona fide a physician-patient relationship when the physician has no enforceable duties to the patient. In my opinion, because physicians such as Dr. Eisenbud, in the course of approving written certifications for the medical use of marijuana, do not establish a legally binding physician-patient relationship in the matter, such relationships, in the eyes of the law, are not bona fide.

In this regard, the Catch-22 for patients is found in §§ 4(f) and 8(a). Section 4(f) provides that "a physician 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 . . . ." MCL 333.26424(f). But § 8(a) of the act states that a patient can assert a medical-marijuana defense if *in the course of a bona fide physician-patient relationship* the physician makes certain statements and authorizes the patient to use marijuana. MCL 333.26428(a). It would be unusual, if not outright peculiar, for the law to recognize a physician-patient relationship if no potential liability attached to the actions of the treating physician. Because one part of the MMMA provides that no civil liability, and thus no potential malpractice liability, attaches to physicians who authorize the medical use of marijuana, while another part of the act states that a

physician must have a bona fide physician-patient relationship to assert the affirmative medical-marijuana defense, the act presents a seemingly irreconcilable internal conflict.

Adding to the confusion in this case is that, according to the record, *all* of Dr. Eisenbud's patients visited him for a single treatment plan and for no other purpose. In each instance then, the patient is not only directing the treatment plan, but setting his or her own boundaries and monitoring his or her own progress. It strains credibility to suggest that a treatment plan has already been established before the doctor has examined the patient. The confusion is resolved by simply concluding that a one-stop shopping event to obtain a permission slip to use marijuana under § 8 does not meet the requirement of § 8(a)(1) that the authorization occur in the course of a bona fide physician-patient relationship. Stated another way, a § 8 affirmative defense is not available unless the testifying physician is the patient's treating physician for the underlying serious or debilitating condition. Dr. Eisenbud was not either defendant's treating physician, and therefore the § 8 affirmative defense was not available to them.

In an attempt to explain and help this Court interpret the protections contained in the MMMA, Karen O'Keefe, who was identified in part II of this opinion as director of state policies at the MPP in Washington, D.C., filed an affidavit in this case. In the affidavit, Ms. O'Keefe stated, in paragraph 4, that she was the "principal drafter of Michigan's medical marijuana ballot initiative." In paragraph 7 she stated, "We intended for both Michigan law and MPP's model legislation to include two levels of protection," i.e., defenses, with § 4 providing the greater level of protection and § 8 a lesser level of protection. While that affidavit might assist this Court in separating

those two types of protection, it does not address any protections under either § 4 or § 8 concerning the sale of marijuana in Michigan. What it does accomplish is to confirm that the MMMA was intended to provide defenses from arrest and prosecution for the use of small amounts of marijuana for medical purposes. But neither the affidavit nor the act itself asserts that the MMMA provides any protections for the sale of marijuana in Michigan. To have authorized the sale of marijuana in Michigan, the MMMA would have had to specifically make such provision. It did not. I further note that the language of the ballot proposal did not mention that the sale of marijuana was included in the act. It is therefore clear that neither § 4 nor § 8 of the MMMA affords any protections for the sale of marijuana in Michigan.[25]

IV. WHAT MUST BE INCLUDED IN THE WRITTEN CERTIFICATION AND HOW DOES ONE OBTAIN A WRITTEN CERTIFICATION FROM A QUALIFIED PHYSICIAN?

Through no fault on the part of legitimate patients and caregivers who are taking pains in good faith to

[25] The MMMA contains a number of Catch-22 situations for the unsuspecting. The act allows someone who is properly registered to possess marijuana, but anyone receiving compensation for the marijuana from someone other than the registrant's primary caregiver may be prosecuted. The act also allows caregivers and patients to grow marijuana, but then provides that this must be done in an enclosed, locked facility. Anyone growing marijuana in his or her backyard can thus be prosecuted under the Public Health Code. Another peculiarity is that patients or their caregivers may grow marijuana, but there is no provision for the legal purchase of marijuana seeds or plants in the first instance. The act also includes no caregiver-reporting requirement, which raises the questions, How much may a caregiver charge his or her qualifying patient and how does a caregiver report the income on tax returns? Another oddity is that the act allows a patient or primary caregiver to possess 2.5 ounces of marijuana and 12 plants. MCL 333.26424(a) and (b). What is the legal consequence if the plants are all harvested at the same time and they happen to produce more than 2.5 ounces?

comply with the law and conduct themselves accordingly, the current written certification process reflects badly on them. The process also reflects badly on legitimate physicians who honestly believe that marijuana would assist their patients.

Section 3(*l*) of the MMMA defines "written certification" as

> a document signed by a physician, stating the patient's debilitating medical condition and stating that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition. [MCL 333.26424(*l*).]

In the present case, defendants' written certification forms fail to set forth their respective debilitating medical conditions and therefore are invalid on their faces. I further regard the process used to obtain the written certification under the current administrative rules as suspect and opine that § 3(*l*) is clearly the most abused section in the MMMA.[26]

I do not direct my critical comments toward those qualifying patients who do in fact have a serious debilitating condition and seek some therapeutic or palliative solace in marijuana. This act was intended to help those individuals. My comments are directed at those who are currently abusing the written certification process, i.e., the majority of the persons who are becoming certified at this time. My comments are also directed at those who are charged with the oversight of the administrative process.

At oral argument, it was revealed that a certain Livingston County doctor was selling written certifica-

[26] I reiterate that, even with a registry identification card, a qualifying patient can be prosecuted for uses of marijuana exceeding the scope of the statutory defenses. See MCL 333.26424(d)(2).

tions for $50. Apparently all one had to do to obtain a written certification to use marijuana was to show up at this doctor's house and slip $50 under the door. This history of the written certification process may in fact jeopardize the entire medical-marijuana process for those who are legitimately entitled to use it. New checks and balances on this process are certainly necessary to resolve this problem.[27]

I will set forth the histories of the MMMA and its written certification process in parts V and VI of this opinion and leave readers to form their own opinions whether the written certification process is serving its legitimate purpose or is being abused. It is within the province of our legislative and executive officials to retain or change that process. But I reiterate that in the present case both defendants' written certifications[28] did not comply with the statute and were therefore invalid *ab initio*.[29] The balance of this opinion will

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[27] There currently exist no checks and balances on physicians signing the written certification forms. A simple revision of the form that requires a doctor under penalty of perjury to attest that each patient has a serious or debilitating condition and name that condition might clean up the process. Doctors who are indiscriminately selling written certifications could then be penalized by the courts for issuing false certificates. This would work an important reform, given that § 4(f) appears to immunize even physicians who intentionally sign false certifications. Limiting the number of certifications one doctor may sign might further deter fraudulent certifications.

[28] In the present case, Dr. Eisenbud testified that he met with each defendant for about a half-hour, spending 5 minutes reviewing the medical records and about 10 minutes on the physical examination, while also interviewing them. On those bases, Dr. Eisenbud then certified that he was treating both defendants "for a terminal illness or a debilitating condition." Such foolishness is so obvious on its face as to deserve no more than a footnote in this opinion to expose it, although I note that even Dr. Eisenbud's certifications appear to be more credible than the Livingston County doctor described in the previous paragraph.

[29] The certification forms at issue here stated:

address issues concerning the written certification process, which the Legislature or the DCH are free to change if persuaded that a problem exists.

V. THE HISTORY OF THE MMMA

The MMMA has a noble purpose, i.e., providing an avenue for improving the health or comfort of those afflicted with a serious or debilitating medical condition.[30] One supposes that most citizens voting for the MMMA envisioned that those individuals suffering

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> I, Eric Eisenbud, MD, am a physician, duly licensed in the State of Michigan. I have completed a full assessment of this patient's medical history, and I am treating this patient for a terminal illness or a debilitating condition as defined in Michigan's medical marijuana law. I completed a full assessment of this patient's current medical condition. This assessment was made in the course of a bona fide physician-patient relationship. I have advised the patient about the potential risks and benefits of the medical use of marijuana. I have formed my professional opinion that the potential benefits of the medical use of marijuana would likely outweigh any health risks for the patient. This patient is LIKELY to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate a serious or debilitating medical condition or symptoms of the serious or debilitating medical condition.

I note that Dr. Eisenbud attempted to specify neither what the ailment was, nor whether it constituted a terminal illness or a debilitating condition.

[30] Some assert that marijuana is not a bad thing, especially in light of current research, and that those thinking otherwise are illogical prudes. Then there is the view of the National Institute on Drug Abuse, which maintains that marijuana smoke contains 50 to 70 percent more carcinogenic hydrocarbons than tobacco smoke. *NIDA InfoFacts: Marijuana* <http://www.nida.nih.gov/infofacts/marijuana.html> (accessed September 10, 2010). The Partnership for a Drug Free America similarly reports that "[s]tudies show that someone who smokes five joints per week may be taking in as many cancer-causing chemicals as someone who smokes a full pack of cigarettes every day." *Drug Guide* <http://www.drugfree.org/portal/drug_guide/marijuana> (accessed September 10, 2010). While each of these views is legitimate, for the purposes of this opinion I am not concerned with which view the law should reflect. This

from such conditions would visit their regular doctors, obtain prescriptions for marijuana, and then have the prescription filled at a licensed pharmacy. Citizens would rightly expect such a process because the drug-delivery system in Michigan has always dispensed drugs in this manner.[31]

The DCH is the agency charged with regulating this new industry. Under the act, the DCH was required to draft within 120 days administrative rules to implement the act. MCL 333.26425(a). The Governor oversees administrative agencies such as the DCH, and the Legislature also plays a role, maintaining checks and balances to ensure that administrative agencies function properly. Under the normal process, those elected or appointed officials would maintain sufficient control of the process to assure that a schedule 1 drug would not be sold, distributed, or otherwise transferred to the public without a legitimate process in place to regulate the use, sale, and delivery of that drug.

Further, in legitimate medical practice, doctors would observe their ethical duties to sign their names to written certification forms only if their patients were actually suffering from terminal illnesses or serious or debilitating medical conditions, as the act specifies.[32] No ethical doctor would advertise for sale to

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Court's job is to interpret statutes as they are written. Public policy is determined by the other branches of government.

[31] A question that arises is, Why is there the need for a specialized medical-marijuana business, instead of dispensing through pharmacies as is the case of other legal prescription drugs, if the marijuana is for medical purposes? The answer, in many cases, is that the medical purpose is mere pretext.

[32] In proper medical practice, when a doctor prescribes a drug, that doctor carefully monitors the patient to see if the drug is working, if there are side effects, etc. Shouldn't doctors similarly monitor their

That someone is spending money to run such an ad well proves that confusion runs rampant concerning what is, and is not, subject to prosecution under the MMMA.

Unfortunately, the administrative rules associated with the MMMA do not provide for any checks and balances on the accuracy of the medical certifications signed by these doctors. At 1,000 new registry applicants a week,[34] Michigan will soon have more registered marijuana users than unemployed individuals—an incredible legacy for the Great Lakes State. And soon we will even have graduates from the Medical Marijuana Academy.

What has been lost in the rush to implement the MMMA is a comprehensive set of administrative rules. Under MCL 333.26425(a), the DCH only had 120 days to draft the administrative rules that are currently in effect.[35] As demonstrated by the rules that did come into being, this was a totally unreasonable time limit for such a task.[36]

No system of regulation can succeed without a clear set of rules. Those wishing to use marijuana need to know when, how, and under what conditions they can legally do so. Providers need to know under what conditions they can legally grow, harvest, and distribute their product, and the operators of the new medical-marijuana clinics that appear to be springing up on

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[34] See Yung, *Even in a poor economy, the pot industry grows*, Detroit Free Press, June 21, 2010, p 4A.

[35] Mich Admin Code, R 333.101 *et seq*.

[36] The current administrative rules include no reporting requirements, no log-keeping requirements, and no directions for school officials or law enforcement officers on how to regulate the new medical-marijuana industry. The DCH should continue the rule-making process, taking pains to hear from all interested parties. At oral argument, the attorneys for both sides expressed their approval of a negotiated rule-making process. The goal would be to set boundaries for all activities and persons associated with the MMMA.

every corner need to know if they are in fact set up to dispense marijuana to the public legally. Until today, the DCH, the Legislature, and the appellate courts have answered very few of these questions. Pressure and confusion results from trying to operate under a system in which no one has stepped forward and stated specifically what actions are legal and what actions are not. It appears that most elected officials, including my colleagues, understand the political nature of this controversy and simply choose to address the MMMA only to the extent that a particular occasion requires. I, on the other hand, right or wrong, prefer giving some notice to those concerned *before* they are deprived of their liberty and property.[37]

What is clear from reading the lower court record in this case is that no one has set out a comprehensive plan to implement the new MMMA. The job of setting public policy should not be handed to the courts as a consequence of the inaction of legislative or administrative officials. Those elected and appointed officials can choose to remain silent and allow the courts to interpret this act piecemeal or on a case-by-case basis. Or the statute can be revised, or the pertinent administrative rules revised, to provide a clear direction to all citizens, including the judges of the courts, who are affected by this act.

VII. CONCLUSION

To quote from Sir Walter Scott's 1808 poem, *Marmion*, canto 6, stanza 17, "O, what a tangled web we weave, / When first we practise to deceive!" Of central

[37] I am reminded of Shakespeare's sentiments, "Yet the first bringer of unwelcome news / Hath but a losing office," (*The Second Part of King Henry the Fourth*, act 1, sc 1), and "Come hither, sir. / Though it be honest, it is never good / To bring bad news," (*Antony and Cleopatra*, act 2, sc 5), and a more modern equivalent: Please don't shoot the messenger.

importance to this appeal is the question, Is the MMMA a subterfuge for legalizing marijuana in this state, or is it a legitimate medical reform intended to help only those individuals who have a terminal illness or a serious or debilitating medical condition?

The answer is simple. For those who instituted the process of placing the proposal on the ballot, the MMMA was both an avenue for allowing society to explore the medical uses of marijuana and a first step in legalizing marijuana in Michigan. For some citizens who voted for the initiative petition out of empathy for the terminally ill or those suffering from debilitating conditions, it was a vote for a medical process that would help those in need. Unfortunately for all concerned with the implementation of the medical mission, including compassionate-care groups, marijuana growers, marijuana users, marijuana dispensers, the police, prosecutors, municipalities, townships, etc., the act has resulted in much confusion. And it has suggested itself to many purely recreational marijuana consumers as a vehicle to aid in their continuing illicit indulgence in that vice.

In any event, the MMMA is currently the law in Michigan. To the extent possible, it must be administered in a manner that protects the rights of all our citizens. When prosecutors and defense attorneys agree that the law is hazy and unclear and poses hazards to all concerned because it does not with sufficient clarity identify what conduct is subject to prosecution, it is time for action from our legislative and executive officials. While the MMMA may be controversial and polarizing, politics should be set aside in the interest of the rule of law in our state.[38]

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[38] I note that Senators Roger Kahn, Wayne Kuipers, and Gerald Van Woerkom have introduced bills that might resolve some of the issues raised in this opinion. See SB 616, SB 617, and SB 618 of 2009.

With the MMMA, two roads have diverged in the forest:[39] one leads to refining and distilling the administrative rules and other law associated with the act, and the other leads to the regulators and regulated alike being totally confused concerning how to give effect to the act. The former leads to the orderly implementation of the MMMA, while the latter leads to disrespect for the law and possibly contempt for the rule of the law itself.[40] Our legislative and administrative officials must make a choice: they can either clarify the law with legislative refinements and a comprehensive set of administrative rules, or they can do nothing. In this situation, not deciding is, in fact, a decision to do nothing.[41]

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[39] This line is adapted from the beginning of Robert Frost's poem, *The Road Not Taken* ("Two roads diverged in a yellow wood . . . .").

[40] An example of confusion at best, or disrespect for the law at worst, is that there is a marijuana shop in Lansing that is less than 100 feet from a school. Clearly, this shop is in violation of the federal Safe and Drug-Free Schools and Communities Act, 20 USC 7101 *et seq*.

[41] I recall an old cartoon that depicted a king in his palace, with his subjects outside rioting, pillaging, and otherwise destroying the kingdom. The king asks, "Why are they rioting, I didn't do anything?" His wisest advisor responds, "Maybe that is the problem."

KEINZ v KEINZ

Docket No. 292781. Submitted September 14, 2010, at Detroit. Decided September 16, 2010, at 9:00 a.m.

Diane M. Keinz obtained a divorce from Kenneth C. Keinz in the St. Clair Circuit Court in 2005 and was granted child support. In 2008, plaintiff moved to increase defendant's child support obligation. At the initial hearing on the motion, defendant stated that his usual biweekly gross income was $1,594.56. However, because of voluntary overtime, defendant's actual earnings were nearly double that amount. On the basis of the parties' assertions at the hearing, the referee recommended a slight decrease in defendant's monthly child support payments. Plaintiff objected, but the court, James P. Adair, J., adopted the referee's recommendation. Plaintiff moved to set aside the order. The court granted the motion and referred the case to the Friend of the Court, which made a new recommendation, in light of the parties' actual incomes, to increase defendant's child support payments. Plaintiff moved for entry of an order consistent with that recommendation and for sanctions. The parties ultimately settled the support issue, but plaintiff continued to request that the court sanction defendant for initially misrepresenting his income. Defendant contended that he had not reported his voluntary overtime because he had reduced expectations of similar overtime income in the future. The court denied plaintiff's request for sanctions, concluding that defendant had not intentionally misled the referee. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 600.2591(1), a court may award attorney fees and costs to a prevailing party as sanctions if an action or defense was frivolous. Because the parties' settlement resulted in a higher child support award, plaintiff won on the entire record and, thus, was the prevailing party as defined in MCL 600.2591(3)(b).

2. In light of defendant's admission that he had already earned $40,000 by the time of the initial hearing in July 2008 and that he ultimately earned $81,808.32 that year, defendant had no reasonable basis to believe that the biweekly gross income he reported to the referee, which would have totaled only $41,458.56 annually, was true. Thus, his initial opposition to the motion to increase

child support was frivolous under MCL 600.2591(3)(a)(*ii*), and the circuit court abused its discretion by denying plaintiff's motion for sanctions.

Reversed and remanded.

COSTS — ATTORNEY FEES — SANCTIONS — PREVAILING PARTIES — DIVORCE — CHILD SUPPORT — SETTLEMENTS.

A court may award attorney fees and costs to a prevailing party as sanctions if an action or defense was frivolous; a party who moved for higher child support payments and received higher child support payments as the result of a settlement is a prevailing party (MCL 600.2591[1]).

Lorrie J. Zahodnic, P.C. (by *Lorrie J. Zahodnic*), for plaintiff.

Samuel J. Behringer, Jr., for defendant.

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

WILDER, P.J. Plaintiff appeals as of right the circuit court's order denying her motion to shift her attorney fees and costs to defendant. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The parties' 2005 divorce judgment granted plaintiff primary physical custody of the parties' two minor children and required defendant to pay child support in the amount of $682.88 a month for two children and $449.51 a month for one child "until Defendant returns to his employment from Disability," after which the obligation would be $785.27 a month for two children and $516.67 a month for one child.

In 2008, plaintiff moved to increase defendant's support obligations. At the hearing in July 2008, both parties proceeded without assistance of counsel. Defendant stated that his biweekly gross income was

$1,594.56 (which would generate an annual income of $41,458.56) and produced a letter from his employer that mirrored his representations. Defendant explained that his gross income was based on his "usual[]" work schedule of 36 hours in one week and 48 hours the next week at his hourly pay rate of $17.84. After inquiring about plaintiff's income and the parties' sundry expenses, the referee recommended that defendant's general care assessment be $734 a month for the two children and $481 a month for one child.

Plaintiff filed objections on the grounds that the referee did not ask defendant what his income was in 2007 and that defendant had not provided his W-2 Form for that year. Nonetheless, the referee's recommendation was adopted in a court order. Plaintiff moved to set aside that order. The circuit court granted the motion and reserved the question of attorney fees. The matter was referred to the Friend of the Court for the purpose of calculating child support for two minor children in accordance with the true incomes of the parties.

A new recommendation followed, this time for support in the amount of $1,090 a month for two children and $709 a month for one child. Plaintiff moved for entry of an order consistent with that recommendation and for sanctions.

The parties appeared for an evidentiary hearing and settled the support issue. Plaintiff's attorney reported that in addition to agreements concerning health-care expenses, "[t]he parties have come to agreement regarding the Uniform Child Support Order by modifying it retroactive to April 29th, 2008 wherein [defendant] will pay to [plaintiff] child support for two children in the amount of $1,175, and for one child the amount of $800." The hearing continued on the issue of sanctions. Plaintiff argued that defendant had misrepresented his

income at the initial hearing on the motion to increase his support obligations, thereby requiring numerous court appearances that would have otherwise been unnecessary.

Defendant admitted that, by the time of the first hearing in July 2008, at which he reported a biweekly gross income that would have totaled $41,458.56 for the year, he had already earned $40,000 and that he ultimately earned $81,808.32 in 2008. Defendant's attorney averred that defendant excluded voluntary overtime when reporting his usual work schedule because he had reduced expectations of similar future income as a result of the economy and a health condition that caused a doctor to recommend that he work 60 hours a week or less. Defendant's attorney also averred that expenses from the divorce had made it difficult for defendant to get back on his feet.

At the conclusion, the circuit court held as follows:

> [T]here was not an intentional or deliberate act or motive on the part of the Defendant which could . . . give rise to a consideration that is lack of or intended . . . misleading information to the Friend of the Court, particularly in reviewing the transcript of the Friend of the Court hearing on July 7th, 2008, which would cause the Court to conclude that . . . there should be leveled . . . the reimbursement of an attorney fees or costs in this case and, therefore the request by the Plaintiff for . . . attorney fees and/or cost[s] is denied.

On appeal, plaintiff argues that she is entitled to costs and attorney fees on the grounds that she was the prevailing party and that defendant caused unnecessary court appearances and delayed resolution of the case by maintaining positions with no reasonable basis in law or fact.

This Court reviews a trial court's ruling on a motion for costs and attorney fees for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996); *In re Condemnation of Private Prop for Hwy Purposes*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). A trial court's findings of fact, such as whether a party's position was frivolous, may not be set aside unless they are clearly erroneous. MCR 2.613(C); see *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). MCL 600.2591(1) grants a court the authority to award sanctions in the form of attorney fees and costs to a prevailing party if an action or defense is deemed "frivolous." For an action or defense to be considered "frivolous," at least one of the following conditions must be met:

> (*i*) The party's primary purpose in initiating the action . . . was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

Plaintiff first argues that she was a "prevailing party" for purposes of MCL 600.2591(1). The circuit court did not resolve this question, instead concluding

that the defense was not frivolous. Nevertheless, according to MCL 600.2591(3)(b), a "prevailing party" is "a party who wins on the entire record." Because the parties' settlement resulted in a higher support award, we agree with plaintiff that she was the prevailing party on her motion.

Defendant relies on MRE 408 to argue that consideration of the parties' settlement should be precluded. MRE 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Because the settlement is not offered to prove defendant's liability for the amount of child support to which the parties agreed, but is offered to prove whether plaintiff is a prevailing party, we reject defendant's argument.[1]

Plaintiff next argues that defendant deceived the referee by offering evidence that his biweekly gross income was $1,594.56 when he knew that he actually earned more, thereby requiring additional proceedings,

[1] We also note that trial courts 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." *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006).

including those on the motion to set aside the order resulting from the referee's recommendation, and delaying resolution of the matter. We agree. In light of defendant's admission that he had already earned $40,000 by the time of the July 2008 hearing and that he ultimately earned $81,808.32 in 2008, defendant had no reasonable basis to believe that the biweekly gross income he reported to the referee, which would have totaled $41,458.56 annually, was true. Consequently, we agree with plaintiff that defendant's initial opposition to the motion to increase child support was frivolous.

Defendant explains that his self-serving omission of evidence regarding his voluntary overtime was made in light of an anticipated loss of that overtime in the future. Defendant then correctly argues that a trial court has discretion to deviate from the child support formula when application of the formula would be unjust or inappropriate. See MCL 552.605(2). However, even if the anticipated loss of overtime would have made application of the formula using his actual income in July 2008 unjust, defendant had no reasonable basis to believe that the biweekly gross income he reported to the referee was true. Moreover, it would have been in the referee's discretion, not defendant's, to recommend a deviation from the formula after child support was calculated using accurate facts.

Because plaintiff was the prevailing party and defendant asserted a frivolous defense, we conclude that the circuit court abused its discretion by denying plaintiff's motion for attorney fees and costs pursuant to MCL 600.2591(1). We reverse and remand to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

KIETA v THOMAS M COOLEY LAW SCHOOL

Docket No. 291608. Submitted July 14, 2010, at Lansing. Decided September 16, 2010, at 9:05 a.m.

Christine Kieta, a student at Thomas M. Cooley Law School, brought an action in the Kent Circuit Court against the law school, seeking injunctive relief to prevent the law school from conducting formal proceedings to investigate plaintiff's alleged violations of the law school's student honor code. The court, Paul J. Sullivan, J., denied the request for injunctive relief, but allowed plaintiff to amend her complaint to raise claims of breach of contract and arbitrary and capricious conduct. The hearing at the law school proceeded, and the hearing panel concluded that there was clear and convincing evidence to support a determination that plaintiff had lied in violation of the honor code. The panel also held that there was not clear and convincing evidence to support the charge of failing to cooperate with the initial review. The panel determined that three hours of counseling and instruction in civility, ethics, and stress management was an appropriate remedy. The panel stated that a summary of the decision would be placed in plaintiff's student file, but expressly concluded that the nature and the circumstances of the violation would not prevent plaintiff's admission to the bar. After the panel rendered its decision, plaintiff attempted to pursue her action in the trial court, but the court granted the law school's motion for summary disposition and denied plaintiff's motion requesting the court to apply judicial estoppel. The court held that the honor code had not given rise to an enforceable contract and that the law school had not engaged in arbitrary and capricious conduct. After the court's decision, plaintiff graduated from the law school and was admitted to the Illinois bar. Plaintiff appealed the order granting defendant's motion for summary disposition.

The Court of Appeals *held*:

Under MCR 7.203(A), a party must be an aggrieved party in order to appeal. A party is entitled to appeal when the party has an interest in the subject matter of the controversy and is injuriously affected or aggrieved by the lower court's judgment or order. An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy. The Court of Appeals

could not provide a remedy in this case because after the trial court granted the law school's motion for summary disposition, plaintiff graduated from the law school. Plaintiff's appeal was thus moot.

Appeal dismissed.

1. APPEAL — JUDGMENTS — ORDER.

A party must be an aggrieved party in order to appeal; a party is entitled to appeal a lower court's judgment or order when the party has an interest in the subject matter of the controversy and is injuriously affected or aggrieved by the judgment or order (MCR 7.203[A]).

2. APPEAL — MOOT ISSUES.

An issue becomes moot for purposes of appealing a lower court's determination regarding the issue when a subsequent event renders it impossible for the appellate court to fashion a remedy.

Christine Kieta *in propria persona*.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh* and *Michael P. McCasey*), for Thomas M. Cooley Law School.

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM. Plaintiff appeals as of right the circuit court order granting defendant's motion for summary disposition. We dismiss the appeal as moot.

Plaintiff was a student at defendant law school when she failed to attend her intraschool moot court class and turn in an assignment worth 10 points. The following week, she reported that she had not turned in the assignment because she was not proud of it. When instructed to e-mail the assignment immediately after class so that it could be determined if points could be awarded, plaintiff admitted that she had been dishonest with her professor about the status of the assignment. The professor referred the matter to the assistant dean

of students for review under the school's honor code. After attempts to resolve the matter informally failed because plaintiff refused to cooperate, formal proceedings for lying and for failing to cooperate (termed "toleration") in violation of the law school's honor code were commenced. Plaintiff filed a complaint seeking injunctive relief to prevent the hearing from occurring. The trial court denied the motion, but allowed plaintiff to amend her complaint to raise claims of breach of contract and arbitrary and capricious conduct. Despite the amended complaint, plaintiff continued to request injunctive relief to prevent damage to her reputation, her academic record, and her admission to the bar. Plaintiff did not identify monetary damages arising from any alleged breach of contract.[1]

After the hearing was completed, the panel concluded that there was clear and convincing evidence to support the honor-code violation of lying, but did not find clear and convincing evidence to support the honor-code violation of toleration. With regard to the penalty for the violation, the panel concluded that three hours of counseling and instruction in civility, ethics, and stress management was appropriate. More importantly, the panel held that a summary of the decision would be placed in plaintiff's file, but expressly concluded that the nature and circumstances of the violation would not prevent plaintiff's admission to the bar.

After the panel rendered its decision, plaintiff attempted to pursue her lawsuit, but the trial court granted defendant's motion for summary disposition and denied plaintiff's motion for application of judicial

[1] Plaintiff's brief on appeal does not comply with the requirements of MCR 7.212(C)(6) because it does not contain a statement of all the material facts, both favorable and unfavorable. In fact, it does not identify the underlying factual basis for the honor-code violations.

estoppel. The trial court held that the honor code did not give rise to an enforceable contract and that the law school had not engaged in arbitrary and capricious conduct. After the trial court's decision, plaintiff graduated from defendant law school and was admitted to the Illinois bar. Nonetheless, plaintiff filed an appeal of the order granting defendant's motion for summary disposition.

In order to appeal, a party must be an aggrieved party. MCR 7.203(A). "It is a cardinal principle, which applies alike to every person desiring to appeal, that he must have an interest in the subject-matter of the litigation. Otherwise he can have no standing to appeal." *Allen v Soule*, 191 Mich 194, 197; 157 NW 383 (1916). On appeal, the litigant must demonstrate that he or she is affected by the decision of the trial court. *George Realty Co v Paragon Refining Co of Mich*, 282 Mich 297, 300; 276 NW 455 (1937); see also *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 226 n 9; 249 NW2d 29 (1976) (stating that a party is entitled to appeal when it is interested in the subject matter of the controversy and is injuriously affected or aggrieved by the lower court's judgment or order) (citation omitted). An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003).

The summary of the facts of this case demonstrates that we cannot provide a remedy from the trial court's decision. Defendant sought to investigate an incident between plaintiff, who was a student, and a professor wherein the professor accused plaintiff of lying in violation of the student honor code. Defendant sought to informally resolve the matter, but plaintiff refused to cooperate. Consequently, defendant commenced formal

proceedings against plaintiff. Plaintiff was found to have violated the honor code and ordered to complete three hours of counseling. After the hearing was held and the sanction was imposed, plaintiff pursued her claims of breach of contract and arbitrary and capricious conduct. However, plaintiff has since graduated from defendant law school. In light of plaintiff's graduation, we cannot fashion a remedy, and her appeal is moot.[2] *Id*.[3]

Dismissed as moot. Defendant, as the prevailing party, may tax costs. MCR 7.219.

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[2] At oral argument, plaintiff refused to answer questions regarding the underlying incident. Moreover, plaintiff alleged that she had incurred damages, but could not identify harm flowing from any alleged breach of contract or to her reputation. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Indeed, but for the filing of this appeal, the underlying incident would have merely remained part of the plaintiff's law school file.

[3] For purposes of completeness, we note that the student honor code did not create a contract, see *Cuddihy v Wayne State Univ Bd of Governors*, 163 Mich App 153, 156-158; 413 NW2d 692 (1987), and plaintiff failed to establish a genuine issue of material fact regarding the alleged arbitrary and capricious conduct, see *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

WILSON v SPARROW HEALTH SYSTEM

Docket No. 290895. Submitted June 16, 2010, at Lansing. Decided September 21, 2010, at 9:00 a.m.

David L. and Sheryl J. Wilson brought an action in the Ingham Circuit Court against Sparrow Health System, Sparrow Development Corporation, and East Lansing Athletic Club, Inc., doing business as Michigan Athletic Club, Inc., alleging, in part, negligence and defamation. The action arose from an incident that occurred at defendants' athletic club when a man exposed himself to two female lifeguards. The executive director of the athletic club conducted an internal investigation of the incident and, during the investigation, showed the lifeguards photographs of 16 male members of the athletic club who had used the facility on the evening that the incident occurred. The lifeguards identified David Wilson as the man who had exposed himself. The executive director reported the offense and the results of his investigation to the police, who conducted their own investigation. David Wilson was subsequently arrested and charged with indecent exposure, but the charge was dropped after another indecent-exposure incident occurred at the athletic club, the perpetrator was caught, and he confessed that he was the man who had exposed himself in the prior incident. Defendants moved for summary disposition, and the court, William E. Collette, J., granted summary disposition in their favor. Plaintiffs appealed.

The Court of Appeals *held*:

1. The conduct complained of by plaintiffs did not cause their injuries. It was the police and the prosecuting attorney, not defendants, who concluded that there was probable cause to pursue the matter against David Wilson. Any causal contribution of defendants' investigation to plaintiffs' alleged injuries was cut off by the actions of the police and the prosecuting attorney. It was not reasonably foreseeable when defendants conducted their own investigation that law enforcement officials would do anything other than conduct an independent investigation and then arrive at their own independent judgment regarding whether to bring the charge against David Wilson. The conduct of the police and the prosecuting attorney constituted a superseding cause of plaintiffs'

alleged injuries, and defendants cannot be held liable for those injuries as a matter of law. Holding otherwise would have a chilling effect on citizens who discharge their civic duty to both inquire into and report information about possible criminal conduct to law enforcement officials. The trial court correctly granted summary disposition in favor of defendants on the negligence claim.

2. Because the police had told defendants that David Wilson was their prime suspect in the indecent-exposure incidents when defendants created and distributed to their managers and lifeguards a memorandum that referred to David Wilson as a previously identified suspect and because the memorandum specifically stated that David Wilson was a suspect, not the person who had committed the acts, the statement in the memorandum was not false and was not defamatory. The trial court correctly granted summary disposition in favor of defendants on the defamation claim.

Affirmed.

LIBEL AND SLANDER — DEFAMATION — DEFENSES — TRUTH.

To establish a claim for defamation, a plaintiff must show (1) that a false and defamatory statement concerning the plaintiff was made, (2) that the defendant made an unprivileged publication to a third party, (3) fault that amounted to at least negligence on the part of the publisher, and (4) either actionability of the statements irrespective of special harm or the existence of special harm that the publication caused; truth is an absolute defense to a defamation claim.

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *James F. Graves* and *Steven A. Hicks*), for plaintiffs.

Johnson & Wyngaarden, P.C. (by *Robert M. Wyngaarden* and *Michael L. Van Erp*), for defendants.

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

SAAD, J. Plaintiffs appeal the trial court's order that granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Because plaintiffs failed to make out prima facie cases of negligence and defamation, we affirm.

I. FACTS

This action arises from an incident that occurred at the Michigan Athletic Club (MAC) in East Lansing at approximately 10:00 p.m. on August 25, 2006. That evening, a man exposed himself to two female lifeguards as they were closing the pool. The lifeguards reported the incident to the manager, who in turn reported it to the MAC's executive director. Before he reported the incident to the police, the executive director conducted an investigation to determine if the police should be contacted. The executive director compiled 16 photographs of male MAC members who had used their membership cards to check in on the evening of August 25. Plaintiff David Wilson[1] was one of those men. The executive director showed the photographs to the lifeguards and they identified Wilson as the man who exposed himself. After their identification, the executive director reported the offense to the police and relayed the results of his internal investigation. The police conducted their own investigation, interviewed all relevant witnesses, and ultimately arrested Wilson and charged him with indecent exposure. After another indecent-exposure incident occurred at the MAC, the perpetrator was caught, and he confessed that he was the man who had exposed himself in the August 25, 2006, incident as well. Later, the police dropped the charge against Wilson.

Plaintiffs filed a complaint against defendants alleging multiple theories of liability, including common-law negligence and defamation. Following some discovery, defendants moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court ruled that defen-

[1] We will refer to David Wilson as "Wilson" and to David and Sheryl Wilson as "plaintiffs."

dants did not owe plaintiffs a legal duty and granted defendants' motion for summary disposition on plaintiffs' negligence claim. The trial court also granted summary disposition to defendants on plaintiffs' defamation claim.

II. NEGLIGENCE

"This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party is entitled to judgment as a matter of law when viewing the evidence in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), and drawing all reasonable inferences in favor of the nonmovant, *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005), the court finds that no genuine issue of material fact exists, *Maiden*, 461 Mich at 120.

Though the trial court ruled that defendants did not owe a duty to plaintiffs regarding defendants' investigation, we need not address the question of defendants' legal duty because we hold that the conduct complained of did not cause plaintiffs' injuries. Were we to hold that defendants owed Wilson a duty of care in conducting their investigation, Wilson's claim would nonetheless fail because, as a matter of law, defendants did not proximately cause any of plaintiffs' alleged injuries. The gravamen of plaintiffs' complaint is that the police wrongfully charged Wilson with the crime of indecent exposure. After defendants conducted a modest, preliminary internal investigation following complaints of a crime, they turned the matter over to the police. It

was then in the hands of law enforcement officials to pursue the matter, and it was the prosecutor's decision whether the police had gathered sufficient evidence against Wilson to bring criminal charges. *People v Jackson*, 192 Mich App 10, 15; 480 NW2d 283 (1991).

When a citizen places information or a complaint in the hands of the police, even if the information is flawed, and then the police conduct their own investigation and, with the prosecutor, determine that there is probable cause to pursue the matter, that decision is entirely outside the authority or control of the private citizen. Even if Wilson was incorrectly identified by the female lifeguards who witnessed the crime, the police conducted their own investigation, gathered evidence, and interviewed all relevant witnesses, and it was the police and the prosecutor, not defendants, who concluded that there was sufficient probable cause to pursue the matter. Had plaintiffs produced some evidence showing that defendants' investigation somehow contributed to plaintiffs' injuries, any causal contribution of defendants' investigation to plaintiffs' alleged injuries was nonetheless cut off by the actions of the police and the prosecutor. And it was simply not reasonably foreseeable when defendants conducted their own investigation into the August 25, 2006, incident that law enforcement officials would do anything more or less than conduct an independent investigation and then arrive at their own independent judgment regarding whether to bring charges against Wilson. Thus, the conduct of the police and the prosecutor constituted a superseding cause of plaintiffs' alleged injuries, and defendants cannot be held liable as a matter of law. See *Ridley v Detroit*, 231 Mich App 381, 389-390; 590 NW2d 69 (1998). We further observe that, were we to hold otherwise, it would have a chilling effect on citizens who discharge their civic duty to both inquire into and

report information about possible criminal conduct to law enforcement officials. Indeed, institutions such as businesses, schools, and municipalities and employers are often put in a position where they must investigate alleged criminal activity while accommodating important competing interests and must decide how to pursue complaints and what information, if any, to report to outside authorities. To impose legal responsibility on these citizens for the later, independent decisions of law enforcement officials would unduly restrict the citizens' ability to discharge their legal rights and duties to report criminal wrongdoing. Indeed, it is a fundamental "right and privilege of [a citizen] secured by the constitution and laws of the United States to aid in the execution of the laws of [his or her] country by giving information to the proper authorities." *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 615; 396 NW2d 809 (1986). Were our courts to impose civil liability on citizens who turn information over to the police and prosecutors, it would, quite simply, undermine this basic constitutional principle and impede criminal investigations. Accordingly, and for the reasons stated, the trial court correctly granted summary disposition to defendants on plaintiffs' negligence claim.

III. DEFAMATION

Plaintiffs argue that the trial court erred when it dismissed their defamation claim. To establish a claim for defamation, the plaintiff must show (1) that "a false and defamatory statement concerning the plaintiff" was made, (2) that the defendant made "an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statements irrespective of special harm, or the existence of special harm caused by

the publication." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 76-77; 480 NW2d 297 (1991). Truth is an absolute defense to a defamation claim. *Porter v Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995). Plaintiffs' claim centers on a memorandum distributed to all MAC managers and lifeguards that outlined the procedures for handling indecent-exposure incidents. That memorandum referred to a previously identified suspect, i.e., David Wilson.

The trial court ruled that at the time defendants circulated the memorandum containing the alleged defamatory statement, the police had told defendants that Wilson was the "prime suspect" in the indecent-exposure incidents. The court explained that because the memorandum merely relayed information that defendants received from the police, allegations about Wilson contained in the document were neither false nor defamatory. Because Wilson was, in fact, a suspect in the indecent-exposure incidents when the memorandum was created and circulated and the memorandum specifically stated that he was a *suspect*, not the person who had committed the acts, defendants' statement was not defamatory. *Id*. Therefore, the trial court did not err when it held that plaintiffs were not entitled to relief on their defamation claim.

Affirmed.

BRADLEY v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 292716. Submitted September 15, 2010, at Lansing. Decided September 28, 2010, at 9:00 a.m.

Stephanie M. Bradley brought an action in the St. Clair Circuit Court against State Farm Mutual Automobile Insurance Company, the insurer of her automobile, alleging breach of contract resulting from State Farm's refusal to settle plaintiff's claim for uninsured-motorist benefits under her policy. Plaintiff had been injured in an accident that occurred when her vehicle was struck by a vehicle that was driven by William Bowen, III, and owned by Sandra Bowen. After the accident, plaintiff had originally brought an action against William and Sandra, but it was determined during discovery that William was specifically excluded as a driver under Sandra's automobile insurance policy because he was charged with stealing Sandra's vehicle. Sandra was then dismissed from that action. William, who was uninsured, failed to defend, and a default judgment for $50,000 was entered against William after the court determined that plaintiff had suffered a serious impairment of a body function, following which plaintiff brought the present action. State Farm moved for summary disposition, arguing that plaintiff had breached her contract by failing to join William and Sandra as parties, which was required by the provision in the policy that mandated joinder of all tortfeasors in any suit brought against State Farm under the policy. The trial court, Daniel J. Kelly, J., agreed with State Farm and granted its motion. Plaintiff appealed.

The Court of Appeals *held*:

1. Although the Supreme Court held in *Rory v Continental Ins Co*, 473 Mich 457 (2005), that an unambiguous provision in an uninsured-motorist policy must be enforced as written, *Rory* did not overrule the holding in *Koski v Allstate Ins Co*, 456 Mich 439 (1998), that an insurer that seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice must establish actual prejudice to its position. The *Koski* principle is equally applicable to an analo-

gous provision requiring the joinder of all tortfeasors in any suit brought against the insurer by the insured. State Farm's subrogation rights will not be prejudiced by allowing this suit to be litigated.

2. The insurance policy provided that State Farm would not be bound by any judgment obtained without its consent or by any default judgment against any person other than State Farm. Therefore, plaintiff was contractually precluded from contending that the default judgment against William entitled her to collect certain sums from State Farm in uninsured-motorist benefits. Plaintiff may not rely on the prior suit against William and Sandra, and in this case she must still prove her tort case in relation to the accident, including establishing that she suffered a serious impairment of a body function.

Reversed and remanded.

HOEKSTRA, J., dissenting, noted that the joinder provision in the insurance policy required plaintiff to join State Farm, William Bowen, and Sandra Bowen in a lawsuit seeking uninsured-motor-vehicle benefits. The provision is unambiguous and must be enforced as written. *Rory* required the enforcement of unambiguous contract provisions as written unless the provisions violated law or public policy or one of the traditional contract defenses applied. While agreeing that *Rory* did not overrule the specific legal principle stated in *Koski* that required a showing of prejudice, Judge HOEKSTRA disagreed with the majority's decision to require defendant to show prejudice. Prejudice is not a traditional contract defense, and the joinder provision in the policy contained no prejudice exception.

INSURANCE — UNINSURED-MOTORIST BENEFITS — ACTIONS — JOINDER OF TORTFEASORS — PREJUDICE.

An unambiguous provision in an uninsured-motorist policy must be enforced as written, regardless of the equities and reasonableness of the provision; an insurer must establish actual prejudice to its position, however, in order to cut off its responsibility under an uninsured-motorist policy provision that requires the joinder of all tortfeasors in any suit brought against the insurer by the insured on the basis that the insured failed to comply with the joinder provision.

Daniel Randazzo for plaintiff.

James C. Rabaut & Associates (by *Steven A. Kohler*) for defendant.

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

MURPHY, C.J. In this action involving uninsured-motorist benefits, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We reverse. This case has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured in a car accident on March 8, 2007, in St. Clair County, Michigan. Plaintiff's vehicle was struck on the passenger side by a vehicle driven by an uninsured motorist, William Bowen, III (hereafter referred to as "Bowen"). As a result of the accident, plaintiff sustained multiple injuries.

Before filing the instant action against defendant, the insurer of her vehicle, plaintiff filed a complaint on June 18, 2007, against Bowen as the driver of the car that caused the collision and Sandra Kay Bowen as the owner of that car. AIG was the insurer of Sandra Bowen's vehicle. The prior complaint alleged that Bowen was driving the car with Sandra Bowen's knowledge and consent. However, it was determined during the discovery process that Bowen was specifically excluded as a driver under the AIG policy because he was charged with stealing the vehicle. Sandra Bowen was thereafter dismissed from that suit.

Bowen failed to defend against the prior lawsuit and, following testimony, a default judgment was entered against him. The trial court in the prior action took testimony from plaintiff and determined that she had suffered a serious impairment of body function. The default judgment was for $50,000 and was entered May 12, 2008.

Thereafter, plaintiff unsuccessfully attempted to settle with defendant, her insurance company, following entry of the default judgment in the 2007 lawsuit. Plaintiff claimed that she was entitled to recover benefits under an uninsured-motor-vehicle provision in her policy. The policy limit for uninsured-motorist benefits was $25,000. When defendant refused to settle, plaintiff filed the instant complaint, claiming breach of contract.

Defendant moved for summary disposition, arguing that plaintiff had breached the contract by failing to join Bowen and Sandra Bowen as parties, given their statuses as driver and owner, respectively, or to join defendant in the prior lawsuit, which was required in order for plaintiff to recover benefits under the policy. The trial court agreed and granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), determining that plaintiff breached the contract when she failed to follow the unambiguous language of the policy that required joinder of all tortfeasors in the suit brought against defendant. Accordingly, plaintiff was not entitled to uninsured-motorist benefits.

On appeal, plaintiff presents myriad arguments in support of reversal, but we need only address plaintiff's contention that, essentially, defendant incurred no prejudice by her failure to join Bowen and Sandra Bowen as party defendants.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Brown*, 478 Mich at 551-552. A decision granting summary disposition is appropriate if

there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 552.

Because uninsured-motorist coverage is not statutorily mandated, the language of the insurance policy governs the conditions of coverage. *Stoddard v Citizens Ins Co of America*, 249 Mich App 457, 460; 643 NW2d 265 (2002). The interpretation of an insurance contract, including resolution of whether an ambiguity exists in the contract, is a question of law that is reviewed de novo on appeal. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). The language in the insurance contract is given its plain and ordinary meaning if apparent to a reader of the instrument. *Id.* at 47-48.

Plaintiff argues that the language in the insurance contract requiring joinder of any tortfeasors reflects an attempt to protect defendant's subrogation rights, but plaintiff's act of procuring a default judgment, as opposed to a settlement agreement with a release, in an amount that exceeded the policy limit did not infringe defendant's subrogation rights; defendant can still recover against Bowen. This argument necessarily acknowledges that plaintiff failed to comply with the joinder provision, but because defendant suffered no prejudice from the failure to join, defendant should not be relieved of liability to provide uninsured-motorist benefits to plaintiff, who had paid premiums for that coverage.

In *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998), our Supreme Court indicated that, generally speaking, one who files suit for performance of a contractual obligation must prove that all contractual conditions prerequisite to performance have been satisfied. However, the Court continued by stating that

"it is a well-established principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position." *Id.*; see also *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447-448; 761 NW2d 846 (2008).

Although we are not specifically addressing a notice provision, the joinder provision here served a comparable purpose, which was to give defendant the opportunity to protect its financial interests by exercising investigatory, defense, and subrogation rights. We conclude that the *Koski* principle is equally applicable to an analogous joinder provision; there is no valid distinguishing reason not to apply *Koski*. We acknowledge our Supreme Court's decision in *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005), wherein the Court held that an unambiguous provision in an uninsured-motorist policy must be enforced as written regardless of the equities and reasonableness of the provision. However, *Koski* carved out a narrow prejudice requirement relative to all insurance contracts, and *Rory* did not overrule the Supreme Court's earlier ruling in *Koski*, which we find controlling.[1]

With respect to subrogation, the insurance policy provided: "If *we* are obligated under this policy to make payment to or for a *person* who has a legal right to

[1] The dissent disagrees that defendant should be required to show prejudice, asserting that *Rory* controls given that it is the latest pronouncement of our Supreme Court concerning construction of an insurance policy. *Rory*, however, did not examine the prejudice principle discussed in *Koski*. Moreover, *Tenneco*, 281 Mich App at 447-448, which was decided in 2008 and after *Rory* was issued, and which constitutes binding precedent, acknowledged the continuing application of *Koski*. The *Tenneco* panel also cited additional, earlier Michigan Supreme Court precedent supporting imposition of a prejudice requirement. *Id.* at 448.

collect from another party, then *we* will be subrogated to that right to the extent of *our* payment."

Subrogation rights can be acquired by way of contractual assignment or under principles of equity. *Citizens Ins Co of America v Buck*, 216 Mich App 217, 226; 548 NW2d 680 (1996). Here, defendant can subrogate itself with respect to plaintiff's right to enforce the $50,000 default judgment against Bowen, at least up to the policy limit of $25,000, and attempt collection from Bowen if defendant becomes obligated, through litigation or settlement, to pay benefits to plaintiff. Bowen was not released from liability. Whether Bowen is ultimately collectible is irrelevant, given that the same problem would exist even had Bowen, Sandra Bowen, and defendant been joined in a lawsuit. And $50,000 is more than enough to cover defendant's potential liability to plaintiff, considering that the policy limit for uninsured-motorist benefits was $25,000. Accordingly, defendant's subrogation rights will not be prejudiced by allowing the instant suit to be litigated.

With respect to defendant's right to defend, defendant maintains that entry of the default judgment resulted in the loss of an opportunity to challenge the elements of plaintiff's tort action, which thereby precludes defendant from challenging its liability under the insurance policy. Defendant's argument lacks merit. The insurance policy provides that defendant is not bound by any "judgment obtained without [defendant's] written consent," nor is it bound by any "default judgment against any *person* . . . other than [defendant]." Therefore, plaintiff is contractually precluded from contending that the default judgment entitles her to collect certain sums from defendant in uninsured-motorist benefits. Regardless of the default judgment, and in the context of this insurance action, plaintiff will

still have to prove her tort case in relation to the accident, including establishing that she suffered a serious impairment of a body function, an issue now controlled by *McCormick v Carrier*, 487 Mich 180, 184; 795 NW2d 517 (2010), overruling *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

The doctrine of collateral estoppel does not apply here because defendant did not have any opportunity, let alone a full, fair, and adequate opportunity, to litigate the issues of negligence and serious impairment of body function, given plaintiff's conduct in failing to join defendant in the first suit as called for by the insurance policy. *Monat v State Farm Ins Co*, 469 Mich 679, 682-683 & n 2; 677 NW2d 843 (2004).

Plaintiff cannot simply rely on the prior suit that led to the default judgment; the case effectively starts from scratch. Under those circumstances, defendant will not be deprived of its right to defend and thus will not be prejudiced by our allowing the instant suit to be litigated.

In light of our holding, it is unnecessary to address the additional arguments presented by plaintiff.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

STEPHENS, J., concurred.

HOEKSTRA, J. (*dissenting*). Because I disagree with the majority's conclusion that defendant is required to show prejudice from plaintiff's failure to join defendant in a lawsuit with Sandra Bowen and William Bowen, III, I respectfully dissent.

This Court is obligated to follow the most recent pronouncement of the Supreme Court on a principle of

law. *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 703 NW2d 486 (2005). The Supreme Court's most recent pronouncement on how an insurance policy is to be construed is found in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). Pursuant to *Rory*, an insurance policy is subject to the same rules of contract construction that apply to other species of contract. *Id*. at 461. The rules of contract construction provide that an unambiguous contract provision is to be enforced as written unless the provision violates law or public policy or one of the traditional contract defenses applies. *Id.* at 461, 468, 470.

Plaintiff's insurance policy includes uninsured-motor-vehicle coverage. Because such coverage is not required by the no-fault act, MCL 500.3101 *et seq*., the rights and limitations of that coverage are purely contractual. *Rory*, 473 Mich at 465-466. The provision for uninsured-motor-vehicle coverage in plaintiff's insurance policy requires that if the parties are unable to agree about whether plaintiff is legally entitled to collect compensatory damages from the owner or driver of an uninsured motor vehicle or the amount of those damages, plaintiff "shall . . . file a lawsuit" against defendant, the owner and the driver of the uninsured motor vehicle, and any third party who may be liable for plaintiff's injuries. The term "shall" denotes mandatory conduct. *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010). This joinder provision is unambiguous; it required plaintiff to join defendant, Sandra Bowen, and William Bowen, III, in a lawsuit seeking uninsured-motor-vehicle benefits. Because the joinder provision is unambiguous, it must be enforced as written. *Rory*, 473 Mich at 461.[1]

[1] I find no merit to plaintiff's argument that certain elements of the provision for uninsured-motor-vehicle coverage violate public policy.

I agree with the majority that *Rory* did not overrule the specific legal principle stated in *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998), that "an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position." "[T]o overrule is to declare that a rule of law no longer has precedential value." *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653, 665; 633 NW2d 1 (2001); see also Black's Law Dictionary (7th ed) (defining "overrule" as "to overturn or set aside (a precedent) by expressly deciding that it should no longer be controlling law"). In *Rory*, the Supreme Court did not address whether, and consequently did not declare that, the prejudice principle stated in *Koski* was no longer a controlling legal principle.

Nonetheless, I disagree with the majority's decision to require defendant to show prejudice from plaintiff's failure to comply with the joinder provision. Prejudice is not a traditional contract defense. See *Rory*, 473 Mich at 470 n 23 ("Examples of traditional defenses include duress, waiver, estoppel, fraud, or unconscionability."). Moreover, this Court is mandated to enforce an unambiguous contractual provision as written. *Id*. at 461. The majority, by requiring defendant to show prejudice from plaintiff's failure to comply with the joinder provision, fails to enforce the joinder provision as written.

First, the provision does not strip plaintiff of her right to a jury trial because it expressly provides that if the parties are unable to reach an agreement regarding uninsured-motor-vehicle benefits, plaintiff must file a lawsuit. Second, while the provision states that defendant is not bound by any judgment obtained without its written consent, this would clearly not pertain to a judgment obtained directly against defendant itself as a party to a lawsuit. I also find no merit to plaintiff's argument that the insurance policy is an unconscionable adhesion contract.

The joinder provision contains no prejudice exception. With its decision to apply the prejudice principle stated in *Koski* to the joinder provision, the majority fails to follow the Supreme Court's most recent pronouncement on how to construe an insurance policy.[2]

Because plaintiff did not join defendant in a lawsuit with Sandra Bowen and William Bowen, III, plaintiff failed to comply with the unambiguous terms of her insurance policy. For this reason, I would affirm the trial court's order granting summary disposition to defendant.

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[2] I acknowledge that in *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429; 761 NW2d 846 (2008), this Court applied the prejudice principle of *Koski*. Ultimately, however, the Court concluded that the defendant insurance company was prejudiced by the plaintiff's failure to provide prompt notice of suits, claims, or demands. Thus, there was no reason for the Court to address whether *Koski* and its prejudice principle remained binding precedent. Indeed, the Court never cited *Rory*, and it did not address the effect of *Rory* on the prejudice principle stated in *Koski*. In this context, while *Tenneco* is binding precedent, MCR 7.215(C)(2), *Tenneco* is not controlling on the question presented in this case.

SWANSON v PORT HURON HOSPITAL (ON REMAND)

Docket Nos. 275404 and 278491. Submitted January 25, 2010, at Lansing. Decided June 24, 2010. Approved for publication September 28, 2010, at 9:05 a.m.

Heather Swanson brought a medical malpractice action in the St. Clair Circuit Court against Port Huron Hospital (also known as Port Huron Hospital Medical Group), Jeannie L. Rowe, D.O., and Bluewater Obstetrics and Gynecology, P.C. Plaintiff alleged, in part, that Dr. Rowe's negligence during a laparoscopic procedure to remove an ovarian cyst resulted in a puncture wound to her aorta and a scar around her navel as a result of a laparotomy performed to repair the aorta. Port Huron was dismissed from the proceedings. After the close of plaintiff's proofs, the remaining two defendants moved for a directed verdict, arguing that plaintiff's affidavit of merit had not sufficiently specified the element of proximate cause, as MCL 600.2912d(1)(d) required, because it did not properly describe the manner in which defendants' breach caused plaintiff's injury. The court, Daniel J. Kelly, J., denied the motion, concluding that the affidavit was sufficient. After the jury returned a verdict in plaintiff's favor, defendants moved for judgment notwithstanding the verdict or a new trial, arguing again that the affidavit of merit was deficient and also that plaintiff's notice of intent had failed to comply with MCL 600.2912b. The court denied the motion. Defendants appealed, and plaintiff appealed the court's award of attorney fees and costs. After consolidating the appeals, the Court of Appeals, WHITBECK, P.J., and OWENS, J., (O'CONNELL, J., dissenting), reversed in an unpublished opinion per curiam, issued June 2, 2009 (Docket Nos. 275404 and 278491), concluding that the notice of intent was defective, and remanded the case for entry of an order vacating the verdict and judgment against defendants. In lieu of granting plaintiff's application for leave to appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded for that court to reconsider the parties' appeals in light of *Bush v Shabahang*, 484 Mich 156 (2009), and MCL 600.2301. 485 Mich 1008 (2009).

On remand, the Court of Appeals *held*:

1. MCL 600.2301 allows a court to amend any process, pleading, or proceeding in an action for the furtherance of justice on terms that are just. *Bush* held that MCL 600.2301 may be used to cure defects in a notice of intent. Under *Bush*, the applicability of MCL 600.2301 rests on a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. In medical malpractice cases, in which the defendants are health professionals with enough medical expertise to understand the nature of the claims against them, defects present in a notice of intent do not implicate substantial rights. When a plaintiff makes a good-faith attempt to comply with the requirements for the notice of intent set forth in MCL 600.2912b, allowing an amendment to cure any defects in the notice, rather than dismissing the action without prejudice, is in the furtherance of justice.

2. Plaintiff's notice of intent was defective because it failed to provide sufficient statements regarding the breach of the standard of care, the actions that defendants should have taken to comply with that standard, and proximate cause. However, plaintiff provided an explanation of the factual basis of her claim and made a good-faith effort to comply with the statutory content requirements by alleging numerous standards of practice or care she considered applicable. The defects in her notice did not warrant dismissal and should be disregarded.

3. The trial court erred by instructing the jury on the doctrine of res ipsa loquitur. That instruction is appropriate when the requesting party presents sufficient evidence (1) that the event was of a kind that ordinarily does not occur in the absence of someone's negligence, (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant, (3) that it was not due to any voluntary action or contribution on the part of the plaintiff, and (4) that evidence of the true explanation of the event is more readily accessible to the defendant than the plaintiff. At trial, both plaintiff and defendants presented evidence that plaintiff's injury was a known complication of laparoscopic surgery and could occur in the absence of any negligence on the part of the treating physician. Accordingly, the jury was incorrectly instructed, and reversal was required.

Reversed and remanded.

1. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE SUIT — DEFECTS IN NOTICE — AMENDMENT OF NOTICE.

MCL 600.2301 allows for the amendment of processes, pleadings, or proceedings and may be used to cure defects in a notice of intent

under MCL 600.2912b; determining whether MCL 600.2301 applies involves a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice; in medical malpractice cases, in which the defendants are health professionals with enough medical expertise to understand the nature of the claims against them, defects present in a notice of intent do not implicate substantial rights; when a plaintiff makes a good-faith attempt to comply with the requirements for the notice of intent set forth in MCL 600.2912b, allowing an amendment to cure any defects in the notice is in the furtherance of justice.

2. NEGLIGENCE — RES IPSA LOQUITUR — ELEMENTS.

Instructing a jury on the doctrine of res ipsa loquitur is appropriate when the requesting party presents sufficient evidence (1) that the event was of a kind that ordinarily does not occur in the absence of someone's negligence, (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant, (3) that it was not due to any voluntary action or contribution on the part of the plaintiff, and (4) that evidence of the true explanation of the event is more readily accessible to the defendant than the plaintiff.

Sachs Waldman, Professional Corporation (by *Linda Turek*), for Heather Swanson.

Chapman and Associates, P.C. (by *Ronald W. Chapman* and *Brian J. Richtarcik*), for Jeannie L. Rowe, D.O., and Bluewater Obstetrics and Gynecology, P.C.

ON REMAND

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

PER CURIAM. This matter returns to this Court on remand from the Michigan Supreme Court[1] with the direction that we evaluate the merits of these appeals in light of *Bush v Shabahang*[2] and MCL 600.2301. We reverse.

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[1] *Swanson v Port Huron Hosp*, 485 Mich 1008 (2009).

[2] *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009).

I. OVERVIEW

This is a consolidated appeal arising out of a medical malpractice action filed by plaintiff, Heather Swanson, against defendants, Port Huron Hospital (also known as Port Huron Hospital Medical Group), Jeannie L. Rowe, D.O., and Bluewater Obstetrics and Gynecology, P.C. Swanson alleged, in part, that Dr. Rowe's negligence during a laparoscopic procedure to remove an ovarian cyst resulted in a puncture wound to Swanson's aorta and then a scar around her navel as a result of a laparotomy performed to repair the aorta. In Docket No. 275404, Dr. Rowe and Bluewater appeal as of right the jury trial judgment in Swanson's favor. In Docket No. 278491, Swanson appeals as of right the trial court's award of attorney fees and costs. The trial court dismissed Port Huron Hospital from the proceedings below, and thus it is not a party to either appeal.

II. UNDERLYING FACTS AND PROCEDURAL HISTORY

On April 9, 2002, 16-year-old Swanson went to the Port Huron Hospital emergency room, complaining of severe pain in the lower right quadrant. An ultrasound showed a 4-centimeter ovarian cyst, and the hospital admitted her. The attending physician requested an obstetrics/gynecology consultation with Dr. Rowe. Dr. Rowe then diagnosed Swanson as having a right ovarian cyst. Swanson was discharged from the hospital on April 11, 2002, even though her pain was allegedly continuous and she was experiencing nausea and vomiting.

On April 12, 2002, Swanson returned to see Dr. Rowe, still complaining of severe pain in the lower right quadrant, nausea, and vomiting. A pelvic ultrasound showed that the cyst had grown to 5.6 centimeters. Dr.

Rowe recommended a laparoscopy and drainage of the cyst. According to Dr. Rowe, in discussing the procedure with Swanson and her mother, Dr. Rowe informed them that the risks involved in such treatment included "the risk of possible injury to bowel, blood vessels or other pelvic organs . . . ." Swanson's mother admitted that Dr. Rowe told her that damage to blood vessels could occur, but she claimed that she thought that meant "little vessels," not the "main aorta." Later that same day, the hospital readmitted Swanson and scheduled her for a laparoscopy with a possible right ovarian cystectomy and a possible appendectomy later that same evening. Before the procedure, Swanson's mother signed an "Authorization, Release and Waiver" form and an informed consent form.

At 6:30 p.m. on April 12, 2002, Dr. Rowe performed the laparoscopy. The laparoscopy was initiated by inserting a Veress needle through the umbilical fold into the abdomen. More specifically, the Veress needle was inserted caudally, at an angle toward the feet, while Dr. Rowe lifted up on the abdomen with a towel clip. Once the Veress needle was inserted into the abdomen, carbon dioxide gas was passed through the needle into the abdomen to insufflate the abdomen. According to Dr. Rowe, the Veress needle was then withdrawn from the abdomen and a trocar inserted at an angle towards the feet, through which a camera was used to observe the ovarian cyst. At that time, Dr. Rowe observed some bright red blood in the peritoneal cavity. Dr. Rowe was not immediately able to locate the exact source of the bleeding, but it appeared to stop, so she proceeded to drain the cyst.

While Dr. Rowe was withdrawing the instruments from the surgical site, she observed a large "pulsating" mass (i.e., a retroperitoneal hematoma). Dr. Rowe con-

sulted a general surgeon, who immediately recommended a vascular consultation with Dr. Khattab Joseph. With Dr. Rowe's assistance, Dr. Joseph then performed an exploratory laparotomy. According to Dr. Rowe, during this second procedure, an incision was made approximately 2 inches above the umbilicus, extending to about 3 inches below the umbilicus. Dr. Joseph and Dr. Rowe identified a "very small" puncture, "like a needle puncture," at the distal portion of the aorta at its bifurcation. Dr. Joseph repaired the puncture with two "very fine sutures." Dr. Joseph opined that, given the puncture's small size, the Veress needle had caused it. Dr. Rowe also opined that the puncture was caused when she inserted the Veress needle. Dr. Rowe then closed the incision without further complications.

On April 18, 2002, the hospital discharged Swanson. Swanson alleged that at the time of her discharge, she had continued pain in the lower right quadrant, a significant amount of pain from gas, and straining with bowel movements. Dr. Rowe testified that Swanson was discharged with medication to treat nausea and pain, but she was in stable condition.

In April 2004, Swanson initiated this lawsuit by mailing a notice of intent[3] to defendants. The notice of intent alleged that the applicable standard of care required defendants, *inter alia*, to "appropriately evaluate the aforementioned patient, including but not limited to, assessing the abdomen and abdominal structures in order to determine the appropriate amount of force needed to perform a laparoscopy"; "appropriately identify the location of the aorta and other anatomical structures prior to placing the veress needle . . . [and] the trocar"; and "protect vital structures, such as the

[3] MCL 600.2912b.

aorta from surgical injury." With respect to breach of the standard of care, the notice of intent stated, "The applicable Standard of Practice and Care was breached as evidenced by the failure to do those things set forth in Section II above." Regarding what actions should have been taken to comply with the standard of care, the notice of intent stated, "The action that should have been taken to achieve compliance with the Standard of Care should have been those things set forth in Section II above." And with respect to proximate cause, the notice of intent stated, "As a result of the defendants' gross and blatant negligence, Heather Swanson sustained injury to the main artery in her body, necessitating a surgical repair that rendered this teenager permanently scarred and disfigured, along with intermittent diarrhea and abdominal pain."

In October 2004, Swanson filed her complaint and affidavit of merit.[4] Swanson's affidavit of merit, signed by Dr. Jon Hazen, explained the proximate cause element as follows: "As a direct result of Defendants' gross and blatant negligence, Heather Swanson sustained injury to the main artery in her body, necessitating a surgical repair that rendered this teenager permanently scarred and disfigured, along with intermittent diarrhea and abdominal pain."

During the September 2006 jury trial, Swanson's primary theory of liability was premised on allegations that Dr. Rowe inserted the Veress needle or trocar at the wrong angle into the abdomen and used too much force during the insertion. At the close of Swanson's proofs, defendants moved for a directed verdict, arguing that Swanson's affidavit of merit did not sufficiently specify the element of proximate cause, as MCL 600.2912d(1)(d) required, because it did not describe the manner in which defendants'

[4] MCL 600.2912d.

breach "factually and foreseeably" caused Swanson's injury. The trial court denied the motion, concluding that the affidavit was sufficient.

Following deliberations, the jury returned a verdict in Swanson's favor, finding that Swanson had sustained an injury, that defendants were negligent, and that defendants' negligence was the proximate cause of Swanson's injury. Defendants then moved for a judgment notwithstanding the verdict (JNOV) or a new trial, arguing again that Swanson's affidavit of merit was deficient and also arguing that Swanson's notice of intent failed to comply with MCL 600.2912b. The trial court denied defendants' motion.

III. PRIOR APPELLATE PROCEEDING

Defendants appealed in this Court (Docket No. 275404), arguing, in pertinent part, that the trial court clearly erred by denying their motion for JNOV or a new trial. Defendants argued they were entitled to a JNOV because Swanson's notice of intent "failed to sufficiently specify proximate cause by failing to detail the manner in which defendants' alleged breach of the standard of care factually and foreseeably caused injury to Swanson's aorta."[5]

A majority of this Court (WHITBECK, P.J., and OWENS, J.) reversed the judgment against defendants on the ground that the notice of intent was defective and remanded the case for entry of an order vacating the verdict and judgment against defendants.[6] The *Swanson* majority reasoned:

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[5] *Swanson v Port Huron Hosp*, unpublished opinion per curiam of the Court of Appeals, issued June 2, 2009 (Docket Nos. 275404 and 278491), p 3.

[6] *Id*. at 6.

Here, the notice of intent alleged that the applicable standard of care required defendants to, *inter alia*, "appropriately evaluate [Swanson], including but not limited to, assessing the abdomen and abdominal structures in order to determine the appropriate amount of force needed to perform a laparoscopy;" "appropriately identify the location of the aorta and other anatomical structures prior to placing the veress needle . . . [and/or] the trocar . . .;" and "protect vital structures, such as the aorta from surgical injury." With respect to breach, Swanson's notice of intent merely stated, "The applicable Standard of Practice and Care was breached as evidenced by the failure to do those things set forth in Section II above." Regarding what actions should have been taken to comply with the standard of care, the notice of intent simply stated, "The action that should have been taken to achieve compliance with the Standard of Care should have been those things set forth in Section II above." And with respect to proximate cause, the notice of intent stated:

"As a result of the defendants' gross and blatant negligence, Heather Swanson sustained injury to the main artery in her body, necessitating a surgical repair that rendered this teenager permanently scarred and disfigured, along with intermittent diarrhea and abdominal pain."

Swanson's notice of intent is very similar in its deficiencies to the notice of intent in *Miller* [*v Malik*, 280 Mich App 687, 696-697; 760 NW2d 818 (2008)]. The notice of intent here was similarly inadequate to meet the requirement of MCL 600.2912b(4)(e). Here, although Swanson stated that "defendants' gross and blatant negligence" caused "injury to the main artery in her body," nowhere did she state *how* the defendants were negligent other than by breaching the enumerated standards of care. In other words, there is no indication in the notice of intent how defendants caused or could have avoided the injury to Swanson's artery. Like in *Miller*, Swanson did identify certain duties in the standard of care portion of the notice of intent, but she failed to describe the *manner* in which any failure on the part of defendants to perform any of these duties caused Swanson's injury.

> For example, although Swanson asserted that defendants had a duty to appropriately evaluate Swanson, including "assessing the abdomen and abdominal structures in order to determine the appropriate amount of force needed to perform a laparoscopy," Swanson never explained *how* determining the appropriate amount of force would have prevented injury to the aorta, nor did she allege that Dr. Rowe actually used anything other than the appropriate amount of force. Similarly, Swanson did not explain *how* identifying "the location of the aorta and other anatomical structures" would have prevented injury to the aorta. Further, Swanson failed to explain *how* Dr. Rowe was supposed to "protect vital structures, such as the aorta from surgical injury."
>
> Thus, "Although the instant notice of intent may conceivably have apprised [defendants] of the nature and gravamen of [Swanson's] allegations, this is not the statutory standard; § 2912b(4)(e) requires something more." The mere correlation between alleged malpractice and an injury is insufficient to show proximate cause. We therefore conclude that the notice of intent was not sufficiently stated to put the defendants on statutorily sufficient notice of the nature of the claim.[7]

Accordingly, the *Swanson* majority held that the trial court erred by denying defendants' motion for a JNOV and reversed the verdict against defendants.

Judge O'CONNELL, dissenting, stated that he believed *Miller* was wrongly decided and that the notice of intent filed in the instant case was sufficient.[8]

Swanson sought leave to appeal in the Michigan Supreme Court. And in December 2009, the Supreme Court entered an order vacating the judgment in *Swanson* and remanding "for reconsideration of the parties'

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[7] *Id.* at 5-6 (citations omitted) (alterations other than addition of citation in original).

[8] *Id.* at 2 (O'CONNELL, J., dissenting).

appeals in light of this Court's decision in *Bush v Shabahang*, 484 Mich 156 (2009), and MCL 600.2301."[9]

IV. NOTICE OF INTENT

A. STANDARD OF REVIEW

Defendants argue that the trial court clearly erred by denying their motions for JNOV or a new trial because Swanson's notice of intent failed to sufficiently specify proximate cause by failing to detail the manner in which defendants' alleged breach of the standard of care factually and foreseeably caused injury to Swanson's aorta. Whether a notice of intent complies with the requirements of MCL 600.2912b is a question of law that this Court reviews de novo.[10]

B. *BUSH v SHABAHANG*

In *Bush*, the plaintiff filed a notice of intent several days before the expiration of the period of limitations.[11] The plaintiff then filed a medical malpractice action 175 days after serving notice on the defendants.[12] The defendants sought summary disposition, arguing that the notice of intent did not comply with MCL 600.2912b and that the plaintiff had failed to wait the required 182 days before filing the complaint.[13] The trial court granted summary disposition in favor of several defendants, but denied summary disposition for other defendants, and held that the complaint had not been filed

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[9] *Swanson*, 485 Mich 1008.

[10] *Jackson v Detroit Med Ctr*, 278 Mich App 532, 545; 753 NW2d 635 (2008).

[11] *Bush*, 484 Mich at 162.

[12] *Id*.

[13] *Id*.

prematurely.[14] This Court affirmed in part, reversed in part, and remanded.[15]

On appeal, the Supreme Court first considered whether the filing of a defective notice of intent tolls the period of limitations for a medical malpractice action.[16] The Court concluded that, pursuant to the clear language of MCL 600.2912b, which requires that a plaintiff file an notice of intent not less than 182 days before a medical malpractice action is commenced, and MCL 600.5856(c), which provides that the period of limitations is tolled "[a]t the time notice is given in compliance with the applicable notice period under section 2912b," if the plaintiff complies with the applicable notice period before commencing a medical malpractice action, the period of limitations is tolled.[17] Thus, the filing of a timely notice of intent tolls the period of limitations in a medical malpractice action "despite the presence of defects in the [notice of intent]."[18]

The Court then proceeded to consider what consequences attach to the filing of a defective notice of intent.[19] The Court reviewed the legislative history of the statute creating notices of intent and concluded that the Legislature did not intend that a defective notice of intent be grounds for a dismissal with prejudice pursuant to MCL 600.2912b.[20] Thus, the Court found it appropriate to consider other relevant statutory provisions "to see if other appropriate remedies

[14] *Id*. at 163.

[15] *Bush v Shabahang*, 278 Mich App 703, 727; 753 NW2d 271 (2008).

[16] *Bush*, 484 Mich at 164.

[17] *Id*. at 169.

[18] *Id*. at 170.

[19] *Id*.

[20] *Id*. at 172-175.

exist . . . ."[21] The Court then found applicable MCL 600.2301, which provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

The Court reasoned that giving notice of intent "is a part of a medical malpractice 'proceeding' " and therefore that MCL 600.2301 "applies to the [notice of intent] 'process.' "[22] The Court therefore held that MCL 600.2301 "may be employed to cure defects in [a notice of intent]"[23] and stated as follows regarding the use of MCL 600.2301 in such a manner:

> We recognize that § 2301 allows for amendment of errors or defects, whether the defect is in form or in substance, but only when the amendment would be "for the furtherance of justice." Additionally, § 2301 mandates that courts disregard errors or defects when those errors or defects do not affect the substantial rights of the parties. Thus, the applicability of § 2301 rests on a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed "on such terms as are just." Given that [notices of intent] are served at such an early stage in the proceedings, so-called "defects" are to be expected. The statute contemplates that medical records may not have been turned over before the [notice of intent] is mailed to the defendant. Defendants who receive these notices are sophisticated

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[21] *Id*. at 176.

[22] *Id.* at 176-177.

[23] *Id*. at 177.

> health professionals with extensive medical background and training. Indeed, these same defendants are allowed to act as their own reviewing experts. A defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of claims being asserted against him or her even in the presence of defects in the [notice of intent]. Accordingly, we conclude that no substantial right of a health care provider is implicated. Further, we hold that the second prong of the test, which requires that the cure be in the furtherance of justice, is satisfied when a party makes a good-faith attempt to comply with the content requirements of § 2912b. Thus, only when a plaintiff has not made a good-faith attempt to comply with § 2912b(4) should a trial court consider dismissal of an action without prejudice.[24]

The Court then examined the notice of intent at issue in the case before it and agreed with this Court that, while the vast majority of the notice of intent complied with MCL 600.2912b(4), portions of it were defective.[25] But the Court held that those defects could be cured by amendment pursuant to MCL 600.2301 and thus affirmed this Court's decision in part, reversed it in part, and remanded the matter to the trial court for further proceedings.[26]

C. ANALYSIS ON REMAND

On remand in this case, this Court must reexamine the notice of intent in light of the Supreme Court's decision in *Bush* and MCL 600.2301. As stated earlier, the Court explained in *Bush* that "the applicability of § 2301 rests on a two-pronged test: first, whether a

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[24] *Id*. at 177-178 (citations omitted).

[25] *Id*. at 178-180.

[26] *Id*. at 180-181, 185.

substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice."[27]

With respect to the substantial-right prong of the test, the *Bush* Court explained that in medical malpractice cases, the defendants who receive the notice of intent "are sophisticated health professionals with extensive medical background and training."[28] And, according to the Court, "[a] defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of claims being asserted against him or her even in the presence of defects in the [notice of intent]."[29] Thus, because defendants here are health care providers, like the *Bush* defendants, no substantial rights are implicated.

Turning to the furtherance-of-justice prong, the *Bush* Court explained that this prong is satisfied "when a party makes a good-faith attempt to comply with the content requirements of § 2912b. Thus, only when a plaintiff has not made a good-faith attempt to comply with § 2912b(4) should a trial court consider dismissal of an action without prejudice."[30]

We continue to believe that Swanson's notice of intent was defective because it failed to meet the minimum requirements of MCL 600.2912b(4)(c), (d), and (e).[31] With respect to breach of the standard of care,[32] Swanson's notice of intent merely stated, "The

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[27] *Id*. at 177.

[28] *Id*. at 178.

[29] *Id*.

[30] *Id*.

[31] Judge O'CONNELL is of the opinion that the notice of intent was sufficient, and for the reasons stated by the trial court, both Judges O'CONNELL and OWENS are of the opinion that the affidavit of merit was sufficient.

[32] MCL 600.2912b(4)(c).

applicable Standard of Practice and Care was breached as evidenced by the failure to do those things set forth in Section II above." Regarding what actions should have been taken to comply with the standard of care,[33] the notice of intent simply stated, "The action that should have been taken to achieve compliance with the Standard of Care should have been those things set forth in Section II above." And with respect to proximate cause, the notice of intent failed to describe the *manner* in which any failure on the part of defendants caused Swanson's injury.[34]

However, despite these defects, Swanson did explain the factual basis for her claim[35] and alleged numerous standards of practice or care that she deemed applicable to defendants' conduct.[36] Notably, Swanson's notice of intent alleged that the applicable standard of care required defendants to, among other things, "appropriately evaluate [Swanson], including but not limited to, assessing the abdomen and abdominal structures in order to determine the appropriate amount of force needed to perform a laparoscopy"; "appropriately identify the location of the aorta and other anatomical structures prior to placing the veress needle . . . [and] the trocar;" and "protect vital structures, such as the aorta from surgical injury."

In *Bush*, although acknowledging arguably more egregious defects in the notice of intent,[37] the Court

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[33] MCL 600.2912b(4)(d).

[34] MCL 600.2912b(4)(e).

[35] MCL 600.2912b(4)(a).

[36] MCL 600.2912b(4)(b).

[37] In *Bush*, with respect to defendant West Michigan Cardiovascular Surgeons, the plaintiff's notice failed to adequately address the standard of care under a direct theory of liability for failure to properly train or hire, failed to state how West Michigan Cardiovascular's hiring and

nevertheless held that the plaintiffs had made a good-faith attempt to comply with the content requirements of MCL 600.2912b and that the defects did not warrant dismissal of the claim.[38] According to the *Bush* Court, "These types of defects fall squarely within the ambit of § 2301 and should be disregarded or cured by amendment."[39]

Thus, looking at Swanson's notice as a whole and comparing its defects to those in *Bush*, we conclude that her notice of intent was a good-faith attempt to comply with the content requirements of MCL 600.2912b. Therefore, dismissal of her claims was not warranted. With respect to the appropriate remedy, we further conclude that, in light of our conclusion regarding the trial court's res ipsa loquitur instruction, discussed in part V, these defects should be disregarded.

V. RES IPSA LOQUITUR INSTRUCTION

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's determination whether a jury instruction is applicable to the facts of the case.[40]

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training practices violated the standard of care, failed to state which hiring practices or training methods it should have employed, and failed to state how those improper practices proximately caused the alleged injuries. *Bush*, 484 Mich at 179. And with respect to defendant Spectrum Health's nursing staff and physician assistants, the plaintiff's notice failed to state a separate standard of care for the nurses and physician assistants, failed to delineate the specific actions taken by the nursing staff or physician assistants that purportedly breached the standard of care, and failed to state the manner in which the identified breaches proximately caused the alleged injuries. *Id*. at 179-180.

[38] *Bush*, 484 Mich at 180.

[39] *Id*.

[40] *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006); *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993).

B. ANALYSIS

Michigan Model Civil Jury Instruction 30.05, the res ipsa loquitur instruction, states in pertinent part:

> If you find that the defendant had control over the *[body of the plaintiff / instrumentality which caused the plaintiff's injury]*, and that the plaintiff's injury is of a kind which does not ordinarily occur without someone's negligence, then you may infer that the defendant was negligent.

M Civ JI 30.05 also includes the following use note: "This instruction should be given only if there is expert testimony that the injury does not ordinarily occur without negligence, or if the court finds that such a determination could be made by the jury as a matter of common knowledge." Accordingly, the following conditions must be met for a plaintiff to invoke the res ipsa loquitur doctrine:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
>
> (4) [e]vidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.[41]

In order for the court to give a requested jury instruction, the requesting party must present sufficient evidence to warrant the instruction.[42]

At trial, both plaintiff and defendants presented expert witness testimony to explain how the injury to

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[41] *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005) (citations and quotation marks omitted) (alteration in *Woodard*).

[42] *Bordeaux*, 203 Mich App at 169.

Swanson's aorta could have occurred. Both Dr. Rowe and Laura Williams, the surgical technologist, testified that Dr. Rowe inserted the Veress needle and the trocar at the appropriate angle. Nevertheless, Swanson's expert, Dr. Hazen, testified that the injury must have occurred because Dr. Rowe improperly inserted an instrument (most likely the trocar) at the wrong angle. However, Dr. Hazen also admitted that injury to the aorta can occur during this type of laparoscopic surgery two times out of a thousand. Moreover, defendants' experts testified that Dr. Rowe performed Swanson's surgery within the applicable standard of care and that injury to the aorta is a known complication of a properly performed laparoscopic procedure. Specifically, defendants' two expert witnesses, Dr. Samuel McNeeley, Jr., and Dr. William Floyd, who are board-certified in obstetrics and gynecology, both testified that a laparoscopic procedure like that performed on Swanson is a "blind procedure" and confirmed that one of the known risks associated with such procedures is injury to blood vessels, including the aorta. Therefore, it is clear that the evidence did not support an instruction that Swanson's injury was of a kind that does not ordinarily occur without someone's negligence.

In this case, both defendants' experts and Swanson's expert, Dr. Hazen, testified that Swanson's injury was a known complication of laparoscopic surgery that can occur in the absence of any negligence on the part of the treating physician and indeed does occur up to two times out of a thousand without any negligence on the part of the treating physician. Since this type of injury is a known complication of laparoscopic surgery, and since this type of injury can occur without any negligence on the part of the treating physician, it is axiomatic that instructing the jury on the doctrine of res ipsa loquitur was an abuse of discretion. Given that this

error alone merits reversal, we need not address the parties' remaining arguments.

We reverse on the basis of the erroneous res ipsa loquitur instruction and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

VANDONKELAAR v KID'S KOURT, LLC

Docket No. 292856. Submitted September 8, 2010, at Grand Rapids. Decided September 30, 2010, at 9:00 a.m.

Chadwick Vandonkelaar, a minor, by his next friend, Tonya L. Slager, his mother, brought an action in the Ottawa Circuit Court against Kid's Kourt, L.L.C., and Maryanne Barringer, seeking damages for injuries sustained at defendants' daycare center when a metal pipe holding a large roll of paper dislodged and plaintiff's finger was crushed and lacerated. Defendants admitted liability in relation to plaintiff's premises-liability claim, but contested the extent of the damages. Defendants moved for leave to file a notice of nonparties at fault and to amend their affirmative defenses. Defendants sought to designate plaintiff's parents as nonparties at fault for their alleged failure to follow the prescribed course of medical treatment for plaintiff after surgery was performed on his finger. Defendants also sought to add affirmative defenses that alleged that plaintiff's injuries were caused by acts or omissions of his parents that were beyond the control of defendants and to reserve the right to have the trier of fact allocate fault under MCR 2.112(K). The parties agreed that plaintiff's parents were protected by parental immunity, considering that the parents' alleged inaction and failures pertained to plaintiff's medical care. The parties disagreed regarding the effect of that immunity on the question whether fault could be allocated to the parents as nonparties, thereby potentially minimizing the extent of the damages for which defendants would be liable. The court, Edward R. Post, J., denied the motion, concluding that the immunity enjoyed by plaintiff's parents precluded defendants from naming them as nonparties at fault because their immunity exempted them from any legal duty to obtain medical care for plaintiff. Defendants appealed by leave granted.

The Court of Appeals *held*:

1. Under the principles of joint and several liability existing before the enactment of the comparative-fault statutes, MCL 600.2956, MCL 600.2957, and MCL 600.6304, defendants and plaintiff's parents could only have been held severally liable

because their negligence did not produce a single, indivisible injury, and a court could not have imposed joint and several liability.

2. The purpose of enacting the comparative-fault statutes was to eliminate joint and several liability in situations in which such liability existed. The comparative-fault statutes were not applicable here because this case was not one in which there would have been joint and several liability before the enactment of the comparative-fault statutes. The comparative-fault statutes are inapplicable with respect to fact patterns entailing multiple torts separated in time, multiple torts separated by individual causal chains, and multiple torts that did not produce a single, indivisible injury.

3. There was no dispute that plaintiff's parents did not contribute to the cause of plaintiff's injuries arising from the incident at the daycare center, although their inaction may have caused plaintiff to later suffer separate, more extensive, and divisible damage.

4. "Injury" and "damages," while interrelated, are two distinct concepts for purposes of the comparative-fault statutes. Damages can only be the result of an injury. Damages cannot arise on their own, but must flow from an injury.

5. When subsections (1)(b) and (2) of MCL 600.6304 are read together, consideration of the causal relation between the conduct and the claimed damages means consideration of conduct that jointly contributed to the injury and the damages flowing from that particular conduct and resulting injury. The subsections do not direct a trier of fact to consider damages unrelated to conduct that produced or caused the underlying injury. The conduct of plaintiff's parents constituted a possible subsequent, separate tort that was not part of the causal chain with respect to the finger injuries that occurred at the daycare center, but initiated a new causal chain leading to its own set of damages, which plaintiff could not recover because of parental immunity.

6. The conduct or inaction of plaintiff's parents was not the factual or proximate cause of plaintiff's joint and tendon injuries suffered at the daycare center. The parents' conduct could not constitute "fault" for purposes of the statutory definition of "fault" found in MCL 600.6304(8).

7. As a matter of law, defendants were the only parties at fault and there were no other tortfeasors with respect to the conduct that was the factual and proximate cause of the injuries to plaintiff's finger at the daycare center. Thus, any presumed

negligence by plaintiff's parents in regard to plaintiff's medical treatment after the injuries occurred at the daycare center did not trigger the need to assess their fault for purposes of the comparative-fault statutes.

Affirmed and remanded.

MURRAY, J., dissenting, stated two reasons for not joining the majority opinion. First, the majority decided this case on the basis of a theory neither raised nor decided in the trial court and not raised in the Court of Appeals. Second, the majority erred by holding that the comparative-fault statutes did not apply to this case. The parents' alleged failure to take the child to the prescribed follow-up care was not a separate tort that initiated a new causal chain leading to its own set of damages. Rather, the permanent injury to plaintiff's finger was an element of the damages that plaintiff sought to recover from defendants. An argument could be made that the parents at least in part caused that damage by breaching their duty to provide proper medical care to plaintiff. Consequently, the injury at the daycare center, the immediate harm that was caused, and any lasting damage are all part of plaintiff's lawsuit and, as in all cases involving nonparties at fault, defendants asserted that more than one potential person caused at least some of the harm at issue. Because the comparative-fault statutes reveal a legislative intent to allocate liability according to the relative fault of all persons contributing to the accrual of a plaintiff's damages, defendants should have been allowed to argue to the jury that plaintiff's parents were at least partially at fault for some of the damages plaintiff suffered. Plaintiff's parents had a common-law duty to provide appropriate medical care for plaintiff, and the doctrine of parental immunity did not abrogate this duty. Therefore, the existence of parental immunity cannot preclude an allocation of fault under the comparative-fault statutes. The trial court's order should be reversed, and the case should be remanded for further proceedings.

NEGLIGENCE — COMPARATIVE-FAULT STATUTES — JOINT LIABILITY — SEVERAL LIABILITY.

The purpose of enacting the comparative-fault statutes was to eliminate joint and several liability in situations in which that liability exists; the comparative-fault statutes are inapplicable with respect to fact patterns entailing multiple torts separated in time, multiple torts separated by individual causal chains, and multiple torts that did not produce a single, indivisible injury (MCL 600.2956, 600.2957, 600.6304).

Buckfire & Buckfire, P.C. (by *Thomas N. Economy* and *George G. Burke, III*), for plaintiff.

Smith Haughey Rice & Roegge (by *Marilyn S. Nickell Tyree*) for defendants.

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

MURPHY, C.J. Defendants appeal by leave granted the trial court's order denying their motions to file a notice of nonparties at fault and to amend their affirmative defenses, along with the court's order denying defendants' motion for reconsideration. This premises-liability case arose from injuries to his finger suffered by plaintiff, Chadwick Vandonkelaar (Chad), a minor, at defendants' daycare center. And defendants, while admitting liability, contended that some fault should be allocated to Chad's parents because they were negligent in failing to follow a prescribed course of medical treatment after surgical repair of the finger. The trial court, relying on *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18; 762 NW2d 911 (2009), held that there could be no allocation of fault in regard to the parents because they were immune from suit, which necessarily meant that they had no "legal duty" to obtain proper medical care, a prerequisite under *Romain* before any fault could be attributed to them under the comparative-fault statutes.[1] We affirm, although for reasons different from those offered by the trial court. We conclude that the comparative-fault statutes have no application in this case because, as a matter of law and indisputably, defendants were the only parties at fault and there were no other tortfeasors *with respect to the conduct that was the factual and proximate cause of*

[1] When we speak of the comparative-fault statutes, we refer to MCL 600.2956, MCL 600.2957, and MCL 600.6304.

the injuries to Chad's finger that occurred at the daycare center. Any presumed negligence by the parents in regard to Chad's medical treatment after the injuries occurred at the daycare center did not trigger the need to assess their fault for purposes of the comparative-fault statutes, given that such negligence was not part of the causal chain in regard to his finger's becoming crushed and lacerated in the first place. Rather, any negligent conduct by the parents constituted a subsequent, separate tort that initiated a new causal chain leading to its own set of damages, which, we note, would not be recoverable by Chad because of parental immunity. See *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972).

I. BACKGROUND

Chad, six years old at the time, sustained injuries while at defendants' daycare center in May 2007. Chad placed his right middle finger into the end of a metal pipe that held a large roll of paper, and the pipe dislodged from the paper-roller frame, crushing and lacerating Chad's finger. The preoperative diagnosis indicated that Chad suffered a "middle finger extensor tendon injury" and an "[o]pen distal interphalangeal joint injury." Surgery on the finger was performed by Dr. Donald Condit, and the surgical procedure entailed repair of the extensor tendon, along with "middle finger debridement and repair with pinning of distal interphalangeal joint injury."

Defendants admitted their liability in relation to a premises-liability claim pursued by Chad, through his mother, Tonya L. Slager, as next friend, in October 2008, but defendants contested the extent of the damages.[2]

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[2] The trial court dismissed the claims of gross negligence and nuisance on defendants' motion for summary disposition.

The trial court limited discovery "to the question of the mechanics of the injury" and to Chad's "reaction, pain, and other damages."

In April 2009, defense counsel had the opportunity to meet with Dr. Condit, and they discussed the doctor's findings and opinions concerning Chad's injuries, treatment, and prognosis. Defense counsel averred, on the basis of the conversation at this meeting, that Dr. Condit had prescribed physical therapy once a week for four weeks following the surgery, but Chad had only attended an initial evaluation and one therapy session. Defense counsel further averred that Dr. Condit had indicated that it was his intent to have Chad attend at least 8 to 12 physical therapy sessions over a three-month period in order to improve the finger's range of motion as well as to alleviate stiffness and swelling in the fingertip. According to the affidavit filed by defense counsel, Dr. Condit informed counsel that the failure to continue with the therapy had a "very significant" effect on Chad's recovery.

On the basis of this information, defendants moved for leave to file a notice of nonparties at fault and to amend their affirmative defenses. Defendants sought to designate Chad's parents as nonparties at fault for their failure to follow Dr. Condit's advice and failure to ensure Chad's attendance at follow-up physician appointments and physical therapy. Defendants also sought to add affirmative defenses, alleging that Chad's injuries were caused by acts or omissions by his parents that were beyond the control of defendants and reserving the right to have the trier of fact allocate fault under MCR 2.112(K).[3]

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[3] MCR 2.112(K) incorporates MCL 600.2957 and MCL 600.6304 and addresses procedural and notice requirements with respect to fault allocation.

At the hearing on the motions, the parties agreed that Chad's parents were immune from civil liability, considering that their alleged inaction and failures pertained to Chad's medical care. Indeed, in *Plumley*, 388 Mich at 8, our Supreme Court abolished general intrafamily tort immunity, but with some exceptions, holding:

> A child may maintain a lawsuit against his parent for injuries suffered as a result of the alleged ordinary negligence of the parent. Like our sister states, however, we note two exceptions to this new rule of law: (1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

See also *Spikes v Banks*, 231 Mich App 341, 348; 586 NW2d 106 (1998).[4]

Even though there was agreement that Chad's parents were protected by immunity, the parties vigorously disagreed about the effect of that immunity on the question whether fault could be allocated to the parents as nonparties, thereby potentially minimizing the extent of the damages that could be the responsibility of defendants. More specifically, the crux of the question in the trial court focused on whether a person or entity protected by immunity could nonetheless be named as a

[4] In determining whether a defendant was exercising reasonable parental authority, the question to be answered is not whether the defendant acted negligently, but whether the alleged act reasonably fell within one of the *Plumley* exceptions. *Spikes*, 231 Mich App at 348-349; *Phillips v Deihm*, 213 Mich App 389, 395; 541 NW2d 566 (1995). Here, the inaction at issue reasonably fell within one of the *Plumley* exceptions because Chad's parents were clearly exercising their discretion with respect to the provision of medical services and care. Again, there was and is no dispute on this matter.

nonparty at fault. In answering that question, our Supreme Court's holding in *Romain* made it necessary to determine whether the nonparty owed a "legal duty" to the injured person. In *Romain*, 483 Mich at 20-22, the Michigan Supreme Court ruled as follows concerning the comparative-fault statutes:

> We write briefly to eliminate a conflict between two published Court of Appeals opinions. Specifically, we overrule the statement in *Kopp v Zigich* [268 Mich App 258, 260; 707 NW2d 601 (2005)] that "a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated." That is an incorrect statement of Michigan law. In *Jones v Enertel, Inc* [254 Mich App 432, 437; 656 NW2d 870 (2002)], the Court of Appeals held that "a duty must first be proved before the issue of fault or proximate cause can be considered." Under the "first out" rule of MCR 7.215(J)(1), the *Kopp* panel should have followed *Jones* or declared a conflict under MCR 7.215(J)(2). Because the *Kopp* panel did not declare a conflict, *Jones* is the controlling precedent and proof of a duty *is* required "before fault can be apportioned and liability allocated" under the comparative fault statutes, MCL 600.2957 and MCL 600.6304.
>
> In addition to being the controlling precedent under the court rules, *Jones* correctly stated Michigan negligence law; *Kopp* did not. As noted by this Court in *Riddle v McLouth Steel Products Corp* [440 Mich 85, 99; 485 NW2d 676 (1992)]:
>
> " 'In a common law negligence action, before a plaintiff's fault can be compared with that of the defendant, it obviously must first be determined that the defendant was negligent. It is fundamental tort law that before a defendant can be found to have been negligent, it must first be determined that the defendant owed a legal duty to the plaintiff.' "
>
> The same calculus applies to negligent actors under the comparative fault statutes. A common-law negligence

> claim requires proof of (1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causation; and (4) damages. Therefore, under Michigan law, a legal duty is a threshold requirement before there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another. Thus, when the Legislature refers to the common-law term "proximate cause" in the comparative fault statutes, it is clear that for claims based on negligence " 'it must first be determined that the [person] owed a legal duty to the plaintiff.' " Additionally, MCL 600.6304(8) includes in the definition of fault "a breach of a legal duty . . . that is a proximate cause of damage sustained by a party." Before there can be "a breach of a legal duty," there must be a legal duty. Without owing a duty to the injured party, the "negligent" actor could not have proximately caused the injury and could not be at "fault" for purposes of the comparative fault statutes. [Citations omitted; some alterations in original.]

The trial court concluded that the immunity enjoyed by Chad's parents precluded defendants from naming them as nonparties at fault because their immunity exempted them from having any legal duty to obtain medical care for Chad. Accordingly, the trial court denied defendants' motion and the subsequent motion for reconsideration. This Court then granted defendants' application for leave to appeal. *Slager v Kids Court, LLC*, unpublished order of the Court of Appeals, entered July 14, 2009 (Docket No. 292856).

II. ANALYSIS

For the reasons set forth later in this opinion, we find it unnecessary to determine whether Chad's parents had a legal duty to obtain medical care for him despite their immunity from liability because we conclude that the comparative-fault statutes are simply not implicated regardless of any parental duty.

A. STANDARD OF REVIEW

The issue on which we base our holding concerns interpretation of the comparative-fault statutes. Statutory construction is a question of law subject to review de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

B. JOINT AND SEVERAL LIABILITY BEFORE ENACTMENT OF THE COMPARATIVE-FAULT STATUTES

In *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008), our Supreme Court, examining MCL 600.2957 and MCL 600.6304, stated:

> The tort-reform statutes have abolished joint and several liability in cases in which there is more than one tortfeasor actively at fault. Traditionally, before tort reform, under established principles of joint and several liability, when the negligence of multiple tortfeasors produced a single indivisible injury, the tortfeasors were held jointly and severally liable. *Watts v Smith*, 375 Mich 120, 125; 134 NW2d 194 (1965); *Maddux v Donaldson*, 362 Mich 425, 433; 108 NW2d 33 (1961).

In *Watts*, 375 Mich at 125, the Michigan Supreme Court, quoting *Meier v Holt*, 347 Mich 430, 438-439; 80 NW2d 207 (1956), observed:

> " 'Although it is not always definitely so stated the rule seems to have become generally established that, although there is no concert of action between tort-feasors, if the cumulative effect of their acts is a single, indivisible injury, which it cannot certainly be said would have resulted but for the concurrence of such acts, the actors are to be held liable as joint tort-feasors; whereas, if the results, as well as the acts, are separable, in theory at least, so that it can be said that the act of each would have resulted in some injury, however difficult it may be as a practical matter to establish the exact proportion of injury caused thereby, each can

> be held liable only for so much of the injury as was caused by his act.' (1 Cooley on Torts [4th ed], § 86, pp 279, 280)." [Alteration in original.]

Under the principles of joint and several liability, tortfeasors could be held jointly and severally liable despite there being no common duty, common design, or concert of action as long as their negligence produced a single, indivisible injury. *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 252; 660 NW2d 344 (2003).

Here, it cannot be concluded that defendants' negligence and the parents' presumed negligence produced a single, indivisible injury, the injuries being a "middle finger extensor tendon injury" and an "[o]pen distal interphalangeal joint injury." Any negligence by the parents was not a cause of the tendon and joint injuries brought about by the occurrence at the daycare center. Rather, the acts of defendants, as well as the results of their tortious conduct, are separable from the acts of the parents, as well as the results of the parents' assumed tortious conduct, so that " ' "it can be said that the act[s] of each would have resulted in some injury, however difficult it may be as a practical matter to establish the exact proportion of injury caused thereby." ' " *Watts*, 375 Mich at 125 (citations omitted). Therefore, under the principles of joint and several liability that existed before the enactment of the comparative-fault statutes, defendants and the parents[5] in the instant case could only have been held severally liable, i.e., liable " ' "only for so much of the injury as was caused by his act." ' " *Id.* (citations omitted). A court could not have imposed joint and several liability.

[5] For purposes of this opinion and our analysis, we are effectively treating the two defendants as a single unit and the two parents as a single unit.

C. THE COMPARATIVE-FAULT STATUTES

As indicated in *Kaiser*, 480 Mich at 37, the "tort-reform statutes . . . abolished joint and several liability in cases in which there is more than one tortfeasor actively at fault." Indeed, the Legislature expressed that sentiment in MCL 600.2956, wherein it is provided:

> Except as provided in [MCL 600.6304 (an exception not applicable here)], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

Accordingly, because the purpose of enacting the comparative-fault statutes was to eliminate joint and several liability in situations in which that liability existed, and because the case at bar is not one in which there would have been joint and several liability before enactment of the statutes, the comparative-fault statutes are not applicable here. There was no need for the legislation to address situations in which there would solely be several liability based on existing common law, considering that simple causation-damage principles would effectively result in a tortfeasor's only being held responsible for injuries caused by his or her tortious conduct. However, it is necessary to examine the language in MCL 600.2957 and MCL 600.6304 to see if they are consistent with our conclusion. MCL 600.2957 provides, in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's per-

> centage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.
>
> * * *
>
> (3) Sections 2956 to 2960 [MCL 600.2956 to 600.2960] do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

We find nothing in MCL 600.2957 that conflicts with our assessment that the comparative-fault statutes are inapplicable with respect to fact patterns entailing multiple torts separated in time, multiple torts separated by individual causal chains, and multiple torts that did not produce a single, indivisible injury.

MCL 600.6304 provides, in pertinent part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d], regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), . . . and shall enter judgment against each party, including a third-party defendant . . . .

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6) [medical malpractice cases], a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). . . .

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

As indicated already, MCL 600.6304(1)(b) requires the trier of fact to allocate the "percentage of the total fault of all persons that contributed to the *death or injury* . . . ."[6] (Emphasis added.) Again, there is no dispute that Chad's parents did not contribute to the cause of Chad's injuries, i.e., the tendon and joint injuries produced by the underlying occurrence at the daycare center, although their inaction may have caused Chad to later suffer separate, more extensive, and divisible damage. At this point, it is appropriate to note, for purposes of the comparative-fault statutes, that the

[6] Because the instant case involves an injury and not a death, we shall solely use the term "injury" for the remainder of this opinion when discussing the statutory language.

concepts of "injury" and "damages," while interrelated, are two distinct concepts. In *Shinholster v Annapolis Hosp*, 471 Mich 540, 552 n 6; 685 NW2d 275 (2004), the Court, construing MCL 600.6304, indicated that "damage cannot arise on its own, but must flow from an injury" and that "[d]amage can only be the result of an injury." The *Shinholster* Court continued, stating, "[F]irst an injury to plaintiff must exist and the trier of fact must then determine whether plaintiff[7] *constituted a proximate cause of such injury before* there is any need for the trier of fact to focus on plaintiff's damages." *Id.* (emphasis added).

As indicated already, MCL 600.6304(2) requires the trier of fact, in "determining the percentages of fault *under subsection (1)(b)*," to "consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed." (Emphasis added.) This language is simply to be incorporated into and made a part of the assessment that must be undertaken in regard to MCL 600.6304(1)(b), which, again, focuses on contribution to the "injury." Accordingly, when subsections (1)(b) and (2) of MCL 600.6304 are read together, consideration of the causal relation between the conduct and the claimed damages means consideration of conduct that jointly contributed to the injury and the damages flowing from that particular conduct and resulting injury. Those statutory subsections, when read together, do not direct a trier of fact to consider damages unrelated to conduct that produced or caused the underlying injury. Once again, the conduct or inaction of Chad's parents

[7] *Shinholster* concerned whether any fault could be allocated to the plaintiff's decedent for causing her own death; however, the quoted language would be equally applicable to any other party or nonparty alleged to be at fault for causing an injury or death.

played no role in causing the tendon and joint injuries or the incident producing those injuries. Therefore, MCL 600.6304 would not even permit the trier of fact to consider any injuries that the parents may have caused Chad to suffer. The parents' conduct constituted a possible subsequent, separate tort that was not part of the causal chain with respect to the finger injuries and the occurrence at the daycare center.

Finally, we examine MCL 600.6304(8), which defines "fault" as conduct "that is a proximate cause of damage sustained by a party." This provision must also be read in the context of the "fault" allocation that the trier of fact must make under MCL 600.6304(1)(b). Accordingly, the examination of whether a person's conduct was a "proximate cause of damage sustained by a party," MCL 600.6304(8), necessarily means conduct that contributed to the injury and the damages flowing from that particular conduct and resulting injury. The conduct or inaction of Chad's parents was not the factual or proximate cause of Chad's tendon and joint injuries that he suffered at the daycare center. Accordingly, their conduct could not constitute fault for purposes of the statutory definition of "fault" found in MCL 600.6304(8).

In sum, the comparative-fault statutes are not implicated under the circumstances of this case.[8] However,

[8] The dissent takes us to task for deciding this case on a theory that was neither raised in the trial court nor raised or briefed on appeal. We do note that the broad issue raised on appeal and addressed by us concerns whether the comparative-fault statutes are applicable, although we acknowledge that our analysis and approach with respect to that issue differs entirely from the arguments presented by the parties. In *Mack v Detroit*, 467 Mich 186, 206; 649 NW2d 47 (2002), our Supreme Court addressed and analyzed a governmental-immunity issue that was neither raised nor briefed by the parties, but the issue was a topic of discussion at oral argument. The *Mack* Court adamantly opposed the "position that

on remand, and under general principles of tort law, plaintiff will have to prove by a preponderance of the evidence that any claimed damages were the factual and proximate result of defendants' negligence, and defendants' negligence alone, which will potentially afford defendants some protection from being assessed damages that they did not cause. See *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977).

III. CONCLUSION

We hold that the comparative-fault statutes have no application in this case because, as a matter of law and indisputably, defendants were the only parties at fault and there were no other tortfeasors with respect to the conduct that was the factual and proximate cause of the injuries to Chad's finger in the occurrence at the daycare center. Any presumed negligence by the parents in regard to Chad's medical treatment after the

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although a controlling legal issue is squarely before this Court, . . . the parties' failure . . . to offer correct solutions to the issue limits this Court's ability to probe for and provide the correct solution." *Id.* at 207. The Court continued by noting that "[s]uch an approach would seriously curtail the ability of this Court to function effectively and . . . actually make oral argument a moot practice." *Id.* At oral argument here, counsel for both parties were questioned regarding whether it could be argued that the comparative-fault statutes were not implicated because there was clearly no fault on the part of Chad's parents in connection with the injury-producing incident. Were we to decide this case on the duty-versus-immunity arguments under the facts presented, we would implicitly be conveying to the bench and bar that the comparative-fault statutes are indeed generally implicated in circumstances in which a party or nonparty was not the proximate cause of a plaintiff's injury or the injury-producing incident. In our estimation, however, this is not a correct legal conclusion for the reasons already stated. Consistently with *Mack*, we find that a controlling legal issue is squarely before us and must be analyzed regardless of the lack of briefing and the failure to raise the issue.

injuries occurred at the daycare center did not trigger the need to assess their fault for purposes of the comparative-fault statutes, given that such negligence was not part of the causal chain in regard to his finger's becoming crushed and lacerated in the first place. Rather, any negligent conduct by the parents constituted a subsequent, separate tort that initiated a new causal chain leading to its own set of damages. However, on remand, and under general principles of tort law, plaintiff will have to prove by a preponderance of the evidence that any claimed damages were caused solely by defendants' negligence.

Affirmed and remanded. Given our resolution of this appeal on grounds not addressed by the parties, we decline to award any party taxable costs. MCR 7.219(A).

SAWYER, J., concurred.

MURRAY, J. (*dissenting*). In this interlocutory appeal, we granted leave to appeal to decide whether the trial court erred in denying defendants' motion for leave to file a notice of nonparties at fault. The trial court had concluded that because the would-be nonparties at fault, the minor child's parents, had parental immunity from their alleged failure to adequately provide medical care to their child, they could not be nonparties at fault under the controlling statute. The majority does not answer the question decided by the trial court and briefed and argued by the parties (and on which we granted leave to appeal), but instead decides that the statute is wholly inapplicable for reasons of its own. With all due respect to my colleagues, I would address the issue decided below and addressed by the parties, and in doing so would hold that the existence of parental immunity does not foreclose an allocation of

fault under the comparative-fault statutes. Accordingly, I would reverse and remand this case.

I. FACTS AND PROCEEDINGS[1]

The facts of this case are undisputed, and arise out of the injuries the six-year-old plaintiff sustained while in defendants' daycare facility on May 9, 2007. The injuries occurred when plaintiff placed his middle finger into one end of a metal pipe that held a large roll of paper. The pipe dislodged from the paper-roller frame, and the child's finger was crushed and lacerated. The paper roller was homemade and maintained by defendant Maryanne Barringer. Defendants do not contest their liability under these facts, but instead challenge the extent of plaintiff's damages.

Seventeen months after the injuries, the child, by his next friend and mother, Tonya Slager, filed suit, alleging gross negligence, nuisance, and premises liability. Defendants admitted liability on the premises-liability theory, and the court dismissed plaintiff's gross-negligence and nuisance claims on defendants' motion for summary disposition. The court also limited discovery to evidence concerning the occurrence, the extent of the injuries, and damages.

Before entry of that order, on April 7, 2009, defense counsel met with the child's treating orthopedic surgeon, Dr. Michael Condit, to discuss the doctor's findings and opinions regarding the child's injuries, treatment, and prognosis. Defense counsel averred that although Dr. Condit had prescribed physical therapy once a week for four weeks following surgery on the

[1] Although the majority opinion has sufficiently detailed the material facts, I add my version simply to provide the reader with some context when reviewing my substantive analysis.

finger, the child was dismissed from therapy after only attending the initial evaluation and one session because of his failure to return to therapy. According to defense counsel, Dr. Condit indicated that his intent was for the child to attend at least 8 to 12 sessions over a three-month period to improve the range of motion as well as to alleviate the stiffness and swelling in the fingertip. In Dr. Condit's estimation, the failure to continue therapy had a "very significant" impact on the child's recovery.

Based on the information acquired from Dr. Condit, defendants quickly moved for leave to file a notice of nonparties at fault and to amend their affirmative defenses. The notice sought to designate the child's parents, Tonya Slager and Chadwick Vandonkelaar, Sr., as nonparties at fault for failing to follow Dr. Condit's advice and failing to ensure their son's attendance at follow-up physician appointments and physical therapy. The amended affirmative defenses sought to allege that the injuries were caused by acts or omissions over which defendants had no control and reserved defendants' right to seek fault allocations under MCR 2.112(K).

At the ensuing motion hearing, the parties disputed whether parental immunity precluded an allocation of fault.[2] Siding with plaintiff, the court ruled that parental immunity did preclude an allocation of fault based on our Supreme Court's ruling in *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18; 762 NW2d 911 (2009), which held that the comparative-fault statutes[3] require that a party owe a legal duty before the party may be named a nonparty at fault. The court concluded that the immunity enjoyed by plaintiff's parents precluded their being named nonparties at fault because their immunity exempted them from any legal duties. Ac-

[2] Plaintiff did not dispute defendants' summary of Dr. Condit's report.

[3] See MCL 600.2957 and MCL 600.6304.

cordingly, defendants' motions were denied, as was their subsequent motion for reconsideration. We then granted defendants' application for leave to appeal these orders, *Slager v Kids Court, LLC*, unpublished order of the Court of Appeals, entered July 14, 2009 (Docket No. 292856).

II. ANALYSIS

As they argued in the trial court, defendants maintain on appeal that the tort-reform legislation of 1995 permits naming plaintiff's parents as nonparties at fault and that the court's ruling that parental immunity eliminated any legal duty was erroneous. This argument raises questions concerning statutory interpretation and the existence of a legal duty, both of which are subject to review de novo. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 488; 697 NW2d 871 (2005); *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004).

In 1995, the Legislature enacted comprehensive tort-reform legislation. *Romain*, 483 Mich at 25 (YOUNG, J., dissenting). An important aspect of this reform was the replacement of the common-law doctrine of joint and several liability with the doctrine of several liability. MCL 600.2956. To this end, the Legislature passed MCL 600.2957 and MCL 600.6304, known as the comparative-fault statutes, which require fact-finders to assess fault in personal injury actions according to an individual's degree of fault irrespective of the individual's involvement in the suit. "The significance of the change is that each tortfeasor will pay only that portion of the total damage award that reflects the tortfeasor's percentage of fault," i.e., the tortfeasor will pay only his " 'fair share liability.' " *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001) (citation omitted).

Section 2957(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action. [MCL 600.2957(1).]

Section 6304 similarly provides, in part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d], regardless of whether the person was or could have been named as a party to the action.
>
> * * *
>
> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed. [MCL 600.6304.]

"Fault" is defined broadly to include "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict

liability, that is a proximate cause of damage sustained by a party." MCL 600.6304(8). Notably, the assessment of fault against a nonparty does not subject the nonparty to liability, but is only used to determine the percentage of fault, if any, of the named parties in an action. MCL 600.2957(3).

Recently, our Supreme Court in *Romain* clarified what is necessary to allocate nonparty fault under the comparative-fault statutes for negligence claims. Specifically, the Court affirmed the holding of *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002), that "a duty must first be proved before the issue of fault or proximate cause can be considered." *Romain*, 483 Mich at 20.[4] The *Romain* Court, however, did not address whether the existence of immunity abolishes a duty per se (and therefore precludes an assessment of percentage of fault under the comparative-fault statutes as the trial court found) or whether an immunity serves only to protect the nonparty from being personally subject to liability when a duty otherwise exists. In fact, *Romain* did not discuss immunity at all, but instead focused on whether a duty was required to be proved before a person could be named a nonparty at fault.

A. IS THERE A DUTY?

Concerning the threshold issue of duty in the case at hand, it is well established that parents have a duty to provide for the support and maintenance of their minor children, including the provision of medical care. Ad-

[4] In reaching this decision, the *Romain* Court overruled this Court's most recent pronouncement on this issue in *Kopp v Zigich*, 268 Mich App 258, 260; 707 NW2d 601 (2005), that "a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated." *Romain*, 483 Mich at 20.

dressing this point directly, this Court has stated that a "parent's duty to support a minor child requires the parent to furnish all necessaries essential to the health and comfort of the child, including, for example, medical care." *Manley v Detroit Auto Inter-Ins Exch*, 127 Mich App 444, 453; 339 NW2d 205 (1983), aff'd in part and rev'd in part on other grounds 425 Mich 140 (1986).

That this is a legal as well as a moral duty is universally recognized in jurisdictions throughout this country, and Michigan is no exception. *Plumley v Klein*, 388 Mich 1, 8 & n 6; 199 NW2d 169 (1972) (referring to the rule that a minor child may sue his parent in tort, and therefore in negligence, as the "original common-law rule"); 59 Am Jur 2d, Parent and Child, § 45, p 213 ("A [parent's] duty to support and maintain minor children is universally recognized . . .[e]ven in the absence of statute . . . ."); see also *Fonken v Fonken*, 334 Ark 637, 642; 976 SW2d 952 (1998) ("[A] parent has a legal duty to support his minor children, regardless of the existence of a support order."); *Stecyk v Bell Helicopter Textron, Inc*, 53 F Supp 2d 794, 800 (ED Pa, 1999) ("Pennsylvania imposes an independent common law duty upon the parent to support a minor child . . . ."), citing *Blue v Blue*, 532 Pa 521, 529; 616 A2d 628 (1992); *RJD v Vaughan Clinic, PC*, 572 So 2d 1225, 1227 (Ala, 1990) ("Alabama has long recognized the principle that parents are, by the common law, under the legal duty of providing medical attention for their children."); *Rounds Bros v McDaniel*, 133 Ky 669, 674; 118 SW 956 (1909) (" 'Three leading duties of parents as to their legitimate children are recognized at the common law: First, to protect; second, to educate; third, to maintain them.' "), quoting Schouler on Domestic Relations, p 415; *Niewiadomski v United States*, 159 F2d 683, 686 (CA 6, 1947) ("At common law a parent is charged with the duty of educating and supporting a minor

child . . . ."); *Doughty v Engler*, 112 Kan 583, 585; 211 P 619 (1923) (stating that parents have a legal obligation independent of statute to support their minor child). Consequently, these parents had a common-law duty to provide the appropriate medical care for their child. As such, unless their parental immunity provides otherwise, they could be named nonparties at fault.

B. THE IMPACT OF AN IMMUNITY

Although parents traditionally enjoyed immunity from suit by their minor child should they breach the duties owed to the child, the modern rule is that a child may sue his parents for negligence. *Plumley*, 388 Mich at 8. An exception to this rule in Michigan, however, extends immunity to parents "where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Id*. According to plaintiff, the existence of this immunity abolished any duty his parents owed him.

Resolution of the effect of an immunity on a duty, however, is not an open question. Indeed, as explained later in this opinion, though an immunity will prevent a party from *being held liable* for breach of a duty, the preexisting duty remains intact despite the liability shield provided by the immunity. Our Supreme Court has recognized this distinction in the context of the "highway exception" to governmental immunity[5] and has concluded that the availability of an immunity is relevant to whether recourse exists for the breach of an *existing duty*. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 157; 615 NW2d 702 (2000). As *Nawrocki* explained:

[5] MCL 691.1402(1).

> Because immunity necessarily implies that a "wrong" has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied. *Although governmental agencies may be under many duties, with regard to services they provide to the public, only those enumerated within the statutorily created exceptions are legally compensable if breached*. [*Id*. (emphasis added).]

Accordingly, the availability of an immunity has no bearing on whether a duty exists, but rather focuses on redressability. In other words, an immunity functions "as a defense so that acts that would otherwise be tortious are permissible because of the circumstances in which they occur." *Domestic Linen Supply & Laundry Co v Stone*, 111 Mich App 827, 833; 314 NW2d 773 (1981).

Significantly, the language of the comparative-fault statutes reflects this distinction. Concerning immunity, MCL 600.2957(3) provides:

> Sections 2956 to 2960 [MCL 600.2956 to MCL 600.2960] *do not eliminate or diminish a defense or immunity that currently exists*, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action. [Emphasis supplied.]

By stating that a fact-finder's assessment of the percentage of a nonparty's fault does not eliminate or diminish an immunity, § 2957(3) necessarily presupposes that an immunity does not abrogate a duty. Otherwise, there would be no need to preserve that immunity after fault has been allocated. Put differently, if an immunity were to abrogate a duty, an allocation of fault could never come into play because as *Romain*

held, a nonparty's duty is necessary to allocate nonparty fault in the first place. Without an allocation of fault, no predicate would exist to eliminate the immunity § 2957(3) otherwise seeks to preserve. Under the interpretation offered by plaintiff, the reference to immunity in § 2957(3) would be rendered superfluous, and we must avoid a construction of a statute that would render part of the statute surplusage or nugatory. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (citation omitted).

In reaching the opposite conclusion, the trial court cited the Black's Law Dictionary (8th ed) definition of "immunity" as an "exemption from a duty, liability" and another source that defined "immunity" as an "[e]xemption from normal legal duties, penalties, or liabilities, granted to a special group of people." However, saying that one is "exempt" from a legal duty is not the same as saying that no duty exists. Indeed, according to the *Random House College Dictionary* (rev ed, 1988), "exempt" means (as a verb) "to free from an obligation or liability to which others are subject" or (as an adjective) that one is "released from, or not subject to, an obligation, liability . . . ." Clearly, to be freed or released from an obligation does not mean that there is no obligation to begin with. Instead, it means one cannot be liable for failing to adhere to the obligation. Otherwise, there would exist nothing from which one would be freed or released.

From the foregoing, it follows that the immunity enjoyed by plaintiff's parents did not abolish their duty to seek appropriate medical care in the first place. Indeed, a number of our sister states granting parental immunity have also found that such immunity does not serve to abolish an already existing duty. See, e.g., *Doering v Copper Mountain, Inc*, 259 F3d 1202, 1216

(CA 10, 2001) ("When the Colorado Supreme Court adopted the parental immunity doctrine, it indicated that courts adhering to the doctrine did so for public policy reasons, not because parents owe no duty of due care to their children."), citing *Trevarton v Trevarton*, 151 Colo 418, 421-422; 378 P2d 640 (1963); *Larson v Buschkamp*, 105 Ill App 3d 965, 969; 435 NE2d 221 (1982) (stating that the doctrine of parental immunity is a procedural rather than substantive bar to actions between a parent and child); *Emery v Emery*, 45 Cal 2d 421, 427 n 3; 289 P2d 218 (1955) ("The parent's immunity . . . from tort liability is based on the minor child's disability to sue rather than on the absence of a violated duty."); *Davis v Smith*, 126 F Supp 497, 504 (ED Pa, 1954) (stating that parental immunity "is given as a means of enabling the parent to discharge his duties in preserving the domestic tranquility"), aff'd 253 F2d 286 (CA 3, 1958); *Dunlap v Dunlap*, 84 NH 352, 372; 150 A 905 (1930) ("Such immunity as the parent may have from suit by the minor child for personal tort, arises from a disability to sue, and not from lack of violated duty.").[6]

Therefore, since the duty to seek appropriate medical care was incumbent upon the parents irrespective of their immunity, the doctrine of parental immunity does not as a matter of law preclude an allocation of fault under the comparative-fault statutes. Instead, the immunity plaintiff's parents enjoy insulates them from liability should the fact-finder allocate a percentage of

[6] The historical approach to parental immunity in Michigan reflects the same distinction. In *Plumley* the Court overturned a prior decision, *Elias v Collins*, 237 Mich 175; 211 NW 88 (1926), that had enforced parental immunity under all circumstances. *Plumley*, 388 Mich at 8. But in doing so, the *Plumley* Court did not *create* new duties vis-à-vis parent and child. Instead, it merely lifted the immunity granted parents for violation of most of those existing common-law duties.

fault to them for any breach of that duty,[7] MCL 600.2957(3), and they were subsequently sued. Additionally, a holding that the existence of parental immunity does not preclude an allocation of fault is consistent not only with the language of § 2957(3), but also with the broad purpose of the comparative-fault statutes, which is to ensure that defendants are only liable for their " 'fair share liability,' " *Smiley*, 248 Mich App at 55, and therefore is in keeping with our obligation to construe statutes "reasonably, in a manner that is consistent with the purpose of the legislation," *Koivisto v Davis*, 277 Mich App 492, 497; 745 NW2d 824 (2008). (Citation omitted.)

Plaintiff argues that in overruling *Kopp v Zigich*, 268 Mich App 258; 707 NW2d 601 (2005), the *Romain* Court rejected the notion that fault can be allocated against a nonparty who is immune from liability. However, in finding an allocation of fault appropriate, the *Kopp* Court actually sidestepped the issue concerning immunity.[8] Instead, the rationale underlying the *Kopp* decision was that the plaintiff's employer (a nonparty to the action) could be a proper party at fault under the exclusive-remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., even though that act also rendered the employer immune from a suit in negligence. *Kopp*, 268 Mich App at 261. In other words, *Kopp* did not rely on or even discuss the interplay between a party's immunity and a party's

[7] The contrary holding of *Byrne v Schnieder's Iron & Metal, Inc*, 190 Mich App 176, 185; 475 NW2d 854 (1991), was made before the enactment of tort-reform legislation and, therefore, has no bearing on this conclusion.

[8] In this respect, defendants' reliance on *Dresser v Cradle of Hope Adoption Ctr, Inc*, 421 F Supp 2d 1024, 1027 (ED Mich, 2006), is misplaced since that court misinterpreted *Kopp* on this issue of immunity.

duty in determining that an allocation of fault was appropriate. Rather, *Kopp* looked to the broad definition of "fault" contained in MCL 600.6304(8) and concluded that the exclusive-remedy provision of the WDCA was a sufficient basis for allocating fault under that definition. *Id*. at 260-261. It was from this line of reasoning that *Kopp* concluded that no proof of a duty was required before fault could be allocated, and it is this conclusion that the *Romain* Court specifically overruled. *Romain*, 483 Mich at 20. Thus, the effect of immunity on the allocation of fault was untouched by *Romain* and is ripe for our review.[9]

Finally, plaintiff claims that because proximate, or legal, cause is essentially a policy question overlapping the concept of duty, see *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977), it must be determined at this juncture whether the conduct of plaintiff's parents was the proximate cause of plaintiff's injuries. The thrust of plaintiff's argument on this point is that since public policy renders parents immune from legal responsibility for certain conduct, that same policy necessarily makes it impossible for the same conduct to be the proximate, or legal, cause of a plaintiff's injuries. However, even assuming that such an analysis is not premature, where duty and proximate clause intersect is on the issue of foresee-

[9] In a similar vein, plaintiff claims that in affirming *Jones*, the *Romain* Court approved of the reasoning in *Jones* that "a party adjudicated to be without fault may not have fault allocated to him under the guise of the doctrine of several liability." *Jones*, 254 Mich App at 437. This statement, however, has no effect on this conclusion because, as previously noted, the existence of immunity does not abrogate the parents' duty. And in any event, the affirmative defense negating an allocation of fault in *Jones* was the open-and-obvious-danger doctrine—a doctrine that our Supreme Court has determined attacks the duty element in a common-law negligence action. *Id*. at 437, citing *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

ability. *Id*. at 439, citing *Palsgraf v Long Island R Co*, 248 NY 339; 162 NE 99 (1928). In contrast, the very foundations of parental immunity are "*the duties and responsibilities* [parents] assume within the household" as well as the need "to avoid judicial intervention into the core of parenthood and parental discipline . . . ." *Hush v Devilbiss Co*, 77 Mich App 639, 645-646; 259 NW2d 170 (1977) (emphasis added). And in any event, plaintiff has neither argued nor cited any authority for the proposition that the policy considerations underlying parental immunity were in any way related to matters of foreseeability.

For two reasons, I cannot join the majority opinion. First, and as noted at the outset, the majority is admittedly deciding this case based upon a theory neither raised nor decided below, nor raised before our Court. As explained in my partial dissent in *People v Michielutti*, 266 Mich App 223, 230-231; 700 NW2d 418 (2005), rev'd in part 474 Mich 889 (2005):

> As any casual reader of the Michigan Appeals Reports will recognize, we quite frequently inform parties that we will not address an issue not raised or decided by the trial court, on the basis that it is not properly preserved. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992); *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). We are likewise disinclined to review issues that are actually raised by the parties, but not adequately briefed. See, e.g., *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). The general rationale supporting these prudent rules of appellate procedure is that it is best to decide issues with the benefit of briefing and argument. *Bradley v Saranac Bd of Ed*, 455 Mich 285, 302-303; 565 NW2d 650 (1997). Although we will, at times, decide a legal issue when the facts necessary to its resolution are properly before us, that is usually invoked when a party raises the issue to

this Court as an alternative means to affirm. See *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991).

We should likewise refuse to engage our discretion in deciding this case on a theory that was not presented by the parties.

Second, the majority errs by holding that the comparative-fault statutes are inapplicable to this case. The parents' alleged failure to take the child to the prescribed follow-up care is not as the majority states a "separate tort that initiated a new causal chain leading to its own set of damages." Rather, as plaintiff's complaint itself makes clear, the alleged permanent injury to the child's finger is an element of the damages plaintiff seeks to recover against defendants. Based on Dr. Condit's statements, surely there is an argument to be made that plaintiff's parents at least in part caused that damage by breaching their duty to provide proper medical care to their son. Consequently, the injury at the child-care facility, the immediate harm that was caused, and any lasting damage are all part of plaintiff's lawsuit, and as in all nonparty-at-fault cases, defendants are asserting that more than one person potentially caused at least some of the damages at issue. And because these statutes reveal "a legislative intent to allocate liability according to the relative fault of *all persons contributing to the accrual of a plaintiff's damages*," *Lamp v Reynolds*, 249 Mich App 591, 596; 645 NW2d 311 (2002), citing *Wysocki v Felt*, 248 Mich App 346, 364; 639 NW2d 572 (2001), defendants should be allowed to argue to the jury that plaintiff's parents are at least partially at fault for some of the damages plaintiff has suffered. (Emphasis supplied.) The statutory language already discussed supports that intent, and the majority's decision that the parents are not capable of being nonparties at fault guts the entire statutory scheme.

III. CONCLUSION

Plaintiff's parents had a common-law duty to provide appropriate medical care for their child, and the doctrine of parental immunity did not abrogate this duty. Therefore, the existence of parental immunity cannot preclude an allocation of fault under the comparative-fault statutes. As the trial court erred by ruling otherwise, I would reverse the trial court's order denying defendants' motions for leave to file a notice of nonparties at fault and to amend their affirmative defenses and remand for further proceedings.

SCHWASS v RIVERTON TOWNSHIP

Docket No. 292737. Submitted September 9, 2010, at Lansing. Decided September 30, 2010, at 9:05 a.m.

Roy and Susan Hackert and Theodore and Joan Schwass petitioned the Michigan Tax Tribunal after Riverton Township reassessed parcels of real property they owned and raised the taxable value of the property beginning with tax year 2006, following conveyances by deed of the property from two partnerships to petitioners. Roy Hackert and Theodore Schwass were the only partners of the partnerships. Respondent had raised the taxable value of the property pursuant to MCL 211.27a(3), which allows taxing bodies to reassess a property's taxable value upon the sale or transfer of the property according to the following year's state equalized value, a process commonly called "uncapping." The Tax Tribunal affirmed the reassessment, concluding that the conveyances were not within one of the exceptions to uncapping identified in MCL 211.27a(7). Petitioners appealed.

The Court of Appeals *held*:

Uncapping occurs when a transfer of ownership occurs. MCL 211.27a(6) lists several types of conveyances that qualify as a transfer of ownership, including a conveyance by deed. Certain types of conveyances are excepted and do not give rise to uncapping, including a joint tenancy exception set forth in MCL 211.27a(7)(h). Asserting that tenancies in partnership such as those involved in each conveyance here are functionally equivalent to joint tenancies, petitioners argued that the joint tenancy exception applied and prohibited uncapping. Conveyances by deed involving tenancies in partnership are not included in the exceptions, however, and the Legislature did not include tenancies in partnership when it used the term "joint tenancy" in the exception provided by MCL 211.27a(7)(h). Thus the joint tenancy exception did not apply.

Affirmed.

TAXATION — PROPERTY TAX — TAXABLE VALUE — TRANSFER OF PROPERTY — UNCAPPING — TENANCIES IN PARTNERSHIP.

MCL 211.27a(3) provides that the taxable value of real property is reassessed upon the sale or transfer of the property according to

the following year's state equalized value, a process called "uncapping"; under MCL 211.27a(7), certain types of conveyances are excepted and do not give rise to uncapping, but conveyances by deed involving tenancies in partnership are not among them.

Mark A. Pehrson, P.C. (by *Mark A. Pehrson*), for petitioners.

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM. Petitioners appeal by right an order of the Michigan Tax Tribunal (MTT) affirming respondent's assessment of their real property. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Petitioners are two husband-and-wife couples, Roy and Susan Hackert and Theodore and Joan Schwass. All the real estate at issue was owned by two partnerships, Tero Farms and KaJo Farms, of which Roy Hackert and Theodore Schwass were the only partners. The partnerships deeded the real estate parcels to one or the other of the individual partners and their respective spouses. Following these conveyances, respondent reassessed the parcels and raised the taxable values of the property beginning with tax year 2006. Petitioners asserted that the conveyance of property from the partnerships to the individual partners was not a transfer that would operate to remove the cap on the property's taxable values. The MTT initially adopted the hearing referee's proposed opinion in its final order affirming the assessment. However, after petitioners filed their claim of appeal in this Court, the MTT issued a "Corrected Final Opinion and Judgment" in which it concluded that the hearing referee's statutory basis for deciding the matter was erroneous, but that the error was harmless because the conveyances were not within

one of the identified exceptions to uncapping.[1] The MTT therefore affirmed the result that petitioners' property was subject to uncapping unless an affidavit was filed stating that the property was qualified agricultural property.

We review de novo legal questions decided by the MTT. See *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006); see also *Blaser v East Bay Twp*, 242 Mich App 249, 252; 617 NW2d 742 (2000). Statutory interpretation is a question of law subject to de novo review. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

The Michigan Constitution and Michigan statutory law permit the taxable value of real property to be reassessed upon the sale or transfer of the property according to the following year's state equalized value. Const 1963, art 9, § 3; MCL 211.27a(3); *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 696-697; 714 NW2d 392 (2006). This is known as "uncapping" the taxable value. *Id*. at 697. Uncapping occurs whenever a "transfer of ownership" occurs. MCL 211.27a(3). "[T]ransfer of ownership" is "the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." MCL 211.27a(6). The statute lists several types of conveyances that qualify as a "transfer of ownership," including "[a] conveyance by deed." MCL 211.27a(6)(a). The statute also lists certain types of conveyances that are excepted from this definition and do not give rise to uncapping. MCL 211.27a(7).

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[1] Because the incorrect statutory basis of the original final order has been vacated, we need not address petitioners' argument that the decision contained erroneous legal reasoning.

In the instant case, the property was conveyed by deed. Accordingly, the conveyance was a "transfer of ownership" under MCL 211.27a(6)(a) unless one of the exceptions of MCL 211.27a(7) was applicable. Before the property was conveyed, it was owned by a partnership. Under Michigan law, "[a] partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership[.]" MCL 449.25(1). Petitioners assert that there is no functional difference between a tenancy in partnership, which existed here, and a joint tenancy. Accordingly, they contend that the joint tenancy exception set out in MCL 211.27a(7)(h) should control and the taxable value should not be uncapped.

We disagree. The statutory scheme unambiguously identifies the types of conveyances that do not trigger uncapping, and conveyances involving tenancies in partnership are not among those listed. See MCL 211.27a(7). Nor can we assume that the Legislature intended to include tenancies in partnership when it used the term "joint tenancy" in the exception provided by MCL 211.27a(7)(h). In *Wengel v Wengel*, 270 Mich App 86, 93; 714 NW2d 371 (2006), this Court identified the five types of coownership in this state, listing joint tenancies and tenancies in partnership separately: "In Michigan, there are five common types or forms of concurrent ownership that are recognized relative to the ownership of real property, and those are tenancies in common, joint tenancies, joint tenancies with full rights of survivorship, tenancies by the entireties, and tenancies in partnership." Although joint tenancies and tenancies in partnership are similar, they remain legally distinct forms of ownership, and the Uniform Partnership Act does not identify property held by a partnership as property held in "joint tenancy." Moreover, because MCL 449.25 was enacted by 1917 PA 72, long

before the process of uncapping was devised by the Legislature, it cannot be said that the Legislature was unaware of tenancies in partnership at the time it amended MCL 211.27a(7) in 1994 to provide for uncapping. See 1994 PA 415. Petitioners essentially ask this Court to make a policy decision, an argument more properly addressed to the Legislature. It is well settled that "questions of Michigan tax policy are determined by the Legislature, not the courts." *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167, 180; 775 NW2d 342 (2009).

Affirmed. No taxable costs pursuant to MCR 7.219, a public question having been involved.

1031 LAPEER LLC v RICE

Docket No. 290995. Submitted July 13, 2010, at Detroit. Decided August 5, 2010. Approved for publication October 7, 2010, at 9:00 a.m.

1031 Lapeer LLC and William R. Hunter brought an action in the Oakland Circuit Court against Ricky L. Rice, doing business as R. L. Rice Properties, alleging that defendant failed to inform them that property they had leased from him was contaminated. Plaintiffs sought rescission of the lease and damages, claiming that defendant had committed silent fraud and fraudulent misrepresentation and had breached the lease. Plaintiffs moved for partial summary disposition, after which defendant also moved for partial summary disposition. The court, Steven N. Andrews, J., denied defendant's motion and granted partial summary disposition in favor of plaintiffs, concluding that the lease was void because defendant had failed to disclose that the property was contaminated. Plaintiffs' fraud claims proceeded to trial. The jury found in plaintiffs' favor, and a judgment was entered against defendant. Defendant appealed.

The Court of Appeals *held*:

1. Part 201 of the Natural Resources and Environmental Protection Act, MCL 324.20101 *et seq*., provides for appropriate response activities related to environmental contamination. MCL 324.20116(1) prohibits a person from transferring an interest in real property that is a "facility," as defined by MCL 324.20101(o), without notifying the transferee in writing that the property is a facility and disclosing the general nature and extent of the contamination. Although the act does not specify a remedy for a violation of this provision, contracts founded on acts prohibited by statute or made in violation of public policy are void. Given that defendant did not dispute that the property at issue was considered a facility, he was prohibited from transferring an interest in the property without providing plaintiffs written notice that the property was a facility. Because defendant failed to provide such notice, the lease contract was founded on an act prohibited by statute and was thus void. Public policy also supported this finding. Enforcement of the contract made without the disclosure

would be against public policy because it exposed plaintiffs to significant costs and liability. Thus, the trial court correctly ruled that the lease contract was void.

2. Defendant's argument that he was entitled to summary disposition on plaintiffs' fraud claims because plaintiffs did not reasonably rely on defendant's alleged misrepresentations failed. Defendant had actual knowledge of the contamination and did not unequivocally advise plaintiffs of that fact in writing. A misrepresentation need not be by words alone, but can be shown if a party required to disclose intentionally suppresses material facts to create a false impression to the other party. Whether defendant intentionally failed to advise plaintiffs of the contamination and whether the contract reasonably placed plaintiffs on notice of the contamination were proper questions for the jury.

Affirmed.

PROPERTY — ENVIRONMENT — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — TRANSFER OF FACILITIES — FAILURE TO PROVIDE WRITTEN NOTICE THAT THE PROPERTY WAS A FACILITY — EFFECT ON CONTRACT.

Part 201 of the Natural Resources and Environmental Protection Act prohibits a person from transferring an interest in real property that meets specific criteria with respect to environmental contamination and thus is defined as a "facility" under the act without notifying the transferee in writing that the property is a facility and disclosing the general nature and extent of the contamination; there is no statutorily specified remedy for a violation of this requirement, but contracts founded on acts prohibited by statute or made in violation of public policy are void; thus, a contract transferring an interest in property that is a facility without the required notice is void (MCL 324.20101[o], 324.20116[1]).

Phillip B. Maxwell & Associates, *P.L.L.C.* (by *Phillip B. Maxwell*), for plaintiffs.

Hartrick & Chapman, *P.L.L.C.* (by *Bruce G. Hartrick*), for defendant.

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

PER CURIAM. Defendant appeals as of right a trial court order granting partial summary disposition in

plaintiffs' favor and denying defendant's motion for partial summary disposition. Because the trial court properly found the lease at issue void, and because defendant was not entitled to partial summary disposition in his favor, we affirm.

In May 2006, plaintiffs and defendant entered into a lease agreement whereby plaintiffs were to lease a gas station from defendant for a period of 10 years. Apparently, the site of the gas station had been found to be a site of environmental contamination in 1996—a fact known by defendant but not disclosed to plaintiffs at the time of the lease. Plaintiffs contacted the Michigan Department of Environmental Quality (MDEQ) in late 2007 and were advised of the contamination. They thereafter initiated the instant lawsuit, alleging that defendant had violated his statutory duty to inform them of the property's status as a site of environmental contamination. Plaintiffs' specific causes of action included silent fraud, fraudulent misrepresentation, and breach of the lease. Plaintiffs sought damages as well as rescission of the lease.

Plaintiffs moved for partial summary disposition pursuant to MCR 2.116(C)(10), contending that the lease at issue was void and that they had established the elements of their claims against defendant, leaving only the issue of damages for trial. Defendant also moved for partial summary disposition in his favor asserting, among other things, that plaintiffs had failed to exhaust their administrative remedies under the former Michigan Environmental Response Act, that plaintiffs' claims were barred by the statute of frauds, and that plaintiffs had not reasonably relied on any alleged written or oral representation.

The trial court granted plaintiffs' motion for partial summary disposition and denied defendant's motion for partial summary disposition, ruling:

> The first portion of Plaintiffs' Motion for Summary Disposition based on MCL 324.20116(1) on the grounds that subject lease for 1031 Lapeer Road was prohibited because of Defendant's failure to disclose to Plaintiffs the fact that the site was contaminated, is granted and the subject lease is determined to be void. Consequently, Defendant's Motion for Partial Summary Disposition seeking a determination of liability under the subject lease is denied, with prejudice.
>
> The second portion of Plaintiff's [sic] Motion for Summary Disposition regarding Plaintiff's [sic] fraud counts is denied, without prejudice.

Plaintiffs' fraud claims proceeded to trial, and the jury ultimately found in plaintiffs' favor. Judgment was accordingly entered against defendant in the amount of $83,000 plus interest and costs. This appeal followed.

On appeal, defendant challenges the trial court's order declaring the lease at issue void, granting plaintiffs' motion for partial summary disposition, and denying defendant's motion for partial summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion brought under MCR 2.116(C)(10) tests a claim's factual support. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002). "Additionally, we review de novo issues of statutory

interpretation." *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003).

On appeal, defendant first asserts that partial summary disposition in plaintiffs' favor was inappropriate because a failure to disclose to a tenant that property has been determined to be a site of "environmental contamination," as defined in MCL 324.20101(1)(o), does not void the parties' commercial lease. We disagree.

Part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq*., was enacted by 1994 PA 451 as part of the repeal and reenactment of numerous environmental statutes. Part 201 was the reenactment of the former Environmental Response Act, MCL 299.601 *et seq*. *Cairns v East Lansing*, 275 Mich App 102, 108; 738 NW2d 246 (2007). MCL 324.20102 includes the following among the express purposes of part 201 of NREPA:

> (c) That it is the purpose of this part to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare, or to the environment from environmental contamination at facilities within the state.
>
> (d) That there is a need for additional administrative and judicial remedies to supplement existing statutory and common law remedies.
>
> * * *
>
> (h) That this part is intended to provide remedies for facilities posing any threat to the public health, safety, or welfare, or to the environment, regardless of whether the release or threat of release of a hazardous substance occurred before or after October 13, 1982, the effective date of the former environmental response act, Act No. 307 of the Public Acts of 1982, and for this purpose this part shall be given retroactive application. However, criminal and

> civil penalties provided in this part shall apply to violations of this part that occur after July 1, 1991.

Consistently with those purposes, part 201 provides for certain penalties for violations of specific provisions within the act. For example, MCL 324.20107a(1)(a) states that a person who owns or operates property that the person knows is a facility containing hazardous substances shall, among other things, undertake measures that are necessary to prevent exacerbation of the existing contamination. MCL 324.20107a(2) provides, "Notwithstanding any other provision of this part, a person who violates subsection (1) is liable for response activity costs and natural resource damages . . . ." There is no specified remedy, however, for a violation of MCL 324.20116(1).

MCL 324.20116(1), a component of part 201 of NREPA, provides:

> A person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a facility shall not transfer an interest in that real property unless he or she provides written notice to the purchaser or other person to which the property is transferred that the real property is a facility and discloses the general nature and extent of the release.

"Facility," for purposes of MCL 324.20116(1), is defined as

> any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of [MCL 324.20120a(1)(a)] or (17) or the cleanup criteria for unrestricted residential use under part 213 [MCL 324.21301 *et seq*.] has been released, deposited, disposed of, or otherwise comes to be located. Facility does not include any area, place, or property at which response activities have been completed which satisfy the cleanup criteria for the residential category provided for in [MCL 324.20120a(1)(a)] and (17) or at which corrective action

> has been completed under part 213 which satisfies the cleanup criteria for unrestricted residential use. [MCL 324.20101(o).]

Defendant does not dispute that the gas station he leased to plaintiffs is considered a "facility" under this definition or that he leased the premises to plaintiffs without advising them of its status as a facility, contrary to MCL 324.20116(1). Defendant does dispute, however, whether a transfer of an interest in property in violation of MCL 324.20116(1) necessarily renders the transfer instrument (in this case, the lease contract) void.

As previously indicated, there is no remedy specified for a violation of MCL 324.20116(1). But "[c]ontracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void." *Michelson v Voison*, 254 Mich App 691, 694; 658 NW2d 188 (2003). Again, MCL 324.20116(1) provides that if a person knows that the real property is a facility, the person "shall not" transfer an interest in that real property *unless* he or she provides written notice to the transferee that the real property is a facility. The word "shall" is generally used to designate a mandatory provision. *AFSCME, AFL-CIO Mich Council 25 v Highland Park Bd of Ed*, 214 Mich App 182, 186; 542 NW2d 333 (1995). Conversely, then, the term "shall not" may be reasonably construed as a prohibition. Because defendant was prohibited from transferring any interest in the property at issue unless he provided plaintiffs with written notice that the property was a facility, and defendant admittedly failed to provide plaintiffs with such a written notice, the contract was founded on an act prohibited by statute and was thus void.

Moreover, public policy supports finding the contract void. MCL 324.20107a provides:

> (1) A person who owns or operates property that he or she has knowledge is a facility shall do all of the following with respect to hazardous substances at the facility:
>
> (a) Undertake measures as are necessary to prevent exacerbation of the existing contamination.
>
> (b) Exercise due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances . . . .
>
> * * *
>
> (2) Notwithstanding any other provision of this part, a person who violates subsection (1) is liable for response activity costs and natural resource damages attributable to any exacerbation of existing contamination and any fines or penalties imposed under this part resulting from the violation of subsection (1) . . . .

"Operator" is defined at MCL 324.20101(1)(y) as "a person who is in control of or responsible for the operation of a facility." Plaintiffs, having run the gas station and car wash located on the property found to be a facility, are arguably operators of the facility.

Given that one who obtains ownership over or becomes an operator of a facility risks exposure to potentially significant costs and liability, enforcement of a contract made without the disclosure required under MCL 324.20116(1) would be against public policy. "It is well established that the courts of this state will not enforce, either in law or in equity, a contract which violates a statute or which is contrary to public policy." *Shapiro v Steinberg*, 176 Mich App 683, 687; 440 NW2d 9 (1989). The trial court appropriately found the lease contract at issue to be void.

Defendant next contends that summary disposition was appropriate in his favor on any one of the grounds

he presented to the court in his motion for partial summary disposition. We disagree.

Defendant presented four distinct grounds to the trial court on which he claimed summary disposition was appropriate in his favor: plaintiffs' lack of legal capacity to sue, plaintiffs' failure to exhaust their administrative remedies, application of the statute of frauds to plaintiffs' claims and the existence of no genuine issue of material fact, and no reasonable reliance by plaintiffs on any alleged written or oral misrepresentation. We shall address each ground in turn.

With respect to a lack of legal capacity to sue, defendant asserts that the lease at issue was signed on May 30, 2007, by plaintiff William Hunter, Brian Hunter, and Owen W. O'Berry, Jr., doing business as 1031 Lapeer LLC. Defendant points out that the lease is not with 1031 Lapeer, a Michigan corporation, and, in fact, 1031 Lapeer was not incorporated until June 1, 2007—after the lease was signed. We would note, however, that the lease identifies the signatories, "DBA 1031 Lapeer LLC," as tenants and that the lease was signed by the named parties "d/b/a 1031 Lapeer LLC." Furthermore, even if 1031 Lapeer lacked the legal capacity to sue, the complaint was not filed solely in the name of 1031 Lapeer. Instead, William R. Hunter is also a named plaintiff. That being so, it is unclear what effect defendant would hope the potential dismissal of 1031 Lapeer as a plaintiff would have.

In any event, defendant has cited no law whatsoever, or even a basic court rule, to support his position. An appellant may not, in his or her brief on appeal, simply announce a position or assert an error and then leave it to this Court to discover and rationalize the basis for the appellant's claims, unravel and elaborate upon the arguments, and search for authority to support his or

her position. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant has thus abandoned this claim.

Defendant next asserts that summary disposition should have been granted in his favor because of plaintiffs' alleged failure to exhaust their administrative remedies. According to defendant, MCL 324.20135(3)(a) requires that before one may bring a private action against an "owner or operator" for injunctive relief, a written notice of intent to sue must be given to the MDEQ and that, additionally, a cause of action may not be brought if the state is not diligently pursuing compliance. Defendant contends that because no notice was provided as required by statute and the state of Michigan is working with defendant toward compliance, plaintiffs' action is barred. We disagree.

MCL 324.20135 provides:

> (1) Except as otherwise provided in this part, a person, including a local unit of government on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release from a facility, other than a permitted release or a release in compliance with applicable federal, state, and local air pollution control laws, by a violation of this part or a rule promulgated or order issued under this part, or by the failure of the directors to perform a nondiscretionary act or duty under this part, may commence a civil action against any of the following:
>
> (a) An owner or operator who is liable under [MCL 324.20126] for injunctive relief necessary to prevent irreparable harm to the public health, safety, or welfare, or the environment from a release or threatened release in relation to that facility.

* * *

> (3) An action shall not be filed under subsection (1)(a) or (b) unless all of the following conditions exist:
>
> (a) The plaintiff has given at least 60 days' notice in writing of the plaintiff's intent to sue, the basis for the suit, and the relief to be requested to each of the following:
>
> (*i*) The department [MDEQ].
>
> (*ii*) The attorney general.
>
> (*iii*) The proposed defendants.
>
> (b) The state has not commenced and is not diligently prosecuting an action under this part or under other appropriate legal authority to obtain injunctive relief concerning the facility or to require compliance with this part or a rule or an order under this part.

This statute, known as the "citizens suit" provision of part 201, *Cairns*, 275 Mich App at 114, clearly governs only those lawsuits brought by a "person, including a local unit of government on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release from a facility . . . ." Moreover, the lawsuits governed by this statute are specified as those against an owner or operator for injunctive relief. Plaintiffs have not brought suit in the position of citizens whose health or enjoyment of the environment may be adversely affected by the contamination at issue. Instead, their lawsuit finds its genesis in the parties' contract and is based on fraud and statutory violations. Plaintiffs sought rescission of the contract as well as damages—not injunctive relief.[1] Clearly, then, MCL 324.20135 is inapplicable in this matter.

Next, defendant contends that summary disposition was appropriate in his favor because the statute of

[1] While plaintiffs did initially seek injunctive relief, the injunction sought was to enjoin enforcement of the lease.

frauds bars plaintiffs' claims and there is no genuine issue of material fact. The entirety of defendant's argument on this issue consists of this single, one-sentence bare assertion, supported by no law or fact. Again, a party may not simply announce a position or assert an error on appeal and leave it to this Court to discover and rationalize the basis for his or her claims. *Kelly*, 231 Mich App at 640-641.

Finally, defendant claims that summary disposition should have been entered in his favor on plaintiffs' fraud claims because plaintiffs did not reasonably rely on any alleged written or oral misrepresentation. According to defendant, because plaintiffs had the means to discover all the information about the contamination and suffered no damages as the result of any alleged misrepresentation, their fraud claims necessarily fail. We disagree.

To establish actionable fraud, a plaintiff must show that (1) the defendant made a material representation, (2) the representation was false, (3) the defendant knew the representation was false or recklessly made the representation as a positive assertion without knowledge of its truth, (4) the defendant made the representation with the intention that the plaintiff act on it, (5) the plaintiff acted in reliance on the representation, and (6) the plaintiff suffered injury. *Johnson v Wausau Ins Co*, 283 Mich App 636, 643; 769 NW2d 755 (2009). Additionally, "[s]uppression of facts and truths can constitute silent fraud where the circumstances are such that there exists a legal or equitable duty to disclose." *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 500; 686 NW2d 770 (2004). Importantly, to sustain a claim of fraud, the plaintiff must have reasonably relied on the false representation. *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464;

517 NW2d 235 (1994). "There can be no fraud where a person has the means to determine that a representation is not true." *Id.*

In this case, defendant identifies several provisions within the parties' contract that expressly mentioned contamination, asserting that such references essentially placed plaintiffs on notice of existing contamination. Specifically, defendant cites ¶ (8) of the contract, which provided that the tenant would not be liable for any acts or omissions of the landlord for his failure to comply with laws, orders, regulations, or ordinances, including soil-contamination requirements. The paragraph further provided that

> [i]n the event the Landlord's obligations as to pre-existing contamination on the property are expanded as a result of future changes in environmental laws and/or regulations by any governmental agency, it is agreed that Landlord's obligations as to the pre-existing contamination on the property will include Landlord's obligation to comply with those new governmental laws and regulations at Landlord's sole expense.

Defendant also cites ¶ (14) of the lease, which provided that if any upgrade work was required for the underground-storage tanks, the landlord would be solely responsible for making and paying for those upgrade activities. Defendant further notes ¶ (33), which states:

> [I]n the event any government agency requires cleanup of environmental contamination which exists on the property at the time of this Lease Agreement which is the Landlord's responsibility and the Landlord fails or refuses to pay for the required cleanup and the Tenant is obligated to pay for the cleanup which is the Landlord's responsibility, Landlord and Landlord's other property or any partners shall be subject to levy or execution as a result of

> tenant's obligation to pay for the cleanup that is the obligation of Landlord to pay.

Defendant also agreed, in ¶ (35) of the lease, that he would indemnify plaintiffs and hold them harmless from any liability and expenses for preexisting contamination. Defendant contends that no fraud can lie given that plaintiffs had notice, through the contractual language cited, that the site was contaminated and when plaintiffs otherwise had the means to discover whether any representation regarding the contamination was true. Given the numerous references to preexisting contamination, the contract could be viewed as putting plaintiffs on notice of preexisting contamination. Further, because plaintiffs discovered that the site was contaminated by contacting the MDEQ mere months after the lease was executed, it might be reasonably argued that plaintiffs could have discovered this information before entering into the lease.

However, defendant undisputedly had *actual* knowledge of existing contamination and did not unequivocally advise plaintiffs of this fact in a writing that disclosed the general nature and extent of the contamination as required by MCL 324.20116(1). As stated in *M & D, Inc v McConkey*, 231 Mich App 22, 25; 585 NW2d 33 (1998), "A misrepresentation need not necessarily be words alone, but can be shown where the party, if duty-bound to disclose, intentionally suppresses material facts to create a false impression to the other party." Whether defendant intentionally failed to advise plaintiffs of the known contamination was a question of fact for the jury, as was whether the contract itself reasonably placed plaintiffs on notice that the site was contaminated. Because defendant had a statutory duty to disclose to plaintiffs the fact that the site had been found to be contaminated before transferring any interest in the subject property to them, and

did not do so, and because questions of fact existed regarding the fraud claims, the fraud claims properly withstood summary disposition.

Moreover, the fraud issue was submitted to a jury, which found that defendant had, in fact, engaged in fraud and thus awarded plaintiffs damages on the fraud claims. Because defendant did not appeal the jury verdict itself, any error by the trial court in denying defendant's motion for partial summary disposition on plaintiffs' fraud claims would be irrelevant because no matter what this Court's ruling on the summary disposition issue, the jury verdict would still stand.

With respect to defendant's argument concerning plaintiffs' damages, we would note that defendant asserts that no damages were suffered because plaintiffs did not pay any MDEQ response costs. Plaintiffs have never claimed that they paid MDEQ cleanup costs. Instead, plaintiffs asserted in their complaint that the damages they suffered as a result of defendant's fraud were the over $200,000 they invested in the property, and the facing of *potential* liability for environmental cleanup costs. Defendant's assertion regarding damages, then, is misplaced.

Affirmed. Plaintiffs, as the prevailing parties, may tax costs.

LAFARGE MIDWEST, INC v CITY OF DETROIT

Docket No. 289292. Submitted April 7, 2010, at Detroit. Decided October 12, 2010, at 9:00 a.m.

Lafarge Midwest, Inc., petitioned the Tax Tribunal after the city of Detroit included a tax for servicing school debt on its 2005, 2006, and 2007 property tax bills, despite the fact that the property was located in a renaissance zone and was thus generally exempt from tax under MCL 211.7ff(1). Lafarge moved for summary disposition, arguing that none of the exceptions to the general exemption applied. In particular, Lafarge argued that because the tax had been approved by school district electors, rather than electors of a "local governmental unit" as defined by the Michigan Renaissance Zone Act, the exception from exemption in MCL 211.7ff(2)(b) did not apply. The Tax Tribunal agreed that school districts were not included in the definition of "local governmental unit" in MCL 125.2683. The tribunal granted Lafarge's motion and ordered the city to remove the tax from Lafarge's tax bills and refund any overpaid taxes. The city appealed.

The Court of Appeals *held*:

Under MCL 211.7ff(1), property in a renaissance zone is exempt from taxes collected under the General Property Tax Act unless an exception applies. The exception for ad valorem property taxes under MCL 211.7ff(2)(b) only extends to those levied "for the payment of principal and interest of obligations approved by the electors or obligations pledging the unlimited taxing power of the local governmental unit." This language unambiguously excepts only obligations approved by the electors of the local governmental unit and obligations pledging the unlimited taxing power of the local governmental unit. MCL 125.2683 defines "local governmental unit" as "a county, city, village, or township," which does not include a school district. The exception for obligations approved by the electors of a local governmental unit did not apply. Thus, Lafarge's property was exempt from the tax.

Affirmed.

K. F. KELLY, J., dissenting, would have held that MCL 211.7ff(2)(b) unambiguously provides an exception permitting ad valorem property taxes on property in renaissance zones if the tax is levied for

obligations approved by the electors or for obligations pledging the unlimited taxing power of the local governmental unit. The phrase "of the local governmental unit" refers only to "obligations pledging the unlimited taxing power," not "obligations approved by the electors." Because the tax resulted from an obligation approved by the school district's electors, the exception applied, and Lafarge's property should have been subject to taxation. The Tax Tribunal's decision should have been reversed.

TAXATION — RENAISSANCE ZONE ACT — EXEMPTION FROM TAXATION — EXCEPTIONS — PROPERTY TAXES.

Property located in a renaissance zone is exempt from taxes under the General Property Tax Act unless an exception applies; the statutory exception for ad valorem property taxes only extends to those levied for the payment of principal and interest of obligations approved by the electors of the local governmental unit or for obligations pledging the unlimited taxing power of the local governmental unit; because a school district is not a local governmental unit under the Michigan Renaissance Zone Act, an obligation approved by the electors of a school district does not fall within the exception (MCL 125.2683, MCL 211.7ff[2][b]).

Dickinson Wright PLLC (by *Robert F. Rhoades* and *Adam D. Grant*) for petitioner.

Krystal A. Crittendon, Corporation Counsel, and *Joanne D. Stafford* and *Kevin Richard*, Assistant Corporation Counsels, for respondent.

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

CAVANAGH, J. Respondent, the city of Detroit, appeals as of right an order of the Michigan Tax Tribunal granting petitioner's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Petitioner, Lafarge Midwest, Inc., was responsible for the payment of ad valorem property taxes on three parcels of land that are the site of its cement plant, which is located within the Delray Renaissance Zone in

Detroit. In 2005, 2006, and 2007 petitioner's real property tax bills included a school debt service tax of 13 mills, consistent with the school district electors' approval of $116,156,390 in school building and site bonds. The 13-mill property tax was levied by the Detroit Public School District for retirement of bonded debt. Petitioner filed a petition with the Michigan Tax Tribunal, challenging the tax on the ground that the property was subject to the Michigan Renaissance Zone Act (RZA), MCL 125.2681 *et seq*., and exempt from this school debt service tax.

Subsequently, petitioner moved for summary disposition, arguing that the property was exempt from the school debt service tax because none of the exceptions to the general exemption set forth in MCL 211.7ff applied to the property. First, petitioner argued, the tax levied was not a special assessment under the exception set forth in MCL 211.7ff(2)(a). Second, because the school debt service tax was not levied by a "local governmental unit," i.e., a county, city, village, or township, the exception to the general exemption set forth in MCL 211.7ff(2)(b) did not apply. Third, the tax was not levied pursuant to any of the Revised School Code sections listed under the exception set forth in MCL 211.7ff(2)(c). And, fourth, a casino was not being operated on the property, so the exception set forth under MCL 211.7ff(3) did not apply.

More particularly, with regard to the second exception to the exemption, petitioner argued that a "school district" is not considered a "local governmental unit" under the definition provided in the RZA, MCL 125.2683(g).[1] And contrary to respondent's anticipated claim, the definition of "local governmental unit" pro-

[1] This is the current citation. At other times relevant in this case, the definition has appeared in other subdivisions of this section.

vided in the General Property Tax Act was inapplicable to this case involving the RZA. In support of its position, petitioner cited the case of *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 166; 744 NW2d 184 (2007), which held that MCL 211.7ff must be liberally construed to effectuate the purposes of the RZA—securing tax relief for properties located in renaissance zones. Accordingly, petitioner argued, because the debt obligations were approved by school district electors and not electors "of the local governmental unit," this exception to the general exemption did not apply. Thus, petitioner's property was exempt from the tax, and it was entitled to a refund of the overpaid tax as well as an order granting summary disposition in its favor.

In response to petitioner's motion for summary disposition, the city argued that MCL 211.7ff(2)(b) actually contains two separate and independent clauses. The statute provides that property in a renaissance zone is not exempt from the collection of "[a]d valorem property taxes specifically levied for the payment of principal and interest of obligations approved by the electors *or* obligations pledging the unlimited taxing power of the local governmental unit." MCL 211.7ff(2)(b) (emphasis added). At issue in the *Kinder* case was the second clause, not the first clause, and because the first clause was at issue in this case, *Kinder* provides no guidance. The city claimed that the tax was levied "to satisfy the indebtedness of the School District of the City of Detroit." Thus, the fact that the school district is not a "local governmental unit" as that term is defined in the RZA is irrelevant; the tax was levied for the repayment of principal and interest of obligations approved by the electors. The city argued that if the "Legislature [had] intended for the limiting term 'local governmental unit' to apply to both clauses of MCL 211.7ff(2)(b) it could have easily done so by the simple placement of a couple

of commas." Accordingly, the city requested that the tribunal deny petitioner's motion for summary disposition and enter a judgment in the city's favor.

The Tax Tribunal agreed with petitioner, holding that the definition of "local governmental unit" does not include school districts and that the city's "stance of the Legislature's intent [is] unconvincing." The tribunal concluded that, in light of the clear definition of "local governmental unit," as well as the mandate to read the property tax act in conjunction with the RZA, a clerical error or mutual mistake of fact existed and resulted in an error on petitioner's tax bills. Accordingly, petitioner's motion for summary disposition was granted, and the city was ordered to remove the school debt tax from the taxes charged to the property and refund any overpaid taxes. This appeal followed.

On appeal, the city argues that the general exemption set forth in MCL 211.7ff(1) did not apply to petitioner's property; rather, the exception to that exemption set forth in MCL 211.7ff(2)(b) applied because the tax at issue was approved by the school district electors for payment of school debt principal and interest. We disagree.

In the absence of fraud, our review of the Tax Tribunal's decision is limited to determining whether the tribunal misapplied the law or adopted a wrong principle. *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). The tribunal's interpretation of a statute, however, presents a question of law that is reviewed de novo on appeal. *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 707; 664 NW2d 193 (2003).

MCL 125.2682 of the RZA provides:

> The legislature of this state finds and declares that there exists in this state continuing need for programs to

> assist certain local governmental units in encouraging economic development, the consequent job creation and retention, and ancillary economic growth in this state. To achieve these purposes, it is necessary to assist and encourage the creation of renaissance zones and provide temporary relief from certain taxes within the renaissance zones.

In accord, MCL 125.2689(2)(a) of the RZA states that, except as provided in MCL 125.2690, property in a renaissance zone is exempt from the collection of taxes under MCL 211.7ff of the General Property Tax Act. And MCL 211.7ff provides in part as follows:

> (1) For taxes levied after 1996, except as otherwise provided in subsections (2) and (3) and except as limited in subsections (4), (5), and (6), real property in a renaissance zone and personal property located in a renaissance zone is exempt from taxes collected under this act to the extent and for the duration provided pursuant to the Michigan renaissance zone act, 1996 PA 376, MCL 125.2681 to 125.2696.
>
> (2) Real and personal property in a renaissance zone is not exempt from collection of the following:
>
> (a) A special assessment levied by the local tax collecting unit in which the property is located.
>
> (b) Ad valorem property taxes specifically levied for the payment of principal and interest of obligations approved by the electors or obligations pledging the unlimited taxing power of the local governmental unit.
>
> (c) A tax levied under section 705, 1211c, or 1212 of the revised school code, 1976 PA 451, MCL 380.705, 380.1211c, and 380.1212.

The dispute between the parties came to be centered on the interpretation of MCL 211.7ff(2)(b). The city argues that this exception to the general exemption applied to petitioner's property because the taxes were "levied for the payment of principal and interest of obligations approved by the electors." The taxes were

not levied for "obligations pledging the unlimited taxing power of the local governmental unit." The city argues that the statute details two separate debt obligations that are excepted from the exemption and that the modifying phrase "of the local governmental unit" only applies—consistently with the rule of the last antecedent—to the second type of debt obligation for which taxes may be levied, not the first type of debt obligation, which is the one at issue here. In contrast, petitioner argues that the phrase "of the local governmental unit" applies and modifies both types of debt obligations, consistently with the plain language and purpose of the RZA. Thus, petitioner argues, because the statute itself requires a different interpretation than would be accorded by the application of the rule of the last antecedent, that rule does not apply. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

The primary goal in construing a statute is to discern and give effect to the intent of the Legislature. *Murphy v Mich Bell Tel Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). The first criterion in determining intent is the specific language of the statute. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). The fair and natural import of the terms employed, in view of the subject matter of the law, governs. *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009). If the plain and ordinary meaning of the statutory language is clear, i.e., unambiguous, the Legislative intent is clear. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005); *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004). In such a case, the Legislature is presumed to have intended the meaning it plainly expressed; thus,

no further judicial construction is required or permitted, and the statute must be enforced as written. *Nastal*, 471 Mich at 720.

With regard to the issue of statutory ambiguity, the *Lansing Mayor* Court held that "a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, [*Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003)], or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor*, 470 Mich at 166 (first alteration in *Lansing Mayor*). When is a provision equally susceptible to more than a single meaning? The *Lansing Mayor* Court held that a "reasonable disagreement" is not the standard for identifying ambiguity. *Id*. at 168. That is, "[a] provision is not ambiguous just because 'reasonable minds can differ regarding' the meaning of the provision." *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008), quoting *Lansing Mayor*, 470 Mich at 165. The *Lansing Mayor* Court concluded that "a finding of ambiguity is to be reached only after 'all other conventional means of [ ] interpretation' have been applied and found wanting." *Lansing Mayor*, 470 Mich at 165, quoting *Klapp*, 468 Mich at 474 (alteration in *Lansing Mayor*). That is, "ambiguity is a finding of last resort." *Lansing Mayor*, 470 Mich at 165 n 6.

The provision at issue in this case is MCL 211.7ff(2)(b), which provides for the collection of

> [a]d valorem property taxes specifically levied for the payment of principal and interest of obligations approved by the electors or obligations pledging the unlimited taxing power of the local governmental unit.

According to the city, the phrase should be read as follows: "Ad valorem property taxes specifically levied for the payment of principal and interest of [(1)] obligations approved by the electors or [(2)] obligations

pledging the unlimited taxing power of the local governmental unit." Thus the phrase "principal and interest of" would apply to both types of obligations, but the phrase "of the local governmental unit" would apply only to the second type of obligation, in accordance with the rule of the last antecedent. However, the statutory provision could also be read in the following manner: "Ad valorem property taxes specifically levied for the payment of [(1)] principal and interest of obligations approved by the electors or [(2)] obligations pledging the unlimited taxing power of the local governmental unit." Thus the phrase "principal and interest of" would only apply to obligations approved by the electors and not the obligations pledging the unlimited taxing power of the local governmental unit. In *Kinder*, 277 Mich App at 168-169, the respondent, the city of Jackson, made such an argument. In this case, the city of Detroit declines to take that position, claiming that the phrase "principal and interest of" "clearly" applies to both obligations, although it fails to identify why this interpretation is "clearly" accurate.

Petitioner offers the following construction of the statutory provision: "Ad valorem property taxes specifically levied for the payment of principal and interest of [(1)] obligations approved by the electors or [(2)] obligations pledging the unlimited taxing power[,] of the local governmental unit." The phrase "principal and interest of" would apply to both types of obligations, and the phrase "of the local governmental unit" would apply to both types of obligations. It follows, then, that another possible construction of the statutory provision is the following: "Ad valorem property taxes specifically levied for the payment of [(1)] principal and interest of obligations approved by the electors or [(2)] obligations pledging the unlimited taxing power[,] of the local governmental unit." The phrase "principal and interest

of" would only apply to obligations approved by the electors and not obligations pledging the unlimited taxing power, and the phrase "of the local governmental unit" would apply to both types of obligations.

As set forth earlier, to construe a statute we must first examine its language, according every word and phrase its plain and ordinary meaning and considering the grammatical context. MCL 8.3a; *United States Fidelity*, 484 Mich at 13. First, we turn to the phrase "principal and interest of." The issue whether this phrase applies only to "obligations approved by the electors" or whether it also applies to "obligations pledging the unlimited taxing power of the local governmental unit" has not been raised in this case. This issue was raised in *Kinder*, but the *Kinder* Court was not required to construe the provision on the facts of that case. *Kinder*, 277 Mich App at 168-169. Because this issue was not raised by the parties, we need not construe this statutory language but will assume for purposes of this case that the phrase applies to both obligations.

Next, we consider whether the phrase "of the local governmental unit" applies to "obligations approved by the electors," as held by the Tax Tribunal. Guidance is gleaned from the statutory language. The Legislature used the word "the" with respect to "electors." "The" is a definite article that, when used especially before a noun—like "electors"—has a specifying or particularizing effect. See *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010). Following the rationale of *Robinson*, because MCL 211.7ff(2)(b) refers to "the electors," we must determine to which "specific or particular" electors it refers.[2] If the provision had

[2] The *Robinson* Court construed the "two-inch rule" set forth in MCL 691.1402a(2) of the governmental tort liability act, MCL 691.1401 *et seq*. *Robinson*, 486 Mich at 3, 5.

simply said "electors," it might have referred to electors generally, as the dissent opines. However, because the phrase "of the local governmental unit" is within the same statutory provision, we conclude that "the electors" must be the electors of the local governmental unit. This interpretation recognizes that the Legislature is presumed to be familiar with the rules of statutory construction, as well as the rules of grammar. See *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998); *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009). This construction is also in compliance with the mandate to " '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.' " *Klapp*, 468 Mich at 468, quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). The dissent's interpretation of the provision ignores, and thereby renders surplusage or nugatory, the word "the" in "the electors." Accordingly, we also reject the dissent's claim that "[n]othing in the plain language of MCL 211.7ff(2)(b) specifies or limits which 'electors' must approve the obligation."

The city argues that, under the rule of the last antecedent, the modifying clause "of the local governmental unit" should only apply to the antecedent "obligations pledging the unlimited taxing power" and not to "obligations approved by the electors." Clearly, the rule of the last antecedent does not apply when its application results in a construction that is contrary to the plain language of the statute. See *Sun Valley Foods*, 460 Mich at 237. As discussed earlier, the statutory provision itself refers to "the electors," not merely "electors" in general.

Further, as our Supreme Court noted in *Robinson*, 486 Mich at 15, "to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." Therefore, we turn to MCL 211.7ff(2), which provides in relevant part:

> Real and personal property in a renaissance zone is not exempt from collection of the following:
>
> (a) A special assessment levied by the local tax collecting unit in which the property is located.
>
> (b) Ad valorem property taxes specifically levied for the payment of principal and interest of obligations approved by the electors or obligations pledging the unlimited taxing power of the local governmental unit.
>
> (c) A tax levied under section 705, 1211c, or 1212 of the revised school code, 1976 PA 451, MCL 380.705, 380.1211c, and 380.1212.

The statute clearly states that the exemption does not apply to "[a] special assessment levied *by the local tax collecting unit*" or to "[a]d valorem property taxes levied for payment of . . . obligations pledging the unlimited taxing power *of the local governmental unit*." MCL 211.7ff(2)(a) and (b) (emphasis added). It would be inherently inconsistent to construe the statute so as to require the payment of ad valorem property taxes levied for obligations approved by *any* group of "electors" rather than, consistent with the statutory language and overall scheme, just "*the* electors" of the local governmental unit. This construction (1) complies with the mandate that "[e]ffect is to be given to every provision, and the whole statute is to be considered in order to achieve a harmonious and consistent result," *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 52; 731 NW2d 94 (2006), and (2) recognizes the fact that the Legislature is under no "obligation to cumbersomely

repeat language that is sufficiently incorporated into a statute by the use of such terms as 'the,' 'such,' and 'that,' " *Robinson*, 486 Mich at 17.

In summary, we agree with the Tax Tribunal's conclusion, albeit for different reasons, that the levy of the tax on petitioner's property was improper in that the taxes were not levied for the payment of "obligations approved by the electors" within the meaning of MCL 211.7ff(2)(b). After applying conventional means of statutory interpretation, we conclude that the phrase "of the local governmental unit" clearly applies to both the "obligations approved by the electors" and the "obligations pledging the unlimited taxing power." There is no ambiguity. Thus, the Tax Tribunal properly granted petitioner's motion for summary disposition and properly ordered the removal of the school debt service taxes from the taxes charged to petitioner's property, as well as a refund of any overpaid taxes.

Affirmed.

JANSEN, P.J., concurred.

K. F. KELLY, J. (*dissenting*). I respectfully dissent. I disagree with the majority's interpretation of the phrase "of the local government unit" in MCL 211.7ff(2)(b) as applying to both "obligations approved by the electors" and "obligations pledging the unlimited taxing power." Despite its conclusion that the provision is unambiguous, the majority reads additional terms into MCL 211.7ff(2)(b) and, thus, its holding is contrary to the plain language of the statute and also to the rules of statutory construction. In my view, the language of MCL 211.7ff(2)(b) is clear and unambiguous, and judicial construction of its language is not permitted. I would apply the plain and ordinary meaning of the

provision to the circumstances at issue and reverse the Tax Tribunal's decision that respondent improperly assessed the tax.

This Court reviews the Tax Tribunal's interpretation of a statute de novo. See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 707; 664 NW2d 193 (2003). When interpreting the meaning of a statute, this Court's goal is to determine and give effect to the Legislature's intent. The first step is to review the language used. *Institute in Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996). The Legislature is presumed to intend the meaning that is plainly expressed by the words written. *Id*. If the language of a statute is clear and unambiguous, then judicial construction is not necessary, nor is it even permitted, *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007), and this Court must apply as written the language of the statute to the facts at issue, *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004), even if it results in an absurd outcome, *Decker v Flood*, 248 Mich App 75, 84; 638 NW2d 163 (2001). A statutory provision "is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation omitted; alteration in original). Further, I must emphasize that the reason for these well-established rules of statutory interpretation is to ensure that the courts of this state adhere to their judicial role of applying the law and do not overstep their bounds by acting in a legislative capacity. In other words, the rules of statutory interpretation necessarily mandate judicial restraint in order to ensure the integrity of the separate branches of government. "[I]n our democracy, a legislature is free to make inefficacious or even unwise policy

choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution." *Decker*, 248 Mich App at 84 (citation and quotation marks omitted; alteration in original).

The facts of this matter are not in dispute. Rather, the central issue is a question of law: Whether petitioner is subject to ad valorem tax liability under the language of MCL 211.7ff(2)(b). The Tax Tribunal answered this question in the negative, determining that the Legislature's intent under the Michigan Renaissance Zone Act (RZA), MCL 125.2681 *et seq*., directed this result.

The Legislature enacted the RZA to assist "local governmental units in encouraging economic development" by permitting the creation of renaissance zones within which entities would be provided temporary relief from certain taxes. MCL 125.2682. Consistent with this purpose, MCL 125.2689(2)(a) of the RZA provides, in part, that "property located in a renaissance zone is exempt from the collection of taxes under . . . [s]ection 7ff of the general property tax act [(GPTA)], 1893 PA 206, MCL 211.7ff." And consistent with this mandate, MCL 211.7ff(1) provides an exemption from taxation under the GPTA:

> For taxes levied after 1996, except as otherwise provided in subsection[] (2) . . . , real property in a renaissance zone and personal property located in a renaissance zone is exempt from taxes collected under this act to the extent and for the duration provided pursuant to the Michigan renaissance zone act, 1996 PA 376, MCL 125.2681 to 125.2696.

Subsection 2 of MCL 211.7ff provides a list of exceptions to this exemption:

> Real and personal property in a renaissance zone is not exempt from collection of the following:
>
> (a) A special assessment levied by the local tax collecting unit in which the property is located.
>
> (b) *Ad valorem property taxes specifically levied for the payment of principal and interest of obligations approved by the electors or obligations pledging the unlimited taxing power of the local governmental unit.*
>
> (c) A tax levied under section 705, 1211c, or 1212 of the revised school code, 1976 PA 451, MCL 380.705, 380.1211c, and 380.1212. [MCL 211.7ff(2) (emphasis added).]

In other words, under these limited circumstances the exemption from taxation under the GPTA, which is mandated by the RZA, does not apply and an entity will be subject to tax liability.

The only exception to the exemption that is at issue here is MCL 211.7ff(2)(b). Under this provision, an entity with real or personal property in a renaissance zone will be subject to an ad valorem property tax that was "specifically levied for the payment of principal and interest of [(1)] obligations approved by the electors or [(2)] obligations pledging the unlimited taxing power of the local governmental unit." *Id*. A plain reading of this provision's terms reveals no ambiguity. Reasonable minds cannot differ in the conclusion that this provision provides an exception to the RZA exemption if an ad valorem tax is levied for obligations approved by the electors *or* for obligations pledging the unlimited taxing power of the local governmental unit. Simply put, an ad valorem tax will be applicable if either of these two types of obligations exist.

Despite its conclusion that MCL 211.7ff(2)(b) is unambiguous, the majority somehow concludes that the exception to the exemption found in it only applies if an ad valorem tax is levied for obligations approved by the

electors *of a local governmental unit* or obligations pledging the unlimited taxing power of the local governmental unit. This construction bends the rules of statutory interpretation and adds additional language to the statute. Nothing in the plain language of MCL 211.7ff(2)(b) specifies or limits which "electors" must approve the obligation. The majority's conclusion that the electors must be "of the local governmental unit," which by definition does not include school boards[1] (and would mean that the exception language would not apply), is contrary to the plain language of the provision. The phrase "of the local governmental unit" only refers to the immediately antecedent phrase, i.e., "obligations pledging the unlimited taxing power." Nothing in the grammatical structure of MCL 211.7ff(2)(b) suggests that "of the local governmental unit" also applies to the phrase "obligations approved by the electors." This construction comports with the common grammatical rule of construction, and a common understanding of the English language, "that a modifying clause will be construed to modify only the last antecedent unless some language in the statute requires a different interpretation." *People v Small*, 467 Mich 259, 263 & n 4; 650 NW2d 328 (2002) (noting that "[u]nless set off by commas, a modifying word or phrase, where no contrary intention appears, refers solely to the last antecedent"). "[T]he statutory language must be read and understood in its grammatical context." *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). The majority's interpretation ignores this grammatical rule by adding a comma before the modifying phrase "of a governmental unit" and thereby reading an otherwise

[1] Currently, section 3(g) of the RZA, MCL 125.2683(g), defines "local governmental unit" as "a county, city, village, or township." At other times relevant to this case, the definition has appeared in different subdivisions of this section.

nonexistent limitation into the statute—that "obligations approved by electors" means obligations approved by electors of a local governmental unit, which only includes counties, cities, villages, or townships. "[A court] cannot read restrictions or limitations into a statute that plainly contains none." *Rusnak v Walker*, 273 Mich App 299, 305; 729 NW2d 542 (2006).

The majority further justifies its interpretation by opining that the failure to add the phrase "of a governmental unit" after "obligations approved by the electors" renders the term "the," as used before "electors," nugatory. It is true that the article "the" is a definite article that may have a specifying effect in some contexts. However, it does not follow that the term "the" is necessarily rendered surplusage if the phrase "obligations approved by *the* electors" is not read to mean "obligations approved by *the* electors [of the local governmental unit]." I would note that the article "the" may also be used to designate a noun "as being used generically," *Random House Webster's College Dictionary* (1997),[2] and that that is how the Legislature used the term "the" here. The majority, however, defines the term "the" to require that the particular electors be defined and then goes a step further to conclude that those electors must be "of the local governmental unit." This is not what the provision states.

I agree with the majority that statutory provisions must not be read in isolation, but in the context of the statutory scheme as a whole. See *Robinson*, 486 Mich at 15. However, nothing in the language of MCL 211.7ff(2) renders my interpretation "inherently inconsistent" with the statutory language or the overall scheme of the

[2] An example of how the term "the" may be used in this way is the following: "The dog is a quadruped." *Random House Webster's College Dictionary* (1997).

statute, as the majority asserts. As previously stated, MCL 211.7ff(2) provides a list of exceptions to the RZA exemption:

> Real and personal property in a renaissance zone is not exempt from collection of the following:
>
> (a) A special assessment levied *by the local tax collecting unit* in which the property is located.
>
> (b) Ad valorem property taxes specifically levied for the payment of principal and interest of obligations approved *by the electors* or obligations pledging the unlimited taxing power *of the local governmental unit*.
>
> (c) A tax levied under section 705, 1211c, or 1212 of the revised school code, 1976 PA 451, MCL 380.705, 380.1211c, and 380.1212. [Emphasis added.]

The majority implies that because the statute's "exemption does not apply to '[a] special assessment levied *by the local tax collecting unit*' or to '[a]d valorem property taxes levied for payment of . . . obligations pledging the unlimited taxing power *of the local governmental unit*,' " it must also follow that the ad valorem tax levied under MCL 211.7ff(2)(b) for obligations approved by the electors must be approved by " '*the* electors' of the local governmental unit" rather than "*any* group of 'electors' . . . . " This position is logically untenable; it is based on erroneous deductive reasoning in regard to the relationship between subdivisions (a) and (b) of MCL 211.7ff(2). Moreover, I would also point out that the Legislature's inclusion in subdivision (c) of MCL 211.7ff(2) of an exception to the RZA exemption for taxes levied under the Revised School Code does not mandate the conclusion that MCL 211.7ff(2)(b) must be construed to preclude an ad valorem tax levied for an obligation approved by electors who happen to be a particular school district's electors. And it must be noted that a school district can encompass more than

one discrete local governmental unit or only part of one or more local governmental units. Had the Legislature wished to preclude such an outcome, it could have included the language "of a local governmental unit" after the phrase "obligations approved by the electors." It chose not to do so. The majority has otherwise failed to explain what inherent inconsistency arises within the statutory scheme if MCL 211.7ff(2)(b) is given its plain and ordinary meaning, i.e., the RZA exemption is inapplicable if an ad valorem tax is levied for obligations approved by the electors or for obligations pledging the unlimited taxing power of the local government unit.

For the foregoing reasons, I disagree with the majority's construction of MCL 211.7ff(2)(b), which impermissibly interprets that unambiguous provision and concludes that "the phrase 'of the local governmental unit' clearly applies to both the 'obligations approved by the electors' and the 'obligations pledging the unlimited taxing power.' " Under the circumstances of this case, an ad valorem tax was levied that was a school debt service tax of 13 mills as a result of the school district electors' approval of $116,156,390 in bonds. This was an "obligation[] approved by the electors," and therefore petitioner is subject to taxation under MCL 211.7ff(2)(b). Petitioner cannot avail itself of the RZA's exemption because the factual circumstances fall within the exception to the exemption. I would conclude, then, that the taxes were properly levied against petitioner. I would reverse the decision of the Tax Tribunal.

JOHNSON v PASTORIZA

Docket No. 288338. Submitted April 6, 2010, at Lansing. Decided October 12, 2010, at 9:05 a.m.

Candice Johnson and Baby Johnson, Candice's child who died following its premature birth on November 1, 2005, brought an action in the Jackson Circuit Court against Rajan Pastoriza, M.D., and Rajan Pastoriza, M.D., P.L.C., doing business as Women's First Health Services, alleging medical malpractice and negligence under MCL 600.2922a as a result of defendants' failure to perform a cerclage that Candice requested during her pregnancy with Baby Johnson to prevent the baby's premature birth. The court, Thomas D. Wilson, J., denied defendants' motion for summary disposition and ordered that Candice must have a personal representative appointed for the estate of the deceased child and amend her complaint to bring a claim concerning the child under the wrongful-death act, MCL 600.2922 and MCL 600.2922a. The Court of Appeals granted defendants' application for leave to appeal in an unpublished order, entered February 26, 2009 (Docket No. 288338).

The Court of Appeals *held*:

1. MCL 600.2922, which allows an action for wrongful death, was amended by 2005 PA 270, effective December 19, 2005, to add the language "or death as described in section 2922a" in order to clarify MCL 600.2922 and MCL 600.2922a and to resolve a controversy regarding whether they allow an action brought on behalf of a nonviable fetus. Therefore, MCL 600.2922, as amended by 2005 PA 270, may be applied retroactively from April 1, 2000, the effective date of the last prior amendment of MCL 600.2922 before its amendment in 2005. MCL 600.2922, as amended by 2005 PA 270, retroactively applied in this case.

2. MCL 600.2922 does not require a plaintiff to establish that the injury was caused by an act. Rather, it provides that liability is possible when the injury is caused by wrongful act, neglect, or fault of another. While MCL 600.2922 refers to a death as described in MCL 600.2922a, it does not indicate that the death in question must occur in the manner described in MCL 600.2922a, which refers to wrongful or negligent acts that result in a miscarriage or

stillbirth. Plaintiffs' allegation that defendants caused the injuries when they neglected to perform the requested procedure in a timely manner, when accepted as true, sufficiently established a cause of action under MCL 600.2922.

3. MCL 600.2922a(2)(b) provides that a person is not liable for damages for the death of an embryo or fetus if the death was the result of a medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and (1) performed with the pregnant individual's consent, (2) performed with the consent of an individual who could lawfully provide consent on the pregnant individual's behalf, or (3) performed without consent as necessitated by a medical emergency.

4. The phrase "as necessitated by a medical emergency" in MCL 600.2922a(2)(b) was meant to describe only situations in which consent need not be obtained because of the surrounding circumstances. The trial court erred by interpreting the medical-procedure exception as applying only when the medical procedure was necessitated by a medical emergency. Because consent was not at issue in this case, it was irrelevant whether a medical emergency occurred. MCL 600.2922a(2)(b) clearly provides an exception to MCL 600.2922a if the death of the fetus was the result of the performance of a medical procedure. In this case, however, there was no medical procedure performed, and plaintiffs' claim was based on a failure or refusal to perform an explicitly requested medical procedure. MCL 600.2922a(2)(b) did not apply to the factual allegations in this case.

5. Under MCL 600.2922(2), a wrongful-death action must be brought in the name of the personal representative of the estate. An individual cannot maintain an action in his or her name under the wrongful-death act. Plaintiffs, however, were properly granted leave to amend their complaint so that the action would be brought under the wrongful-death act in the name of the personal representative of the estate of Baby Johnson.

6. The language "or death as described in section 2922a" that was added to MCL 600.2922 in 2005 was added to clarify that a wrongful-death action can be brought not only for the death of a person, pursuant to MCL 600.2922, but also for the death of an embryo or fetus, pursuant to MCL 600.2922a. The Legislature did not intend to supersede the general proposition stated in *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492 (2003), that a plaintiff can bring a cause of action for damages in the plaintiff's own right as a result of a miscarriage in order to recover tort damages. The trial court properly denied defendants' motion for

summary disposition and properly granted plaintiffs an opportunity to amend the complaint to comply with statutory requirements.

Affirmed.

DAVIS, P.J., did not participate.

1. STATUTES — RETROACTIVITY — WRONGFUL-DEATH STATUTE.

MCL 600.2922, as amended by 2005 PA 270, may be applied retroactively to April 1, 2000.

2. NEGLIGENCE — WRONGFUL-DEATH STATUTE — EMBRYOS OR FETUSES — MEDICAL-PROCEDURE EXCEPTION.

MCL 600.2922a(2)(b) provides that a person is not liable for damages for the death of an embryo or fetus if the death was the result of a medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and (1) performed with the pregnant individual's consent, (2) performed with the consent of an individual who may lawfully provide consent on the pregnant individual's behalf, or (3) performed without consent as necessitated by a medical emergency.

3. NEGLIGENCE — WRONGFUL-DEATH STATUTE — ACTIONS — PARTIES — CLAIMS.

An action under the wrongful-death statute must be brought in the name of the personal representative of the estate of the deceased; the persons who may be entitled to damages under the statute must submit to the personal representative a claim for those damages (MCL 600.2922[7]).

Ferris & Salter, P.C. (by *Don Ferris*), for plaintiffs.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Beth A. Wittmann* and *Ellen Keefe-Garner*) for defendants.

Before: DAVIS, P.J., and DONOFRIO and STEPHENS, JJ.

PER CURIAM. In this cause of action involving the wrongful-death act, MCL 600.2922 and MCL 600.2922a, defendants appeal by leave granted the trial court's denial of their motion for summary disposition. On appeal,

defendants argue that none of plaintiffs' claims are compensable under the wrongful-death act. We affirm.

I. SUBSTANTIVE FACTS

As alleged by plaintiffs in their first amended complaint, the medical history of plaintiff Candice Johnson (hereafter Johnson) reflects that her cervix is incompetent. Johnson's incompetent cervix resulted in her having a number of miscarriages. However, in 1999, defendant Dr. Rajan Pastoriza's predecessor, Dr. Dennis Means, performed a cerclage on Johnson when she was 16 weeks pregnant. As a result of the procedure, Johnson's pregnancy proceeded to a full-term vaginal birth in 2000. In 2001, when Johnson was once again 16 weeks pregnant, Dr. Means performed another cerclage, which resulted in that pregnancy reaching 36 weeks. A cesarean section was performed to prevent a breech delivery. In 2002, Dr. Means once again performed a cerclage on Johnson early in the second trimester of a pregnancy. Dr. Means removed the cerclage suture shortly before Johnson vaginally delivered a full-term baby.

Johnson became pregnant again in June 2005. On August 25, 2005, Johnson began receiving treatment from defendant Dr. Rajan Pastoriza and defendant Rajan Pastoriza, M.D., P.L.C. Dr. Pastoriza possessed all of Johnson's previous medical records. An August 25, 2005, note reveals that an ultrasound was scheduled to be conducted at 12 weeks' gestation with a possible cerclage to follow. On September 9, 2005, Johnson appeared at Foote Hospital in Jackson because of vaginal bleeding. An ultrasound was performed, which showed a live fetus at 12 weeks' gestation. Personnel at the hospital recommended bed rest and indicated that Johnson should follow up with her obstetrician.

Johnson followed up with Dr. Pastoriza on September 13, 19, and 23, as well as on October 6. Dr. Pastoriza's records from September and October 2005 continued to note Johnson's history of an incompetent cervix and cerclages.

On October 12, 2005, another ultrasound was ordered because of Johnson's short cervix. The ultrasound revealed a viable fetus at almost 17 weeks' gestation. The findings of the ultrasound also revealed that the length of Johnson's cervix was consistent with the length of Johnson's cervix when the cerclages were performed during her previous successful pregnancies. On October 19, 2005, during an examination by Dr. Pastoriza, Johnson complained of cramping and described a "feeling like pre-term labor." Thereafter, Johnson asked Dr. Pastoriza to perform a cerclage, but he refused to do so.

On November 1, 2005, Johnson went into premature labor, which resulted in advanced cervical dilation. She went to Foote Hospital and was subsequently transferred to Sparrow Hospital in Lansing to receive an emergency cerclage. The emergency cerclage did not prevent the baby's premature birth at 20 weeks' gestation, and, as alleged in the first amended complaint, "Johnson lost the 20 week old fetus shortly after the transfer."

Subsequently, Johnson attempted to have another child and received a cerclage. However, Johnson asserts that as a result of a significant and permanent cervical tear, which she suffered during the emergency cerclage at Sparrow Hospital, the cerclage during this pregnancy failed. Dr. Michael Berke, a board-certified obstetrician, opined that to a reasonable degree of medical certainty, Johnson's cervix would never have been permanently torn if Dr. Pastoriza had timely performed a cerclage in

October 2005. Dr. Berke also opined that to a reasonable degree of medical certainty, Johnson would never have another vaginal birth and that it would be difficult for her to successfully give birth to another child.

II. PROCEDURAL HISTORY

Plaintiffs, Candice Johnson and Baby Johnson, the child who died following its premature birth on November 1, 2005, subsequently brought suit. Plaintiffs alleged two counts, one of medical malpractice and one of negligence under MCL 600.2922a, which is a portion of the wrongful-death act. MCL 600.2922a(1) provides as follows: "A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus." Thereafter, defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) on the ground that the wrongful-death act allows recovery for the death of a fetus only when "death as described in section 2922a [MCL 600.2922a]" occurs. Defendants asserted that no "death as described in section 2922a" occurred "because § 2922a clearly requires an affirmative act, as opposed to a nonobservable negligent omission that causes a death." In contrast, plaintiffs argued that defendant doctor's refusal to perform the cerclage was an act of commission and, in addition, that MCL 600.2922a ties into the wrongful-death act, which allows actions for the death of a fetus when it is caused by a wrongful act or neglect.

At the September 11, 2008, hearing on the summary disposition motion, defendants also asserted that under MCL 600.2922a(2)(b), acts by medical professionals are

specifically excluded. MCL 600.2922a(2)(b) provides that the section allowing for liability does not apply to "[a] medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency." The court said that it interpreted the statute as saying that the provision only applies when the act in question is necessitated by a medical emergency. Defendants argued that the medical-emergency provision relates to the notion of consent and does not apply when a patient is incapable of giving consent. Plaintiffs argued that MCL 600.2922a(2)(b) by its own terms applies to the performance of a medical procedure, but noted that their cause of action was based on the failure to perform a medical procedure.

Defendants also argued that

> to the extent [Johnson] is seeking damages for her own emotional distress under a "bystander" theory for witnessing injury to the fetus, such a claim should be dismissed pursuant to MCR 2.116(C)(8) because it cannot be brought outside the wrongful death act, and because plaintiff failed to allege the elements of such a claim.

The court noted that that argument would cause Johnson to request to amend her complaint, and defense counsel replied that that would be futile because, as just argued, Johnson could not state a wrongful-death claim in light of that act's requirement of a "death as described in section 2922a" in order to recover for the death of a fetus.

Lastly, defendants argued that summary disposition of Johnson's claim for emotional damages for grief and sorrow for her baby's death was proper under the ruling

in *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492; 665 NW2d 484 (2003). Johnson argued that she had also suffered and alleged physical injuries as well as emotional distress. Johnson had alleged that she had an unsuccessful emergency cerclage just before the premature birth. Her attorney told the court that the emergency cerclage ripped, causing physical injury. She also argued that *McClain* did not do away with actions on behalf of a mother because MCL 600.2922a(3) states, "This section does not prohibit a civil action under any other applicable law."

The trial court denied defendants' motion for summary disposition, ruling that Johnson had alleged that she had asked defendant doctor to perform a cerclage, but he did not, and that could be interpreted as an affirmative act. The court also said:

> And taking all the facts in the light most favorable to the plaintiff, I don't believe that I can rule this, as a matter of law, that they cannot develop a cause of action either by amending under 2922a and filing [inaudible] that statute through the Wrongful Death Act, or pursuing, as is now the case, under *McClain*.

Defendants subsequently sought leave to appeal, which this Court granted in an unpublished order, entered February 26, 2009 (Docket No. 288338).

III. APPLICABLE STANDARDS OF REVIEW

This Court reviews de novo a motion for summary disposition. *Teel v Meredith*, 284 Mich App 660, 662; 774 NW2d 527 (2009). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Although defendants initially brought their motion pursuant to multiple

court rules, it was subsequently conceded that the motion was pursuant solely to MCR 2.116(C)(8). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Dolan v Continental Airlines*, 454 Mich 373, 380; 563 NW2d 23 (1997). The motion may not be supported with documentary evidence, affidavits, admissions, or depositions because pursuant to MCR 2.116(G)(5), the trial court must only rely on the pleadings. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). However, "the mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). A motion under MCR 2.116(C)(8) may be granted only when the claims alleged "are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade*, 439 Mich at 163.

Additionally, this appeal requires this Court to consider the meaning of MCL 600.2922 and MCL 600.2922a. The meaning of a statute is a question of law that is reviewed de novo. *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 99; 643 NW2d 553 (2002). As provided in *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996):

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is

> clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. [Citations omitted.]

If judicial construction is warranted, this Court should construe the statute according to its common meaning, and common sense should not be abandoned. *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993); *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). "Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary definition for those meanings." *Hamed v Wayne Co*, 284 Mich App 681, 694; 775 NW2d 1 (2009).

IV. PLAINTIFFS' CLAIM FOR THE DEATH OF BABY JOHNSON

Defendants first assert that the trial court erred by denying their motion for summary disposition regarding plaintiffs' claim arising out of the death of plaintiff Baby Johnson. We disagree.

Defendants argue that summary disposition should have been granted because plaintiffs cannot state a claim for a "death as described in" MCL 600.2922a. MCL 600.2922(1), as amended by 2005 PA 270, currently provides:

> Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in

> section 2922a, and although the death was caused under circumstances that constitute a felony.

At the time of the alleged negligence in this matter, MCL 600.2922, as amended by 2000 PA 56, was slightly different and did not include the language regarding "death as described in section 2922a." Therefore, before determining whether MCL 600.2922 allows for a recovery in this instance, this Court must first determine which version of that statute applies.

It has been held that in determining whether a statute should be applied prospectively or retroactively, the intent of the Legislature controls. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). Specifically, "a statute is presumed to operate prospectively unless the Legislature either expressly or impliedly indicates an intention to give the statute retroactive effect." *Allstate Ins Co v Faulhaber*, 157 Mich App 164, 166; 403 NW2d 527 (1987). However, as this Court has previously explained, the rule that a statute is presumed to operate prospectively

> does not apply to statutory amendments which can be classified as remedial or procedural in nature. Further, a statute which operates in furtherance of a remedy already existing and which neither creates new rights nor destroys existing rights is held to operate retroactively unless a contrary legislative intent is manifested.
>
> A statute is considered remedial or procedural if it is designed to correct an existing oversight in the law or redress an existing grievance. Those statutory amendments which imply an intention to reform or extend existing rights are generally viewed as remedial. [*Id.* at 166-167 (citations omitted).]

In addition, "[a]n amendment *may* apply retroactively where the Legislature enacts an amendment to clarify an existing statute and to resolve a controversy regard-

ing its meaning." *Mtg Electronic Registration Sys, Inc v Pickrell*, 271 Mich App 119, 126; 721 NW2d 276 (2006) (emphasis added).

In this case, it is clear that MCL 600.2922 was amended to add the language "or death as described in section 2922a" in order to clarify both MCL 600.2922 and MCL 600.2922a and to resolve a controversy regarding their meaning. During the discussion of the proposed 2005 amendment of MCL 600.2922 to add the language "or death as described in section 2922a," it was indicated during deliberations in the House of Representatives that MCL 600.2922a had been enacted to "amend the . . . wrongful death statute . . . to extend . . . civil penalties to conduct causing the death of an embryo or fetus." House Legislative Analysis, HB 4777, October 24, 2005, at 1.[1] The House legislative analysis went on to indicate:

> It was believed at the time that [the enactment of MCL 600.2922a] closed the loophole in the wrongful death statute and so would apply to all situations in which conduct toward a pregnant woman resulted in the death of the embryo or fetus she carried.
>
> However, in subsequent civil actions, courts around the state have apparently only looked at Section 2922 of the wrongful death statute and not Section 2922a. Most notably, in *McClain v University of Michigan Board of Regents*, 256 Mich App 492 (2003), the court held that "under Michigan law, an action for wrongful death, MCL 600.2922, cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a 'person' within the meaning of the wrongful-death act."
>
> Once again, it has become clear that legislation is needed to clarify the legislature's intent of providing a

[1] "[L]egislative bill analyses are not official statements of legislative intent" but nonetheless "may be of probative value." *Seaton v Wayne Co Prosecutor (On Second Remand)*, 233 Mich App 313, 321 n 3; 590 NW2d 598 (1998) (citing cases).

> cause of action for the wrongful death of not only a person, but also an embryo or fetus. [*Id*. at 1-2.]

On the basis of the foregoing, we conclude that the 2005 amendment of MCL 600.2922, which added the language "or death as described in section 2922a," was enacted in order to clarify MCL 600.2922 and MCL 600.2922a and to resolve a controversy regarding their meaning. Therefore, MCL 600.2922, as amended by 2005 PA 270, which was immediately effective on December 19, 2005, may be applied retroactively from April 1, 2000, the effective date of the last prior amendment of MCL 600.2922 before its amendment in 2005. *Mtg Electronic Registration Sys*, 271 Mich App at 126.

Having determined that MCL 600.2922, as amended by 2005 PA 270, retroactively applies, we must next determine whether defendants' conduct was actionable considering the language of MCL 600.2922a. As noted, MCL 600.2922a provides for liability against "[a] person who commits a wrongful or negligent act against a pregnant individual . . . if the act results in a . . . stillbirth . . . ." Citing that language, defendants argue that plaintiffs are only entitled to relief if they can establish that the injury in question was caused by "a wrongful or negligent act," as opposed to an omission. We disagree with defendants' interpretation of the applicable statutory scheme. Pursuant to MCL 600.2922, a party need not establish that the injury was caused by an act. Rather, MCL 600.2922 specifically provides that liability is possible when the injury is "caused by wrongful act, neglect, or fault of another . . . ." While MCL 600.2922 refers to a "death as described in [MCL 600.2922a]," it does not indicate that the death in question must occur in the *manner* described in MCL 600.2922a. Plaintiffs are alleging that defendants caused their injuries when they neglected to perform

the requested procedure in a timely manner. That allegation, when accepted as true, sufficiently established a cause of action pursuant to MCL 600.2922.

We note that even if we were to agree with defendants' interpretation and conclude that plaintiffs were required to establish that an affirmative act caused the injuries, defendants would still not be entitled to relief. It is improper in this instance to classify defendants' alleged conduct as an omission. The pleadings on which this motion must be considered note that Johnson specifically requested the performance of a cerclage and defendants consciously chose to deny the request. Their conduct in denying the requested care is tantamount to an affirmative act.

In addition to arguing that a cause of action was not permitted because there was no act that led to plaintiffs' injuries, defendants also assert that plaintiffs' cause of action is barred by MCL 600.2922a(2)(b) and that the trial court misinterpreted that statutory provision. While we agree that the trial court's interpretation of MCL 600.2922a(2)(b) was inaccurate, we further conclude that a correct interpretation of that provision does not lead to the conclusion that plaintiffs' action was barred. This Court can affirm a trial court's decision when the trial court reached the correct decision albeit for the wrong reason. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

MCL 600.2922a(2)(b) provides that a person is not liable for damages for the death of an embryo or fetus if the death is the result of "[a] medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her

behalf or without consent as necessitated by a medical emergency." The trial court indicated that it interpreted the medical-procedure exception as applying only when the medical procedure was necessitated by a medical emergency. We disagree. MCL 600.2922a(2)(b) provides three exceptions enumerating when a person is not liable for damages for the death of an embryo or fetus: (1) if the death is the result of "[a] medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent," (2) if the death is the result of "[a] medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the" consent of an individual who may lawfully provide consent on the pregnant individual's behalf, or (3) if the death is the result of "[a] medical procedure performed by a physician or other licensed health professional within the scope of his or her practice" and without consent "as necessitated by a medical emergency." Thus, the phrase "as necessitated by a medical emergency" is meant to describe only situations in which consent need not be obtained because of the surrounding circumstances. Therefore, because consent is not at issue in the present case, it is irrelevant whether a medical emergency occurred.

MCL 600.2922a(2)(b) clearly provides that there is an exception to MCL 600.2922a if the death of the fetus is the result of the performance of a medical procedure. However, in this case, there was no medical procedure performed. Rather, the claim was based on defendants' failure or refusal to perform an explicitly requested medical procedure. Consequently, we find that MCL 600.2922a(2)(b) is inapplicable to the factual allegations in this case.

V. DAMAGES FOR EMOTIONAL DISTRESS

Defendants next argue that Johnson cannot recover for emotional distress damages because the wrongful-death act only allows for claims brought by a personal representative of the estate of the deceased and does not allow recovery for individual claims. We disagree.

MCL 600.2922 provides, in part:

> (2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.
>
> (3) . . . [T]he person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:
>
> (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
>
> (b) The children of the deceased's spouse.
>
> (c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

* * *

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. . . .

* * *

(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

* * *

(7) A person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6). The failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

Thus, pursuant to MCL 600.2922(2), an action under the wrongful-death act must be brought in the name of

the personal representative of the estate of the deceased. In addition, although the claim is brought in the name of the personal representative, the persons who may be entitled to damages must submit a claim for those damages to the personal representative. MCL 600.2922(7). The trial court or the jury then awards the amount of damages that it believes is fair and equitable considering the amount of damages sustained by each person and the estate of the deceased. MCL 600.2922(6)(d). Consequently, pursuant to the plain language of the statute, an individual cannot maintain an action in his or her name under the wrongful-death act. MCL 600.2922(2); *USAA Ins Co*, 220 Mich App at 389-390. However, although plaintiffs did not properly bring their claim in the name of the personal representative, but only in the names of Johnson and her baby who died following its premature birth on November 1, 2005, the trial court clearly stated in its order denying defendants' motion for summary disposition that "plaintiffs must appoint a personal representative for the estate of baby Johnson and amend the complaint to bring such a claim through the wrongful death act." Plaintiffs were properly granted leave to amend their complaint. MCR 2.116(I)(5) provides that when summary disposition is sought "based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." The deficiency in plaintiffs' complaint can be corrected through amendment. Therefore, summary disposition would have been improper.

Finally, defendants also argue that the wrongful-death act is the exclusive remedy in this case because *McClain* was superseded by the 2005 amendment of MCL 600.2922 when that amendment eliminated any

individual claim of a mother outside the wrongful-death act. In the alternative, defendants argue that if *McClain* remains valid, this Court should overrule that decision because it was wrongly decided. We conclude that the holding in *McClain* is still valid, and we refrain from holding that it was wrongly decided.

In *McClain*, 256 Mich App at 496, the plaintiff filed a medical-malpractice action relating to the death of her fetus. The Court indicated that the wrongful-death act, specifically MCL 600.2922, did not apply to the case because MCL 600.2922 dealt with a person and not a nonviable fetus. *Id*. at 495-496. Thus, the Court specifically indicated that the parent in that case could not recover damages for the loss of society and companionship. *Id*. The Court, however, indicated that a "plaintiff's cause of action for damages in her own right as a result of her miscarriage is well grounded in Michigan law" and, thus, that the plaintiff could recover damages that are recoverable in a tort action. *Id.* at 496. The Court went on to conclude that the plaintiff could recover damages for emotional distress, mental anguish, and grief and sorrow. *Id*. at 500-503. Further, other damages would be available to a plaintiff who could prove them, such as damages for physical pain and suffering, fright, shock, denial of social pleasure and enjoyment, embarrassment, humiliation, or other appropriate damages. *Id*. at 498-499.

Defendants' contention that *McClain* was superseded by the 2005 amendment of MCL 600.2922 is without merit. The only language that was added to MCL 600.2922 as a result of the 2005 amendment was the language "or death as described in section 2922a." That language appears to have only been added to clarify that a wrongful-death action can be brought not only for the death of a person, pursuant to MCL

600.2922, but also for the death of an embryo or fetus, pursuant to MCL 600.2922a. There is no indication in the statute or in the legislative history of the enactment of the 2005 amendment of MCL 600.2922 that the Legislature intended to supersede the general proposition that a plaintiff can bring a cause of action for damages in the plaintiff's own right as a result of a miscarriage in order to recover tort damages. Absent any evidence of the Legislature's intent to eliminate a plaintiff's ability to bring such a cause of action, it would be improper for this Court to conclude that *McClain* is no longer good law regarding that point. Furthermore, we are not persuaded by defendants' assertions that *McClain* was incorrectly decided. As a result, defendants are not entitled to relief.

VI. CONCLUSION

When viewing the evidence in the light most favorable to plaintiffs, we conclude that the trial court properly denied defendants' motion for summary disposition regarding each count of plaintiffs' complaint and properly granted plaintiffs an opportunity to amend that complaint to comply with the statutory requirements.

Affirmed.

DAVIS, P.J., did not participate.

PEOPLE v DINARDO

Docket No. 294194. Submitted October 6, 2010, at Detroit. Decided October 12, 2010, at 9:10 a.m.

John T. Dinardo was charged in the 37th District Court with operating a motor vehicle while intoxicated, third offense, MCL 257.625(1) and (9)(c). At his preliminary examination, defendant moved to suppress the results of the breath test administered by Officer Michael Lake using a DataMaster machine after defendant's arrest. Although the DataMaster machine had generated a printed "ticket" for the tests, the ticket was not available by the time of the preliminary examination. Lake had recorded the DataMaster results on a DI-177 breath-test report, which was available. The court, Jennifer M. Faunce, J., granted defendant's motion to suppress but bound him over to the Macomb Circuit Court for trial as charged. Defendant again moved to suppress the DataMaster test results, and the circuit court, Edward A. Servitto, Jr., J., held a hearing at which defendant argued that the lack of the DataMaster ticket rendered other evidence regarding the test results inadmissible hearsay and denied him his constitutional right to confront the witnesses against him. The prosecution argued that the DataMaster machine was not a declarant, so Lake's testimony repeating the recorded test results would not be hearsay and also argued that because Lake had read the original test results and recorded them on the DI-177 report at the time, he had personal knowledge of the results and should be able to present them as testimony. The circuit court concluded that the report was hearsay and could not be admitted. The circuit court further held that although Lake could testify if he had an independent recollection of the breath-test results, the report could not be used to refresh Lake's memory. The circuit court subsequently denied the prosecution's motion for reconsideration, concluding that the test itself was testimonial in nature and that the test results therefore implicated defendant's constitutional right to confront the witnesses against him. The prosecution appealed.

The Court of Appeals *held*:

1. The circuit court erred by concluding that the DataMaster ticket was testimonial in nature. The Confrontation Clause of the Sixth Amendment guarantees that a person facing criminal prosecution has the right to be confronted with the witnesses against him or her, and § 20 of article 1 of the Michigan Constitution provides the same protection. Testimonial statements of witnesses absent from trial are admissible only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant. Statements are testimonial if the primary purpose of the statements or the questioning that elicited them was to establish or prove past events potentially relevant to later criminal prosecution.

2. Laboratory reports prepared by nontestifying analysts are testimonial hearsay. Data that are automatically generated by a machine and presented without human input, analysis, or interpretation are not testimonial because the machine is not a witness in any constitutional sense. The DataMaster ticket was generated by the machine without human input and no expert interpretation was required for the test results to be understood. The Confrontation Clause did not restrict the admissibility of the DataMaster results.

3. The DataMaster test results were not hearsay under Michigan law. Under MRE 801(c), hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Although a printout of information entered into a machine by a person is hearsay, a printout of machine-generated information does not constitute hearsay because a machine is not a person and therefore, under MRE 801(6), is not a declarant capable of making a statement.

4. The DI-177 report, while hearsay, was admissible as a recorded recollection. A hearsay document may be admitted under MRE 803(5) if the document pertains to matters about which the declarant once had knowledge, the declarant now has an insufficient recollection about those matters, and the document is shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his or her memory. The DI-177 report satisfied the criteria because Lake saw the DataMaster ticket and therefore had personal knowledge of the information at the time he recorded it onto the DI-177 report, he indicated that he no longer had any independent recollection of the specific results printed on the DataMaster ticket, and he personally prepared the DI-177 report.

Lake should be permitted to read the contents of the report into evidence at trial and testify regarding the test results.

Reversed and remanded to the circuit court.

1. CONSTITUTIONAL LAW — EVIDENCE — RIGHT OF CONFRONTATION — TESTIMONIAL STATEMENTS — MACHINE-GENERATED TEST RESULTS.

Testimonial statements of witnesses absent from trial are admissible only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant; statements are testimonial if the primary purpose of the statements or the questions that elicited them was to establish or prove past events potentially relevant to later criminal prosecution; although laboratory reports prepared by nontestifying analysts are testimonial hearsay, data that are automatically generated by a machine and presented without human input, analysis, or interpretation are not testimonial because the machine is not a witness in any constitutional sense. (US Const, Am VI; Const 1963, art 1, § 20).

2. EVIDENCE — HEARSAY — DECLARANT — MACHINE-GENERATED TEST RESULTS.

Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted; a printout of machine-generated information does not constitute hearsay because a machine is not a person and therefore not a declarant capable of making a statement (MRE 801[b], [c]).

3. EVIDENCE — HEARSAY — RECORDED RECOLLECTION EXCEPTION.

A hearsay document may be admitted if the document pertains to matters about which the declarant once had knowledge, the declarant now has an insufficient recollection about those matters, and the document is shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his or her memory (MRE 803[5]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Lawyer, and *Mary Jo Diegel*, Assistant Prosecuting Attorney, for the people.

John T. Dinardo *in propria persona*.

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

JANSEN, J. The prosecution appeals by leave granted the circuit court's order suppressing evidence of certain DataMaster breath-test results. For the reasons set forth in this opinion, we reverse the circuit court's order and remand for further proceedings consistent with this opinion.

I

In November 2008, defendant was arrested on suspicion of drunk driving and taken to the Warren Police Department for alcohol testing using a DataMaster machine. Warren Police Officer Michael Lake administered the DataMaster test. Lake testified that he monitored defendant for at least 15 minutes before administering the test, then took two breath samples two minutes apart in accordance with standard procedures. Lake wrote the test results on a DI-177 breath-test report. According to Lake's DI-177 report, the DataMaster machine indicated that both samples registered alcohol levels of 0.20 percent.

At the preliminary examination, Lake testified that he had administered the DataMaster tests and had written down the results on his DI-177 report. However, he testified that he did not have a copy of the original DataMaster "ticket,"[1] which had been printed directly from the machine at the time of the tests. Defendant had been given a copy of the DataMaster ticket, but the original ticket could not be found and no copies were

[1] A DataMaster ticket apparently states the blood alcohol percentage for each sample, the time when the testing procedure began (including the observation period before the test), and the exact time when each sample was taken and analyzed.

available by the time of the preliminary examination. Officer Lake admitted that he could not independently recollect the specific results of defendant's breath tests, but recalled that he had written them down at the time on the DI-177 report, which was available.

Defendant moved to suppress the breath-test results at the preliminary examination. The district court granted defendant's motion to suppress but nonetheless bound defendant over to the circuit court for trial on a charge of operating a motor vehicle while intoxicated, third offense. MCL 257.625(1) and (9)(c).

Following bindover, defendant moved the circuit court to suppress the DataMaster test results and sought an evidentiary hearing on the issue. Defendant argued that the lack of the DataMaster ticket rendered other evidence regarding the test results inadmissible hearsay and denied him his constitutional right to confront the witnesses against him. Because the relevant facts did not appear to be in dispute, the circuit court dispensed with an evidentiary hearing. The prosecution argued that the district court had erred by ruling the test results inadmissible. The prosecution argued that the DataMaster machine was not a declarant, so the officer's testimony repeating the recorded test results would not be hearsay. The prosecution also argued that because Officer Lake had read the original test results and recorded them directly onto the DI-177 report at the time, he had personal knowledge of the results and should be able to present them in his testimony.

The circuit court concluded that the DI-177 report was hearsay and could not be admitted into evidence. The court noted that if Officer Lake had an independent recollection of the breath-test results, he might be able to testify regarding the numbers he had read from the DataMaster ticket. However, the court stated that if

Lake lacked any independent recollection of the results and could not produce the DataMaster ticket, he would have no basis for testifying about the breath-test results. The court also ruled that if Lake could not specifically remember the contents of the DataMaster ticket, he could not testify regarding what he may have written on the DI-177 report. The prosecution argued that Lake should be able to use the DI-177 report to refresh his memory, even if the DI-177 report was itself inadmissible. The circuit court disagreed, noting that use of the DI-177 report would not effectively "refresh" Lake's memory of the DataMaster results, but instead just show him what numbers he had written down.

The prosecution next argued that even without the test results, Lake should be able to testify that defendant's blood alcohol level exceeded the legal limit, which resulted in defendant being booked and charged. The prosecution further argued that defendant was not prejudiced by the lack of the DataMaster ticket because defendant had been given a copy of the DataMaster machine's printout. Defense counsel countered that defendant did not have a copy of the DataMaster ticket. The court agreed that Officer Lake could testify that defendant was arrested following the DataMaster test results. However, the court noted that because the DataMaster ticket would have shown when the machine was last purged, the duration of the required observation period before testing, and the times that the specific breath samples were taken, the DataMaster ticket would have helped to establish the reliability of the breath tests. The court reasoned that, without this information, the reliability of the test results would be suspect, and the defense would be denied the opportunity to question the reliability of the results. The prosecution argued that whether the proper protocol was followed prior to defendant's breath tests went to

the weight of the evidence rather than its admissibility and noted that defense counsel would be permitted to cross-examine Officer Lake regarding the procedures followed and the lack of supporting documentation. The court disagreed with the prosecution, stating that because the entire testing process had been documented on the DataMaster ticket, the ticket was the foundation for determining defendant's blood alcohol level and whether the proper procedures were followed. The court stated that without the ticket, the test results could not be admitted.

The circuit court entered an order granting defendant's motion to exclude the DataMaster test results. The order provided in relevant part that the prosecution would be "precluded from arguing at trial that defendant's [blood alcohol content] was .08 or in excess of .08," that the prosecution "can only argue [at trial] that defendant was operating under the influence of alcoholic liquor under MCL 257.625," and that the prosecution would be permitted to "present testimony that defendant was charged and arrested after the Datamaster results showed .08 or more based upon the independent recollection of the police officer only to show why defendant was arrested and charged."

The prosecution moved for reconsideration, to adjourn trial, and to stay the proceedings pending an interlocutory appeal. The prosecution also apparently filed a motion to reverse the district court's order suppressing evidence of the DataMaster test results. The circuit court addressed these motions, explaining that it had never considered or reviewed the district court's decision, but had instead addressed the admissibility of the DataMaster test results de novo on the facts presented by the parties. Citing *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d

314 (2009), *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *People v Bryant*, 483 Mich 132; 768 NW2d 65 (2009), the circuit court concluded that "[t]here's no question that the test itself was testimonial in nature" and that the test results therefore implicated defendant's constitutional right to confront the witnesses against him. The circuit court denied the prosecution's motions for reconsideration and to stay the proceedings pending appeal, but granted the motion to adjourn trial.

The prosecution sought leave to appeal in this Court, arguing that the circuit court had erred by suppressing evidence of the DataMaster test results. This Court granted the prosecution's application for leave to appeal and stayed all proceedings in the circuit court.[2]

II

In general, we review for an abuse of discretion a circuit court's decision concerning the admission of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, we review de novo the circuit court's ultimate decision on a motion to suppress evidence, as well as all preliminary questions of law. *Id.*; *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). Similarly, whether the admission of evidence would violate a defendant's constitutional right of confrontation is a question of law that we review de novo. *Bryant*, 483 Mich at 138.

III

We conclude that the DataMaster ticket at issue in this case was neither testimonial in the constitutional

[2] *People v Dinardo*, unpublished order of the Court of Appeals, entered November 2, 2009 (Docket No. 294194).

sense nor hearsay under Michigan law. We further conclude that the DI-177 report constituted a recorded recollection under MRE 803(5). Accordingly, the circuit court erred by suppressing evidence of the DataMaster breath-test results, by ruling that Officer Lake's testimony concerning the DataMaster results would violate defendant's constitutional right to confront the witnesses against him, and by precluding Lake from reading the contents of the DI-177 report into evidence.

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. This "bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford*, 541 US at 42. The Michigan Constitution provides the same guarantee for criminal defendants. Const 1963, art 1, § 20; see also *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). Testimonial statements of witnesses absent from trial are therefore admissible only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant. *Crawford*, 541 US at 59; *Bryant*, 483 Mich at 138. Ordinarily, whether a statement is testimonial in nature depends on whether it constitutes a " 'declaration or affirmation made for the purpose of establishing or proving some fact.' " *Crawford*, 541 US at 51 (citation omitted). More particularly, we have explained that "[s]tatements are testimonial where the 'primary purpose' of the statements or the questioning that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.' " *People v Lewis (On Remand)*, 287 Mich App 356, 360;

788 NW2d 461 (2010), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

In *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2531-2532, the United States Supreme Court held that "certificates of analysis" showing the results of chemical testing of seized narcotics constituted "testimonial statements" under *Crawford*. The certificates at issue in *Melendez-Diaz* were sworn statements by laboratory analysts that reported the results of analyses performed on the seized drug samples. The *Melendez-Diaz* Court explained:

> The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." They are incontrovertibly a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." [*Id.* at ___; 129 S Ct at 2532 (citations omitted).]

Similarly, this Court has held that laboratory reports prepared by nontestifying analysts are "testimonial hearsay" within the meaning of *Crawford*. See, e.g., *People v Payne*, 285 Mich App 181, 198; 774 NW2d 714 (2009); *People v Lonsby*, 268 Mich App 375, 392-393; 707 NW2d 610 (2005). Such reports constitute testimonial hearsay that may not be admitted in evidence unless (1) it is shown that the analyst who prepared the report is unavailable to testify at trial and (2) the defendant has had a prior opportunity to cross-examine

the analyst. *Payne*, 285 Mich App at 198-199; see also *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2532.

We cannot conclude that the original DataMaster ticket, showing the breath-test procedures and defendant's specific blood alcohol level, amounted to testimonial hearsay within the meaning of *Crawford*. As explained previously, the Confrontation Clause guarantees a criminal defendant the right "to be confronted with the *witnesses* against him." US Const, Am VI (emphasis added). The documents at issue in *Melendez-Diaz*, *Payne*, and *Lonsby* constituted testimonial hearsay precisely because they were all prepared by human analysts who recorded the results of various laboratory tests and set down their own conclusions in written form. Such human analysts are unquestionably "witnesses" within the meaning of the Sixth Amendment. In contrast, the DataMaster ticket at issue in this case was generated entirely by a machine without the input of any human analyst. No human analyst entered data into the DataMaster machine or recorded findings or conclusions on the DataMaster printout. Nor was any expert interpretation required for the DataMaster test results to be understood. Indeed, similar to the fingerprint cards at issue in *People v Jambor (On Remand)*, 273 Mich App 477, 488; 729 NW2d 569 (2007), the DataMaster ticket "contained no subjective statements" and did not detail the results of any work performed by a nontestifying analyst. Instead, defendant simply blew into the DataMaster machine, whereupon the machine automatically analyzed his breath and reported the results of its analysis in the form of a printed ticket. The machine was the sole source of the test results, which spoke entirely for themselves. We agree with courts from other jurisdictions that have held that a machine is not a witness in the constitutional sense and that data automatically generated by a

machine are accordingly nontestimonial in nature. See, e.g., *Wimbish v Commonwealth*, 51 Va App 474, 483-484; 658 SE2d 715 (2008); *United States v Moon*, 512 F3d 359, 362 (CA 7, 2008); *United States v Washington*, 498 F3d 225, 230 (CA 4, 2007); *Caldwell v State*, 230 Ga App 46, 47; 495 SE2d 308 (1997). As the Virginia Court of Appeals has aptly explained, "information generated by a machine, and presented without human analysis or interpretation is not testimonial because the machine is not a witness in any constitutional sense and thus the data standing alone is not a testimonial statement under the Confrontation Clause of the Sixth Amendment." *Wimbish*, 51 Va App at 484 n 2. Because the DataMaster breath-test results, printed on the DataMaster ticket, were self-explanatory data produced entirely by a machine and not the out-of-court statements of a witness, the Confrontation Clause did not place any restrictions on their admissibility. See *id*. at 484.

We also conclude that the DataMaster test results did not constitute hearsay under Michigan law. "Hearsay" is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," MRE 801(c), and "declarant" is defined as "a *person* who makes a statement," MRE 801(b) (emphasis added). A printout of machine-generated information, as opposed to a printout of information entered into a machine by a person, does not constitute hearsay because a machine is not a person and therefore not a declarant capable of making a statement. See, e.g., *State v Reynolds*, 746 NW2d 837, 843 (Iowa, 2008); *United States v Hamilton*, 413 F3d 1138, 1142 (CA 10, 2005); *United States v Khorozian*, 333 F3d 498, 506 (CA 3, 2003); *State v Weber*, 172 Or App 704, 709; 19 P3d 378 (2001); *State v Van Sickle*, 120 Idaho 99, 102; 813 P2d 910 (1991). Indeed, as one well-known Michigan trea-

tise explains, "[w]hen . . . a 'fact' is 'asserted' by a non-human entity, such as a clock 'telling the time' or a tracking dog following a scent, the 'statement' is not hearsay because the 'declarant' is not a 'person.' " Robinson, Longhofer & Ankers, Michigan Court Rules Practice: Evidence (2d ed), § 801.3, pp 7-8. The DataMaster machine at issue in the present case is not a declarant because it is not a person, but a tool for analysis that self-generates test results and prints those results on a paper ticket. Since the DataMaster machine is not a declarant capable of making a statement, the results that it generates are not hearsay.

Lastly, although the DI-177 report unquestionably constituted hearsay under Michigan law, we conclude that admission of the DI-177 report would not violate defendant's constitutional right of confrontation and that Officer Lake should be entitled to read the contents of the DI-177 report into evidence pursuant to MRE 803(5). As noted previously, Officer Lake filled out the DI-177 report at the time of the DataMaster testing, contemporaneously recording defendant's breath-test results on the DI-177 report as those results were automatically generated by the DataMaster machine. While Lake's written documentation of defendant's breath-test results on the DI-177 report constituted testimonial hearsay, Lake is available to testify and to be cross-examined at trial regarding the contents of the report. Because Lake is available to testify and to be cross-examined concerning his out-of-court assertions on the DI-177 report, his testimony regarding the contents of the DI-177 report will not violate defendant's constitutional right to confront the witnesses against him. See *Crawford*, 541 US at 59.

Nor should the contents of the DI-177 report be excluded from evidence as inadmissible hearsay. It is

true that Officer Lake has no independent recollection of the specific numbers that were printed on the DataMaster ticket. However, Lake recorded defendant's blood alcohol levels on the DI-177 report at the same time as he read the results from the DataMaster ticket. Accordingly, we conclude that the DI-177 report qualifies as a recorded recollection under MRE 803(5), which excludes from the hearsay rule

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

As this Court has explained, hearsay documents may be admitted as recorded recollections under MRE 803(5) if they meet three requirements:

> "(1) The document must pertain to matters about which the declarant once had knowledge; (2) [t]he declarant must now have an insufficient recollection as to such matters; [and] (3) [t]he document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory." [*People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1992) (citation omitted).]

In this case, the DI-177 report plainly satisfies all three requirements for admissibility. Officer Lake saw the DataMaster ticket and therefore had personal knowledge of the breath-test results at the time he recorded them onto the DI-177 report. Furthermore, Lake has indicated that he no longer has any independent recollection of the specific results printed on the DataMaster ticket. Lastly, it is undisputed that Lake personally prepared the DI-177 report. Because the DI-177 report

meets all requirements for admissibility under MRE 803(5), *Daniels*, 192 Mich App at 667-668, Officer Lake will be permitted to read its contents into evidence at trial.[3]

IV

In sum, while the DataMaster ticket showed facts relevant to the ultimate issue of defendant's guilt, the ticket was neither a testimonial statement nor hearsay because it was not the statement of a witness or a declarant. Instead, the DataMaster ticket was generated by a machine, following an entirely automated process that did not rely on any human input, data entry, or interpretation. Because the DataMaster ticket was not a testimonial hearsay statement, Officer Lake will be permitted to testify regarding the breath-test results. Moreover, because the contemporaneously prepared DI-177 report constitutes a recorded recollection pursuant to MRE 803(5), Lake will be permitted to read its contents into evidence at trial.

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

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[3] Although the contents of the DI-177 report may be admitted and read into evidence at trial, we note that the report "may not itself be received as an exhibit unless offered by an adverse party." MRE 803(5).

PEOPLE v BOUCHA

Docket No. 289197. Submitted May 4, 2010, at Lansing. Decided August 31, 2010. Approved for publication October 12, 2010, at 9:15 a.m.

Barry D. Boucha was found responsible in the 83rd District Court, Daniel L. Sutton, J., for exceeding statutory axle-weight requirements while driving his tractor-trailer, a civil infraction, MCL 257.722 and 257.724. He testified that he had raised three of the axles of his trailer for approximately two miles while driving a series of curves that would have been impossible to negotiate safely with the axles down and did not lower the axles for the straight sections between the curves because of the time it took to restore air to the axle system and the brakes. A police officer followed him through the curves and stopped him after the last one. The officer weighed the truck, but although the axles were down when he stopped the vehicle, the officer weighed the vehicle with the axles in the positions they were in during the curves. Five of the six axles were overweight, and the officer issued defendant a citation. Defendant appealed in the Roscommon Circuit Court. The court, Michael J. Baumgartner, J., affirmed, and defendant appealed by leave granted.

The Court of Appeals *held*:

MCL 257.724a(1) permits lift axles to be raised when the vehicle is negotiating a turn. Defendant submitted evidence of the curves in the roadway, and the curves permitted him to raise the axles while he negotiated them, that is, defendant had to turn the vehicle in order to negotiate the changes in the roadway. There was no evidence contradicting defendant's assertions that it was necessary to raise his axles. MCL 257.724a(2) requires that to determine if the vehicle was overweight, it must be weighed with all the lift axles lowered. Therefore, because defendant had raised the axles to negotiate a turn, the officer should have weighed the vehicle with the axles down. The citation was invalid and must be dismissed.

Reversed.

Paul M. Ross, P.C. (by *Paul M. Ross*), for defendant.

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM. Defendant appeals by leave granted the circuit court's order, which affirmed the district court's decision finding defendant responsible for operating an overweight vehicle in violation of MCL 257.722 and 257.724, a civil infraction. We reverse.

On January 14, 2008, defendant hauled a load of pine chips with a tractor-trailer on Maple Valley Road. Defendant had three of his trailer axles raised for approximately two miles through a series of curves. Defendant testified that it would have been impossible to negotiate the curves, at any speed, with his axles down because the dropped axles created too much resistance to make the curves. He asserted that on a prior occasion he forgot to lift the axles on this stretch of road and ended up driving in the other lane, almost in the gravel. Defendant asserted that he could not lower the axles in the straight sections between the curves because it took too long for the air compressor to pump air into the system that supported the axles and the brakes. He testified that his axles were down after he negotiated the curves and when he was stopped by the police officer who had been following him. Defendant alleged that his load was not overweight when all the axles were down. The police officer concluded that five of the six axles were overweight. The officer testified that he weighed the vehicle with the axles in the positions they were in when traveling on the curves in the roadway.

Following a formal hearing, defendant was found responsible for the civil infraction and fined for the violation. The circuit court affirmed the violation, albeit on other grounds. We granted defendant's application for leave to appeal. The prosecution has not filed a brief in opposition to the appeal.

MCL 257.724a provides in relevant part:

> (1) The axle weight requirements of this chapter do not apply to a vehicle equipped with lift axles during the period in which axles are raised to negotiate an intersection, driveway, or other turn and until the lift axles are fully engaged after the period of time or the distance necessary to negotiate that intersection, driveway, or other turn.
>
> (2) If a vehicle is to be weighed to determine whether the vehicle is being operated in violation of this act or a rule promulgated under this act or of a local ordinance substantially corresponding to this act or a rule promulgated under this act and the vehicle is equipped with lift axles that have been raised to allow the vehicle to negotiate an intersection, driveway, or other turn, the vehicle shall be weighed only after the lift axles have been fully lowered and are under operational pressure as provided in subsection (1).

Statutory construction issues present questions of law reviewed de novo. *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007). When interpreting a statute, courts must ascertain the legislative intent by examining the words of the statute. *People v Plunkett*, 485 Mich 50, 58; 780 NW2d 280 (2010). Terms in a statute are to be construed reasonably in accordance with their plain and ordinary meaning. *People v Yamat*, 475 Mich 49, 56; 714 NW2d 335 (2006).

The word "turn" when used as a noun is defined as "a movement of partial or total rotation: *a turn of the handle*," or "a place where a road, river, or the like turns[.]" *Random House Webster's College Dictionary* (2000), p 1410. In the present case, the police officer testified that he followed defendant through a series of curves in the roadway. Additionally, defendant submitted photographs demonstrating that there were eight curves in the roadway with signs warning drivers of the curves and the applicable speed limit. Defendant reported that the distance between each sign ranged from $^1/_5$ of a mile to $^2/_5$ of a mile. Therefore, the axle-weight requirements were inapplicable during the period in

which the axles were raised to negotiate the curves in the roadway. MCL 257.724a(1). That is, defendant had to turn the vehicle to negotiate the changes in the roadway. It is important to note that the prosecution did not present any testimony to contradict defendant's assertions that it was necessary to raise axles to negotiate this stretch of the roadway or regarding the time to restore compression in the braking system. Because defendant raised his axles "to allow the vehicle to negotiate [a] . . . turn," the officer should have weighed defendant's vehicle with the axles down. MCL 257.724a(2). In light of the fact that the officer weighed the vehicle with the axles raised, as they had been while defendant negotiated the curves, contrary to MCL 257.724a(2), defendant's citation was invalid and must be dismissed.[1]

Reversed.

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[1] In light of our conclusion regarding the statutory language, we need not address defendant's challenges to the circuit court's other rulings.

KING v McPHERSON HOSPITAL

Docket No. 284436. Submitted July 12, 2010, at Lansing. Decided October 19, 2010, at 9:00 a.m.

Diana King, as personal representative of the estate of Andrew Baker, deceased, brought a medical malpractice action in the Livingston Circuit Court on March 1, 2004, against McPherson Hospital, also known as Trinity Health-Michigan (McPherson), and Michael Briggs, D.O., Merle Hunter, M.D., and Emergency Physicians Medical Group, P.C. (the EPMG defendants), alleging that defendants' failure to properly diagnose Baker's medical condition on September 6, 2001, led to his death on September 8, 2001. The EPMG defendants, with McPherson concurring, moved for summary disposition on September 20, 2004, arguing that the statute of limitations barred the complaint because it was not filed within two years after Diana King was appointed personal representative. Defendants relied on *Waltz v Wyse*, 469 Mich 642 (2004), which held that sending a notice of intent to file the action under MCL 600.2912b does not toll the wrongful death saving provision found in MCL 600.5852. Defendants also contended that *Waltz* applied retroactively. Also on September 20, 2004, Timothy King (hereafter plaintiff) was appointed successor personal representative of the estate. Plaintiff argued that this case could be distinguished from *Waltz* because the notice of intent in this case was mailed within two years after the date of defendants' alleged malpractice. Plaintiff argued that *Waltz* cannot be applied retroactively, that the complaint was timely under *Omelenchuk v City of Warren*, 461 Mich 567 (2000), and that the court should apply judicial tolling to the limitations period to save the cause of action. On October 28, 2004, the court, Daniel A. Burress, J., denied defendants' motion. Defendants sought leave to appeal, and the Court of Appeals, OWENS, P.J., and CAVANAGH and NEFF, JJ., reversed the trial court's order in an unpublished opinion per curiam, issued July 12, 2005 (Docket Nos. 259136 and 259229), on the basis that the complaint was untimely pursuant to *Waltz*. The Supreme Court denied plaintiff's application for leave to appeal, *King v Briggs*, 474 Mich 981 (2005), and motion for reconsideration, *King v Briggs*, 474 Mich 1113 (2006). On remand in the trial court, the EPMG defendants moved for an order of dismissal, and McPherson

concurred with the motion. On January 26, 2007, the trial court, David J. Reader, J., granted the motion and dismissed plaintiff's claims. The Court of Appeals dismissed plaintiff's claim of appeal regarding that order for lack of jurisdiction in an unpublished order, entered April 11, 2007 (Docket No. 276287), and denied plaintiff's motion for reconsideration in an unpublished order, entered June 1, 2007 (Docket No. 276287). On November 28, 2007, the Supreme Court decided *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007), concluding that the *Waltz* decision does not apply to any cause of action filed after *Omelenchuk* was decided in which the saving period had expired (i.e., two years had elapsed since the personal representative was appointed) sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. The Supreme Court held that *Waltz* controlled all other causes of action. On January 24, 2008, plaintiff moved to set aside the trial court's order dismissing his claims, relying on *Mullins* and arguing that, with respect to the previous opinion of the Court of Appeals holding that plaintiff's claims were time-barred, the law of the case doctrine was inapplicable because an intervening change in the law had occurred. McPherson argued that the law of the case doctrine applied regardless of the intervening change in the law, that the trial court lacked jurisdiction to grant relief under MCR 7.215(F)(1)(a), and that the holding in *Mullins* did not reverse the previous appellate decisions in this case. The EPMG defendants additionally contended that the trial court lacked authority to vacate a previous judgment of the Court of Appeals and that MCR 2.612(C)(1)(a), (e), and (f) were inapplicable. The trial court denied plaintiff's motion, concluding that the law of the case was the order of the Court of Appeals telling the trial court to dismiss the case. The Court of Appeals denied plaintiff's application for leave to appeal in an unpublished order, entered July 10, 2008 (Docket No. 284436). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 482 Mich 1154 (2008). On April 27, 2010, the Court of Appeals, DAVIS, P.J., and DONOFRIO and STEPHENS, JJ., issued an opinion in which it stated that, pursuant to MCR 2.612(C)(1)(f), plaintiff should prevail. Nevertheless, the Court affirmed the trial court's order on the basis of the decision in *Farley v Carp*, 287 Mich App 1 (2010), noting that it was following *Farley* only because it was required to follow it pursuant to MCR 7.215(C)(2) and (J)(1). The Court of Appeals noted its disagreement with *Farley* and called for the convening of a special panel of the Court of Appeals to resolve the conflict. 288 Mich App 801 (2010). The Court of Appeals then

ordered that a special panel be convened to resolve the conflict and vacated the April 27, 2010, opinion of the Court of Appeals. 288 Mich App 801 (2010).

After consideration by the special panel, the Court of Appeals *held*:

It is not disputed that this case was closed at the time that *Mullins* was decided. Under *People v Maxson*, 482 Mich 385 (2008), *Reynoldsville Casket Co v Hyde*, 514 US 749 (1995), *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653 (2001), and *Gillispie v Detroit Housing Comm Bd of Tenant Affairs*, 145 Mich App 424 (1985), a case given retroactive application only applies to pending cases. Therefore, the partial retroactive application of *Waltz* that was granted in *Mullins* could not apply to this closed case. While MCR 2.612(C)(1)(f) allows relief from a final judgment in certain circumstances, not reviving this case would not be an extraordinary circumstance for which relief should be granted under that court rule. Defendants' rights would be substantially detrimentally affected if this case were to be revived. There was no suggestion that defendants did anything inappropriate in obtaining the final judgment. Therefore, relief was not available under MCR 2.612(C)(1)(f).

Affirmed.

O'CONNELL, J., concurring in part and dissenting in part, stated that the majority opinion misconstrued both the scope and the purpose of the Supreme Court's order in *Mullins*. The *Mullins* order was not an intervening change of the law. In its use of the words "any causes of action," the Supreme Court did not limit the palliative nature of its order to only those cases still pending. Rather than being limited to a select group of plaintiffs, the *Mullins* order should be applied to all the litigants who had properly initiated actions under the rules that controlled before *Waltz* but had their litigation halted by the *Waltz* decision before receiving their day in court. This is how the *Mullins* order, an extraordinary edict by the Supreme Court, was intended to be applied. The original panel in this case properly applied the *Mullins* order, and a limited application of the order will result in a miscarriage of justice.

1. JUDGMENTS — RELIEF FROM JUDGMENTS.

Relief from a final judgment under MCR 2.612(C)(1)(f) requires both the presence of extraordinary circumstances that mandate setting aside the judgment to achieve justice and a demonstration that setting aside the judgment will not detrimentally effect the substantial rights of the opposing party; extraordinary circumstances

warranting relief from a judgment generally arise when the judgment was obtained by the improper conduct of a party.

2. JUDGMENTS — RETROACTIVE APPLICATION OF JUDGMENTS — CLOSED CASES.

New legal principles, even when applied retroactively, do not apply to cases already closed; when a case is given some form of retroactive application, it does not apply to cases that are no longer pending.

Mark Granzotto, P.C. (by *Mark Granzotto*), for Timothy King.

Johnson & Wyngaarden, P.C. (by *David R. Johnson* and *Michael L. Van Erp*), for McPherson Hospital.

Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. (by *William A. Tanoury* and *Anita Comorski*), for Michael Briggs, D.O., Merle Hunter, M.D., and Emergency Physicians Medical Group, P.C.

Before: K. F. KELLY, P.J., and MARKEY, O'CONNELL, TALBOT, WILDER, MURRAY, and FORT HOOD, JJ.

MURRAY, J.

I. INTRODUCTION

The question presented to this panel is whether plaintiff may invoke MCR 2.612(C)(1)(f) to reinstate a case after entry of a final judgment in favor of defendants because of a subsequent change or clarification in the law. In the prior decision in this case, *King v McPherson Hosp*, 288 Mich App 801 (2010) (*King I*), the panel held that a plaintiff should be able to prevail under the court rule, but could not because of the prior decision in *Farley v Carp*, 287 Mich App 1; 782 NW2d 508 (2010), with which it disagreed. Accordingly, the prior panel called for a vote of all members of the Court on whether to convene a conflict panel to resolve this dispute, MCR 7.215(J)(3)(a), which obviously a majority

of the judges agreed to do. See *King v McPherson Hosp*, 288 Mich App 801 (2010) (order vacating prior opinion). For the reasons that follow, we hold that the trial court properly held that plaintiff could not reinstate the case under MCR 2.612(C)(1)(f).

II. BACKGROUND

This case, as well as *Farley* and another pertinent case, *Kidder v Ptacin*, 284 Mich App 166; 771 NW2d 806 (2009), involves the Supreme Court's decision in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007), in which the Court held that its prior holding in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), had only limited retroactive application. Specifically, the *Mullins* Court held in its order:

> We reverse the July 11, 2006, judgment of the Court of Appeals. MCR 7.302(G)(1). We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 [677 NW2d 813] (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 [609 NW2d 177] (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*. In the instant case, because the plaintiff filed this action after *Omelenchuk* was decided and the saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable. Accordingly, we remand this case to the Washtenaw Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order. [*Mullins*, 480 Mich at 948.]

Because plaintiff's action fell within the "any causes of action" language and was otherwise within the

pertinent time frame as described in *Mullins*, and plaintiff had litigated the statute-of-limitations issue up and down the judicial system, the prior panel held that relief should be available under the court rule. *King I*, 288 Mich App 801. We respectfully disagree.

III. ANALYSIS

As mentioned in the introduction, we hold that plaintiff cannot obtain relief from a final judgment under MCR 2.612(C)(1)(f) based upon a partially retroactive change or clarification in the law because, as explained below, both the Michigan and United States Supreme Court, as well as our Court, have held that even a case given full retroactivity does not apply to a closed case, as this one was when *Mullins* was decided.

We first have to recall that this case is before us on appeal from a trial court's grant of a motion for relief from judgment brought pursuant to MCR 2.612(C)(1)(f). As explained in *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999):

> In order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. *Altman v Nelson*, 197 Mich App 467, 478; 495 NW2d 826 (1992); *McNeil v Caro Community Hosp*, 167 Mich App 492, 497; 423 NW2d 241 (1988). Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. *Altman*, *supra*; *McNeil*, *supra*.

As recently noted in *Rose v Rose*, 289 Mich App 45, 58; 795 NW2d 611 (2010), "[w]ell-settled policy consider-

ations favoring finality of judgments circumscribe relief under MCR 2.612(C)(1)," and although relief under subrule (C)(1)(f) is the widest avenue for relief under this court rule, it nonetheless requires "the presence of both extraordinary circumstances and a demonstration that setting aside the judgment will not detrimentally affect the substantial rights of the opposing party." And our caselaw has long recognized that this court rule "contemplates that extraordinary circumstances warranting relief from a judgment generally arise when the judgment was obtained by the improper conduct of a party." *Id*. at 62, citing *Heugel*, 237 Mich App at 479; see, also, *Lark v Detroit Edison Co*, 99 Mich App 280, 283; 297 NW2d 653 (1980).

In order to obtain relief under this subsection, then, plaintiff had to prove that keeping in place a final judgment after the caselaw the judgment was based upon was partially retroactively reversed (i.e., the "circumstances") was so extraordinary that plaintiff should be afforded relief and that doing so would not be detrimental to defendants. Such a conclusion cannot be squared with a clear and unequivocal rule from our Supreme Court, a rule that itself is premised on United States Supreme Court precedent. The rule, plainly and recently set forth in *People v Maxson*, is that " '[*n*]*ew legal principles, even when applied retroactively, do not apply to cases already closed*.' " *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008), quoting *Reynoldsville Casket Co v Hyde*, 514 US 749, 758; 115 S Ct 1745; 131 L Ed 2d 820 (1995) (emphasis supplied).[1] The

[1] Even more recently, a plurality of the Court noted that its decision reversing the retroactive application of a prior case would apply to any injuries inflicted prior to its earlier decision, but only "as long as the claim has not already reached final resolution in the court system." *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 468; 795 NW2d 797 (2010) (opinion by WEAVER, J.).

basis for this longstanding rule is that "at some point, 'the rights of the parties should be considered frozen' . . . ." *Reynoldsville Casket*, 514 US at 758, quoting *United States v Donnelly Estate*, 397 US 286, 296; 90 S Ct 1033; 25 L Ed 2d 312 (1970) (Harlan, J., concurring). In *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653; 633 NW2d 1 (2001), our Court discussed this very point. Writing for the Court, Judge O'CONNELL explained why an intervening change of law was not a basis upon which to obtain relief from judgment:

> In any event, we would not be inclined to grant relief from the judgment in *Sumner I* [*Sumner v Gen Motors Corp*, 212 Mich App 694; 538 NW2d 112 (1995)]. An intervening change in law is not an appropriate basis for granting relief from a judgment; indeed, if it were, "it is not clear why all judgments rendered on the basis of a particular interpretation of law should not be reopened when the interpretation is substantially changed." 2 Restatement Judgments, 2d, § 73, illustration 4, p 200. [*Id*. at 667.]

An earlier case coming to the same conclusion is *Gillispie v Detroit Housing Comm Bd of Tenant Affairs*, 145 Mich App 424; 377 NW2d 864 (1985). There, the parties had agreed that a judgment after a trial should be entered in a particular, agreed-upon amount, and the defendant satisfied the judgment on January 20, 1984. *Id*. at 426. In August of that same year, the plaintiff filed a motion for relief from judgment, arguing that a decision issued just after the judgment was entered (*Gage v Ford Motor Co*, 133 Mich App 366; 350 NW2d 257 [1984], aff'd in part and rev'd in part 423 Mich 250 [1985]) showed that the interest calculations used for the judgment were the result of a mutual mistake, GCR 1963, 528.3(1), which is now MCR 2.612(C)(1)(a). *Id*. at 426-427. The trial court denied the motion, and our Court affirmed. In discussing whether a subsequent decision should apply retroactively to a closed case, we stated:

> Three considerations are often applied to control retroactivity: (1) the purpose of the new rule, (2) the litigants' reliance on the old rule, and (3) the impact of the rule on the administration of justice. Consideration of the third factor alone militates in favor of denying the retroactive application of *Gage* to the present case. As the trial court noted, if *Gage* were to be applied to cases in which a satisfaction of judgment had already been executed, "[w]e could have 10,000 people coming back here and asking the court to change their judgments". The court's concern is not without basis. The application of *Gage* to an action which is no longer pending could well open the floodgates to other litigants eager to increase their recovery and could lead to disasterous results in relation to matters properly considered closed.
>
> *Moreover, even if retroactive application was deemed fitting, it would not extend to cases in which the cause of action is no longer pending*. Normally, application of a new rule of law falls within one of three categories. A new rule of law may be (1) applied in all cases in which a cause of action has accrued and which are still lawfully pending, plus all future cases, (2) applied to the case at bar and all future cases, or (3) applied only to future cases. *Even the most far reaching category would not encompass the present case*. We believe it is clear that retroactive application of *Gage* would be inappropriate in the present case. [*Id*. at 429-430 (emphasis added).]

Here, it is undisputed that the case was closed at the time *Mullins* was decided. No appeal was pending before this Court or the Supreme Court, no motion was pending before the trial court, and the final judgment in favor of defendants had been entered. Under the Michigan Supreme Court decision in *Maxson* and the United States Supreme Court decision in *Reynoldsville Casket*, as well as our decisions in *Sumner* and *Gillispie*, the partial retroactive application of *Waltz* that was granted in *Mullins* could not apply to this closed case. Hence, not reviving this case would not be an extraordinary

circumstance under MCR 2.612(C)(1)(f), but instead would be the required course of action under binding precedent. Additionally, defendants' rights would be substantially detrimentally affected since they would now be required to relitigate a case that had already been through the appellate process, resulting in a final judgment that had been left idle for seven months. There is also no suggestion that defendants did anything inappropriate in obtaining the final judgment. *Rose*, 289 Mich App at 62. As such, relief was not available under MCR 2.612(C)(1)(f).

In his usual colorful and articulate way, our dissenting colleague argues that the order in *Mullins* was not a "change in the law," so the cases upon which we rely for our holding simply do not apply. After careful consideration of this position, there are several reasons why we respectfully conclude otherwise. First, the point of *Maxson* and the other cases is that when a case—here *Waltz*—is given some form of retroactive application, the retroactivity does not apply to cases that are no longer pending. The fact that these cases arose in the context of a motion for relief from judgment is because such a motion would only be brought if a new case were released that potentially revives what was already closed.

Second, whether one views the *Mullins* order as a change in the law or merely a "clarification" of the retroactivity of *Waltz* is of no moment. For there can be no dispute that prior to the *Mullins* order there was a conflict panel decision of this Court, see *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006), as well as at least one prior published opinion, see *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), holding that *Waltz* had full retroactive application. Thus, the *Mullins* order was the Supreme

Court's decision clarifying the law on this issue. Because the *Mullins* order provided an answer different from that of the *Mullins* conflict panel and a prior published case, plaintiff attempted to use this new, favorable ruling on retroactivity to reopen his closed case. Consequently, we believe this case falls squarely within the cases we have applied here.[2]

Finally, as noted in *King I*, although "[t]he Supreme Court in its use of the words 'any causes of action' did not limit the palliative nature of its order to only those cases still pending," *King I*, 288 Mich App at 810,[3] it did not have to be so precise in this case since the law described above already makes clear that a retroactive decision does not apply to closed cases. If the Court had been crafting an exception to this apparently uniform rule, then it would have likely said so, but it did not. Hence, cases such as *Maxson*, *Reynoldsville Casket*, *Sumner*, and *Gillispie* control the outcome of this appeal. Some will certainly say, as have our dissenting colleagues and the prior *King I* panel, that this conclusion is "unfair" since plaintiff diligently pursued his rights and arguments up and down the judicial system. Indeed, the dissent adopts the *King I* panel's view of failing "to see the fairness in allowing only pending actions to receive the benefit of the Supreme Court's

[2] Indeed, the Supreme Court's *Mullins* order is analogous to a decision from the United States Supreme Court that resolves a conflict among the federal circuit courts of appeals. The federal courts have held that a Supreme Court decision breaking a conflict is not an extraordinary circumstance sufficient to reopen a case. See, e.g., *United States ex rel Garibaldi v Orleans Parish Sch Bd*, 397 F3d 334, 337-340 (CA 5, 2005); see, also, *Smith v Arbella Mut Ins Co*, 49 Mass App 53, 55-56; 725 NE2d 1080 (2000).

[3] The usual "limited" retroactive application typically applies to pending cases in which a challenge has been raised and preserved. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005); *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002).

order . . . .” But “fairness” cannot override our obligation to follow binding decisions from the appellate courts of this state, which without exception indicate that a case given retroactive application only applies to pending cases, i.e., it does not apply to closed cases.[4] In *James B Beam Distilling Co v Georgia*, 501 US 529, 541-542; 111 S Ct 2439; 115 L Ed 2d 481 (1991), the United States Supreme Court recognized the somewhat arbitrary result in precluding a closed case from being revived through retroactive application of caselaw (even one dismissed on statute-of-limitations grounds), but nonetheless concluded that finality principles overrode any such concerns:

> Of course, *retroactivity in civil cases must be limited by the need for finality*, see *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 [60 S Ct 317; 84 L Ed 329] (1940); *once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.* It is true that one might deem the distinction arbitrary, just as some have done in the criminal context with respect to the distinction between direct review and habeas: *why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring? . . .* Insofar as equality drives us, it might be argued that the new rule

[4] Interestingly, neither the dissent in *Farley*, nor the dissent in this case, nor the panel in *King I* even give lip service to the standards articulated in cases like *Rose*, which entails a multi-faceted inquiry. There is no doubt that plaintiff would have had a timely suit had a final judgment not been entered at the time *Mullins* was decided, but again the fact is that it was over, and no caselaw, statute, or court rule has been pointed out by the parties or prior courts that would authorize disregarding *Maxson* and similar cases in the name of fairness. Additionally, were we to agree with the dissent in this case, what would be the objective rule to apply in determining how long a case needs to have been final and closed before it cannot be revived by application of a retroactive case? One year, two years? Perhaps no limitation? This is an important question, and one the dissent has not answered.

> should be applied to those who had toiled and failed, but whose claims are now precluded by res judicata; and that it should not be applied to those who only exploit others' efforts by litigating in the new rule's wake.
>
> As to the former, independent interests are at stake; and with respect to the latter, the distinction would be too readily and unnecessarily overcome. While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. " '*Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.*' " *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 [101 S Ct 2424; 69 L Ed 2d 103] (1981) (quoting *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 [51 S Ct 517; 75 L Ed 1244] (1931)). *Finality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time.* [Emphasis added.]

Because this case was closed when *Mullins* was decided, we affirm the trial court's denial of the motion for relief from judgment, as the ruling did not constitute an abuse of discretion.

Affirmed.

K. F. KELLY, P.J., and MARKEY, TALBOT, and WILDER, JJ., concurred with MURRAY, J.

O'CONNELL, J. (*concurring in part and dissenting in part*). I concur with the majority that plaintiff diligently pursued his rights and arguments up and down the judicial system, including an appeal to our Supreme Court. I also concur with the majority and the panel in *King v McPherson Hosp*, 288 Mich App 801 (2010) (*King I*), that a limited application of the now famous order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948

(2007) (*Mullins III*), is "unfair" and, in my opinion, will result in a miscarriage of justice.

I write separately to state that the majority opinion misconstrues both the scope and purpose of the Supreme Court's order in *Mullins III*. The *Mullins III* order was *not*, as the majority opinion speculates, an "intervening change of the law." The law remained the same after the effective date of the *Mullins III* order as it was before the *Mullins III* order was entered. In this regard, the order was an extraordinary edict from our Supreme Court.[1] Rather than limit the *Mullins III* order to a select group of plaintiffs, I would apply the *Mullins III* order to all litigants unceremoniously thrown off the litigation train before receiving their day in court. This is how the *Mullins III* order was intended to be applied and how the *King I* panel applied this order. I see no justice or equity in creating two classes of plaintiffs and then unjudiciously picking which class of plaintiffs will have their day in court and which class of plaintiffs will be denied their day in court. To operate in such a manner is to re-create the same firestorm that generated the *Mullins III* order in the first place.[2]

I. HISTORY OF THE *MULLINS* ORDER

In reality, the Supreme Court's order in *Mullins III* operates as a pardon for those plaintiffs who failed to timely discern the ramifications of the Supreme Court's

[1] Because the Supreme Court's order in *Mullins III* did not change the current state of the law, the majority's reliance on well-written cases such as *Sumner v Gen Motors Corp* (*On Remand*), 245 Mich App 653; 633 NW2d 1 (2001), and *People v Maxson*, 482 Mich 385; 759 NW2d 817 (2008), is misplaced.

[2] Ironically, four of the Court of Appeals judges involved in the current dispute (Judge DONOFRIO on the *King I* panel and Judges K. F. KELLY, O'CONNELL, and TALBOT on this special panel) were also involved in the *Mullins* appellate decisions.

decision in *Waltz v Wyse*.[3] The *Mullins III* order recognized the difficult time this Court experienced interpreting the current state of medical-malpractice law. It also recognized that numerous plaintiffs, through no fault of their own, had lost their ability to pursue their causes of action. In *McLean v McElhaney*, 269 Mich App 196, 207-208; 711 NW2d 775 (2005) (O'CONNELL, P.J., dissenting), rev'd 480 Mich 978 (2007), I metaphorically described the confused state of the law as follows:

> The finest legal augur with the keenest sight and all the birds in the autumn sky could not have anticipated *Waltz's* outcome with enough certainty to provide rudimentary counsel to a prospective client. This analysis would also lead to the conclusion that equity forbids retroactive application of *Waltz*.
>
> Undeniably, *Omelenchuk* [*v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000)] stood as an unchallenged and clear pronouncement of the controlling timetables until *Waltz* changed them. Plaintiffs responded to the original schedules by timely arriving at the station, buying an outrageously expensive ticket, and boarding the correct train. Fueled by even more money, the litigation engine pulled smoothly out of the station and chugged its way up to speed. Now *Ousley* [*v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004)] ceremoniously presents plaintiffs with the Supreme Court's newly revised timetables; paternalistically explains to them how, under the new schedules, they were technically tardy to the station; warmly apologizes for the fallibility and humanness of the legal system; and demands that we unceremoniously throw plaintiffs from the speeding train. I do not see any justice or equity in this course of action. *Ousley* should be disregarded, *Waltz* should only receive prospective application, and I would reverse.

It is important to remember that every judge on this Court experienced some difficulties in attempting to follow the then current state of medical-malpractice law.

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[3] *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

Because of these difficulties, Judge FITZGERALD and I declared a conflict with *Ousley* in the majority opinion in *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586; 711 NW2d 448 (2006) (*Mullins I*). Our Court then voted to convene a conflict panel and vacated part of the *Mullins I* opinion, and, in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006) (*Mullins II*), the conflict panel produced four separate, divergent opinions. I believe it is fair to say that even the conflict panel was conflicted. Unfortunately, the *Mullins II* majority sidestepped the substantive analysis of the issue raised in *Mullins I* (whether *Waltz* should be applied prospectively or retroactively) and chose to resolve the case on the basis of a series of nonbinding remand orders the Supreme Court had issued, leaving both the bench and bar in a state of confusion.[4] After the aborted attempt in *Mullins II* to resolve the retroactivity issue, I described the chaotic situation in *Ward v Siano*, 272 Mich App 715, 721-722, 744; 730 NW2d 1 (2006) (O'CONNELL, J., concurring), rev'd 480 Mich 979 (2007):

> The issue that truly ignited the firestorm was the related holding that because MCL 600.5852 was a "saving provision," the medical malpractice tolling provision, MCL 600.5856, did not toll it. *Waltz*, [469 Mich] at 655. This was an issue of first impression on a settled area of law whose resolution would ordinarily be limited to prospective application. See *Pohutski v City of Allen Park*, 465 Mich 675, 696-697; 641 NW2d 219 (2002); *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004). It was not a nominal extension of understood principles, but the plowing under of familiar and common legal concepts and the reversal of years of standard practice. The ingrained nature of the pre-*Waltz* approach to tolling

[4] *Mullins II*, 271 Mich App at 506-509, quoting *Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929 (2005), *Evans v Hallal*, 472 Mich 929 (2005), and *Forsyth v Hopper*, 472 Mich 929 (2005). The confusion then turned to whether the Supreme Court's remand orders were binding on this Court.

statutes, saving statutes, and other extensions of limitations periods, can best be seen by considering the legal concepts that developed along the way.

* * *

With more than 60 cases involving *Waltz* issues in various stages of the appellate process, the time is ripe for the Supreme Court to address the substantive issue presented to the *Mullins II* conflict panel. Without a plenary discussion of the issues, we are left only with the remand orders. In my opinion, only a learned and exhaustive opinion will amicably put these and other unsettled issues to rest. I would simply ask that the Supreme Court grant leave to appeal in one of these cases and resolve the issue of whether *Waltz* should be applied prospectively or retroactively.[5]

II. THE SUPREME COURT'S EDICT

Mullins II was appealed to the Supreme Court, which resulted in an end to the chaos and produced the now famous *Mullins III* edict:

We reverse the July 11, 2006, judgment of the Court of Appeals. MCR 7.302(G)(1). We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by

[5] In my concurring opinion in *Ward*, I requested that the Supreme Court grant leave to appeal to determine the propriety of prospective or retroactive application of *Waltz*. It appears that the *Mullins III* order was the response to this request. In my opinion, the *Mullins III* order is an astonishing statement by our Supreme Court. It was a bold, assertive order issued to correct a wrong turn by this Court. The Supreme Court should be commended for their foresight; in one paragraph they devised the perfect solution for the then-existing problem.

> *Waltz*. In the instant case, because the plaintiff filed this action after *Omelenchuk* was decided and the saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable. Accordingly, we remand this case to the Washtenaw Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order. Reported below: 271 Mich App 503. [*Mullins III*, 480 Mich at 948.]

The Supreme Court order did not change the law; instead, it created a window in which *Waltz* did not apply retroactively. In my opinion, the Supreme Court order applies to all plaintiffs who were dispatched to the dustbin.[6] All plaintiffs who were properly on the litigation train and who properly exhausted all their appellate remedies should get their tickets stamped and be placed back on the litigation train with full rights and privileges. As the *King I* panel stated, "The Supreme Court in its use of the words, 'any causes of action' did not limit the palliative nature of its order to only those cases still pending." *King I*, 288 Mich App at 810.[7]

I concur with the result reached in the *King I* opinion. I would reverse the decision of the trial court.[8]

FORT HOOD, J., concurred with O'CONNELL, J.

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[6] I note that the *King I* opinion and the *Mullins III* order do not fit into the category described as conventional legal analysis. Both are extraordinary statements that were made to afford justice to those plaintiffs who failed to comprehend the significance of *Waltz*.

[7] I am puzzled at the majority's attempt to place a square peg in a round hole. This type of thinking is what caused the chaos in the first place. See *Ousley*, 264 Mich App 486.

[8] As evidence of the complexity of this issue, I note that those Court of Appeals judges who have opined on the *King* case are split five to five: five judges favor limited application of the *Mullins III* order, and five judges favor applying the *Mullins III* order to all litigants who are denied their day in court.

PEOPLE v HUNT

Docket No. 292639. Submitted October 13, 2010, at Detroit. Decided October 19, 2010, at 9:05 a.m.

A Wayne Circuit Court jury convicted Christopher R. Hunt of kidnapping, two counts of assault with a dangerous weapon, and possession of a firearm during the commission of a felony. The charges arose from a kidnapping at gunpoint in which defendant participated with two other men and beatings that occurred during the course of events. The court, Timothy M. Kenny, J., sentenced defendant to concurrent terms of 15 to 30 years for kidnapping and 1 to 4 years for felonious assault, plus a consecutive 2-year term for felony-firearm. The sentence was based in part on a score of 50 points for offense variable (OV) 7, which involves aggravated physical abuse, including sadism, torture, or excessive brutality. Defendant appealed, challenging his sentencing.

The Court of Appeals *held*:

1. Under MCL 777.37(1)(a), 50 points must be assessed for OV 7 when a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. Scores of 50 points for OV 7 have been upheld when the defendant committed specific acts of sadism, torture, or excessive brutality. However, defendant's actions alone did not qualify as sadism, torture, or excessive brutality because he did not himself commit, take part in, or encourage others to commit such acts. The testimony established that defendant had a gun at various times throughout the crime but did not take part in the beatings or fire a weapon, although others involved did. Defendant did not participate in tying up the victims and did not encourage any of the other perpetrators to act as they did. His participation in helping to move the victims also did not rise to the level of sadism, torture, or excessive brutality. Transportation of a victim to a place of greater danger may be scored under OV 8, MCL 777.38(2)(b), but zero points must be assessed for OV 8 when the sentencing offense is kidnapping. The trial court should have assessed zero points for OV 7.

2. Sentencing must be based on accurately scored sentencing guidelines. Had the guidelines been properly scored, defendant's recommended minimum sentence range for kidnapping would have been 9 to 15 years instead of 11.25 to 18.75 years. Although defendant's minimum sentence of 15 years was within the correctly calculated range, it was at the top of that range rather than the middle. The minimum sentence of 15 years showed an intent by the trial court to sentence defendant in the middle of the range. Defendant is entitled to resentencing.

Convictions affirmed, sentences vacated, and case remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 7 — SADISM, TORTURE, OR EXCESSIVE BRUTALITY.

Fifty points must be assessed under the sentencing guidelines for offense variable 7 (aggravated physical abuse) when a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense; score of 50 points is appropriate when the defendant committed specific acts of sadism, torture, or excessive brutality; only the defendant's actual participation should be scored, however, and 50 points should not be assessed for sadism, torture, or excessive brutality if the defendant did not commit, take part in, or encourage others to commit such acts (MCL 777.37[1][a]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Lori Baughman Palmer*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for defendant.

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of kidnapping, MCL 750.349, two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm),

MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 15 to 30 years for kidnapping and 1 to 4 years for felonious assault, and a consecutive 2-year term for felony-firearm. Defendant's sole challenge on appeal is his sentencing. We affirm defendant's convictions; however, because the trial court erred when it assessed 50 points for offense variable (OV) 7, we vacate defendant's sentence for kidnapping and remand for resentencing in accordance with this opinion.

I. FACTS

This case arises from a kidnapping at gunpoint that occurred on June 7, 2008, in Detroit. On the date in question, Sierra Burton and her ex-boyfriend, Jonathan Broadus, were at a house on Audubon in Detroit. Burton testified that at about 6:00 p.m., during a child's birthday party, defendant, Richard Harden, and Darnell Chapell ran into the house with guns. Defendant and Chapell had handguns, and Harden had a long gun or assault rifle. According to Burton, all three men directed Burton and Broadus to go downstairs at gunpoint. Broadus's testimony was conflicting with regard to whether defendant was present at this time and, if he was present, whether he had a gun. Harden and Chapell then began asking about the whereabouts of Harden's distinctive purple Caprice Classic, which had been stolen. It appeared to Burton that Broadus seemed to know about the missing Caprice. Burton testified that at some point she attempted to use a cell phone, but defendant "snatched" it. Burton also stated that when defendant took the phone, defendant's gun was "just in his hand" and not pointed at her, though she felt scared. Broadus testified that Harden hit him with the assault rifle.

After about two minutes in the basement, the men led Burton and Broadus out of the basement and then out of the house. The men walked Burton and Broadus to Chapell's apartment in a house at the corner of Audubon and Warren. Inside, the men kept asking where the car was in an "aggressive" manner, and Burton perceived it as a threat. Harden did most of the questioning. After Broadus told the men something about the car, the men escorted them outside into two cars. Defendant, Chapell, and Harden all had their guns at this time. They drove to a house on Lakeview. When they arrived, about five strangers were on the porch. Harden jumped out of the car and asked them about the location of his car. Defendant stayed in the car. Harden then started shooting at a boy on the porch, and the boy ran inside. No one else fired shots or got out of the cars.

Both cars left the house and drove to an abandoned house on Beaconsfield, about three minutes away. Everyone went inside, but then Harden and defendant went to get another car. Burton, Broadus, and Chapell waited in the vacant house for them to return. Chapell still had his gun. After about 30 minutes, defendant and Harden returned. Burton, Broadus, defendant, Chapell, and Harden all piled into a white truck and returned to Chapell's apartment on Audubon. Harden ran into the apartment, while defendant and Chapell stayed in the truck with Burton and Broadus. While Burton did not see defendant or Chapell with a gun at this time, she did not feel free to leave because Chapell said, "Don't move." Harden then came out and told them to come inside. When they went in, Harden again starting asking Broadus about the car. Harden tied Broadus's and Burton's hands behind their backs with a telephone cord, shoestrings, and an extension cord. Broadus answered questions about the car, but

then a man named "Black" came in and beat Broadus with his fists. Broadus said that he had seen "Monk" driving the car.

Next, defendant, Harden, and Chapell took Burton and Broadus on a ride to another street looking for Harden's stolen Caprice, a man named Courtney Gillon, known as "Monk," or Gillon's house. They did not find Gillon's house and returned to Chapell's apartment. While there, Chapell called Broadus's and Burton's families and told them to tell their parents that they were all right. Chapell and Broadus did so, speaking to Broadus's nephew. At this point Burton and Broadus were still tied up and Harden still had a gun. After about an hour or two, Harden and Chapell untied them. Defendant was sitting at a table. Black then walked Burton to Black's house around the corner on Courville, where they waited for defendant, Harden, and Chapell to bring Broadus.

Defendant, Harden, Chapell, and Broadus went to pick up Michael Webster and his sister, Unique Webster, from a house on Drexel. When they got to Michael Webster's house, Harden held the gun to Broadus's back and they walked into the house. One of the other men was also carrying a gun. The assailants forced the Websters and Broadus into a Suburban. Later, they all returned to the house on Courville. Unique Webster was Gillon's girlfriend, and she said that Gillon lived at a house on Bluehill. Everyone got back into the Suburban and drove to Bluehill.

At the house on Bluehill, Chapell and Harden walked Unique Webster to the side door, where she knocked. Defendant stayed in the car with Burton, Broadus, and Michael Webster. Gillon answered the door. Harden then "[g]rabbed him by his arms" and "snatched him out [of] the house." Chapell and Harden were holding handguns

and fired shots into the ground. They pushed Gillon into the truck with defendant, Burton, and Broadus.

Next, they returned to Chapell's apartment, and someone phoned Black. Black returned, and he, Chapell, and Harden beat Gillon using "[s]hoestrings, telephone cords, extension cords, chairs." The beating lasted about 30 to 45 minutes. Defendant was in the other room with Burton, Broadus, Michael Webster, and Unique Webster. Defendant did not appear to be armed at this time, but again, neither Burton nor Broadus felt free to leave because Harden and others were still armed. At some point the beating began again in the other room, and they heard Gillon screaming and then gunshots inside the apartment. Shortly thereafter, Black left.

Finally, after 45 minutes to an hour, Burton and Broadus heard the sound of police sirens from the street below. Harden tried to conceal his gun in the ceiling tiles and told the victims to say that they were family members and pretend that they were there willingly. Burton was in the same room as Broadus, Michael Webster, and Gillon. When the police knocked, defendant was in another room or apartment. Harden and Chapell left. Defendant then left with Unique Webster. No one opened the door, and police officers used a battering ram to get inside. Burton and Broadus told the police what happened, explaining that they had been kidnapped by defendant, Harden, and Chapell.

For his participation in the incident, the jury convicted defendant of kidnapping, two counts of felonious assault, and felony-firearm. Defendant now appeals as of right but only challenges his sentencing.

II. STANDARD OF REVIEW

When scoring the sentencing guidelines, "[a] trial court determines the sentencing variables by reference

to the record, using the standard [of proof] of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Interpretation and application of the sentencing guidelines is a question of law, reviewed de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

III. ANALYSIS

Defendant argues that he is entitled to resentencing because the trial court erred when it assessed 50 points for OV 7. MCL 777.37 provides:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 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) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ..... 50 points
>
> (b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ..... 0 points
>
> (2) Count each person who was placed in danger of injury or loss of life as a victim.
>
> (3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

The trial court assessed 50 points for OV 7 because (1) the victims were moved from location to location, (2) a substantial beating was inflicted, designed to increase fear, and (3) one of the victims was beaten by multiple individuals. However, of these three factors, only the

first applies to defendant's role in the criminal enterprise. Defendant maintains that his role was minimal. The record seems to support his contention. While defendant was present and did have a gun at various times throughout the crime, at no time did defendant take part in a beating or fire a weapon. In fact, it appears that the testimony may have been conflicting with regard to whether defendant ever pointed a weapon at one of the victims. Burton testified that defendant, along with Harden and Chapell, ushered her and Broadus down the stairs at gunpoint when they first stormed the house on Audubon. Broadus waivered about whether defendant was present at the house on Audubon and, if defendant was present, whether he was armed. The record shows that defendant did not participate in tying up Burton and Broadus. Harden alone tied them up. Defendant did not strike any blows against Broadus. Black beat up Broadus. Later, when Gillon was kidnapped, defendant waited in the car while Chapell and Harden grabbed Gillon and fired shots into the ground. Then, at Chapell's apartment, Chapell, Harden, and Black beat up Gillon. Defendant, sitting at a table, did not participate. Importantly, there was no testimony that defendant ever encouraged Chapell, Harden, or Black in any of their behaviors. Thus, under these circumstances, Burton's testimony that defendant, along with Harden and Chapell, pointed his weapon at her at the first house was not sufficient to demonstrate acts that qualify as "sadism, torture, or excessive brutality" under OV 7.

Cases upholding scores of 50 points for OV 7 are distinguishable because they involve specific acts of sadism, torture, or excessively brutal acts *by the defendant*. In *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005), the defendant was convicted of assault with intent to commit great bodily harm less

than murder after inflicting a prolonged and severe beating that left lasting and serious effects. The defendant in that case choked the victim a number of times, cut her, dragged her, and kicked her in the head. After her hospital stay, the victim was in a wheelchair for three weeks and used a cane for another three weeks. In another case in which 50 points were assessed for OV 7, the defendant was convicted of kidnapping, felonious assault, and felony-firearm after he held the victim at gunpoint for nine hours, made her look down the barrel of a gun, repeatedly threatened to kill her and himself, and asked her what her son would feel like when he saw yellow crime tape around his mother's house. *People v Mattoon*, 271 Mich App 275, 276; 721 NW2d 269 (2006), and *People v Mattoon*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2007 (Docket No. 272549) (after remand). Similarly, in *People v Hornsby*, 251 Mich App 462, 468-469; 650 NW2d 700 (2002), the defendant pointed a gun at the victim, cocked it, and repeatedly threatened the victim and others in a store. In *People v Kegler*, 268 Mich App 187, 189-190; 706 NW2d 744 (2005), the defendant removed the victim's clothes, assisted with carrying him naked outside, and admitted that she wanted to humiliate him by leaving him outside naked. In *People v James*, 267 Mich App 675, 680; 705 NW2d 724 (2005), the defendant repeatedly stomped on the victim's face and chest and deprived the victim of oxygen for several minutes, causing him to sustain brain damage and become comatose. And in *People v Horn*, 279 Mich App 31, 46-48; 755 NW2d 212 (2008), the defendant terrorized and abused his wife with recurring and escalating acts of violence, including threatening to kill her.

Unlike the defendants in those cases, while defendant was present and armed during the commission of the crimes here, he did not himself commit, take part in,

or encourage others to commit acts constituting "sadism, torture, or excessive brutality" under OV 7. Moreover, unlike OV 1, OV 2, and OV 3, OV 7 does not state that "[i]n multiple offender cases, if 1 offender is assessed points for [the applicable behavior or result], all offenders shall be assessed the same number of points." See MCL 777.31(2)(b), MCL 777.32(2), MCL 777.33(2)(a). For OV 7, only the defendant's actual participation should be scored. In this case, the record reflects that defendant's actions alone did not qualify as "sadism, torture, or excessive brutality" under OV 7.

And the movement of the victims did not justify a 50-point score for OV 7. Transportation to a place of greater danger is appropriately scored under OV 8, but must be given a score of zero points when, as here, the sentencing offense is kidnapping. MCL 777.38(2)(b). The trial court's comments included the OV 8 factor in its discussion of OV 7. There was testimony that defendant held and pointed a gun. However, again, the use of a gun is inherent in the felony-firearm and felonious assault crimes, and defendant, unlike the others, did not fire the gun, threaten to fire it, or hit the victims with it. For a good portion of the time, the victims who testified did not see him holding a gun. For all these reasons, defendant's own conduct toward the victims did not qualify as "sadism, torture, or excessive brutality" or justify a score of 50 points on OV 7.

Finally, defendant is correct that resentencing is required even though the minimum sentence he received for the kidnapping conviction, 15 years, falls within the recommended minimum sentence range calculated under the guidelines after the correction. Sentencing must be based on accurately scored guidelines. MCL 769.34(10). Without the 50-point score for OV 7, defendant's offense variable level and prior

record variable level place him in the D-III cell of the sentencing grid for offense class A, with a recommended minimum sentence range of 9 to 15 years, rather than in the D-V cell, with a recommended minimum sentence range of 11.25 to 18.75 years. MCL 777.62. When the guidelines are correctly scored, a minimum sentence of 15 years is at the top rather than the middle of the guidelines range. The sentence given by the trial court showed an intent to sentence defendant in the middle of the minimum sentence range. In *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006), the Court mandated resentencing in a similar situation, since the sentence imposed "stands differently in relationship to the correct guidelines range than may have been the trial court's intention." *Francisco* also stated that "when a trial court sentences a defendant in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information." *Id*. at 89 n 7. Defendant is entitled to resentencing.

IV. CONCLUSION

Because the trial court erred when it assessed 50 points for offense variable 7, we vacate defendant's sentence for kidnapping and remand for resentencing in accordance with this opinion.

Affirmed in part, vacated in part, and remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

MICHIGAN'S ADVENTURE, INC v DALTON TOWNSHIP

Docket No. 292148. Submitted October 8, 2010, at Lansing. Decided October 21, 2010, at 9:00 a.m.

Michigan's Adventure, Inc., filed a petition in the Tax Tribunal, seeking to invalidate a special assessment imposed on property it owned by Dalton Township for the construction of a sewer project. Three townships, including respondent, entered into an agreement with Muskegon County to facilitate sewer construction, MCL 123.731 *et seq*. Respondent sought to raise funds for the construction by creating a special assessment district. Petitioner objected to respondent's special assessment at a meeting concerning the proposed district, but respondent declined to alter the proposed special assessment. In the tribunal, respondent moved for summary disposition, contending that petitioner had failed to file a written protest of the special assessment as required and that its petition to the tribunal had not been timely filed. The tribunal denied the motion, and subsequently entered judgment in petitioner's favor and vacated the special assessment. Respondent appealed.

The Court of Appeals *held*:

1. MCL 123.751 *et seq*. sets forth procedures related to special assessments. The procedures, however, only apply when a board of public works has imposed a special assessment under MCL 123.743(1). In this case, respondent imposed the special assessment under MCL 123.743(2) and (3). Thus, petitioner was not required to file a written objection to the special assessment under MCL 123.754, and the filing deadline in that statute was also inapplicable. Because petitioner objected to the special assessment district and its inclusion on the special assessment roll at the meeting held on the special assessment in order to invoke the tribunal's jurisdiction, respondent was not entitled to summary disposition as a matter of law.

2. Under MCL 205.735(3), a party must file an appeal with the tribunal within 35 days of the final decision. Respondent's board did not render a final decision at the meeting concerning the special assessment, but continued to consider the matter before finally confirming the special assessment roll. Thus, petitioner

timely filed its petition within 35 days of respondent's final decision, and the tribunal reached the correct result in rejecting respondent's motion for summary disposition.

3. A special assessment is valid if (1) the improvement subject to the assessment confers a benefit on the assessed property and not just on the community as a whole and (2) the amount of the special assessment is reasonably proportionate to the benefit derived from the improvement. A key question is whether the market value of the property was increased as a result of the improvement. The tribunal's ruling vacating the special assessment in this case was supported by competent, material, and substantial evidence, including expert testimony that the installation of the sewer line would not increase the property's value, that the property did not require a sewer line because petitioner disposed of its sewage through the use of sewage lagoons, and that the assessment was not proportionate because the cost of the sewer line in front of petitioner's property was only a fraction of the special assessment imposed on it.

Affirmed.

1. TAXATION — SPECIAL ASSESSMENTS — MUNICIPAL SPECIAL ASSESSMENTS — PROCEDURES.

The procedures applicable to special assessments imposed by a board of public works under chapter 2 of 1957 PA 185 do not apply to special assessments imposed by a municipality other than a county (MCL 123.743; MCL 123.751 *et seq*.).

2. TAXATION — SPECIAL ASSESSMENTS.

A special assessment is valid if (1) the improvement subject to the special assessment confers a benefit on the assessed property and not just the community as a whole and (2) the amount of the special assessment is reasonably proportionate to the benefit derived from the improvement; a key question is whether the property's market value increased as a result of the improvement.

Parmenter O'Toole (by *John C. Schrier* and *Adam G. Zuwerink*) for petitioner.

Wease Halloran, PLC (by *Joshua M. Wease* and *Michele L. Halloran*), for respondent.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

SAAD, J. Respondent, Dalton Township, appeals an order of the Michigan Tax Tribunal that vacated a special assessment respondent had imposed on property owned by petitioner, Michigan's Adventure, Inc. Respondent also appeals the tribunal's order that denied its motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. MOTION FOR SUMMARY DISPOSITION

Respondent argues that the tribunal should have granted it summary disposition under MCR 2.116(C)(4). Respondent maintains that petitioner failed to file a written protest of the special assessment as required by MCL 123.754 and failed to file a timely appeal to the tribunal.[1] We review de novo the Tax Tribunal's decision regarding a motion for summary disposition. *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 698; 714 NW2d 392 (2006).

A. WRITTEN PROTEST

In this case, three townships entered into an agreement with Muskegon County to facilitate various sewer projects. See MCL 123.731 *et seq.* In such an undertaking, a municipality may raise funds through any of the following methods: imposing service charges, imposing special assessments, exacting charges, setting aside state funds, or setting aside other available money. MCL

[1] Petitioner incorrectly claims that this issue was not preserved. This issue was preserved because it was raised before and addressed and decided by the tribunal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Petitioner also incorrectly asserts that respondent's appeal is moot on the ground that respondent satisfied the judgment ordered by the tribunal. However, because neither the tribunal nor the Court of Appeals granted a stay, respondent was obligated to comply with the tribunal's judgment. MCR 7.209(A)(1). The fact of compliance does not render moot an appeal of the substantive issue.

123.742(2). "The governing body shall cause a special assessment roll to be prepared and the proceedings of the special assessment roll and the making and collection of the special assessments shall be in accordance with the provisions of the statute or charter governing special assessments in the municipality . . . ." MCL 123.743(3). Pursuant to MCL 123.731(k), the "governing body" of a township is "the township board[.]" With respect to special assessments under MCL 123.743(2), our Supreme Court has stated that one hearing is required. *Gaut v City of Southfield*, 388 Mich 189, 200; 200 NW2d 76 (1972).

As noted, respondent complains that petitioner failed to file a written objection to the special assessment under MCL 123.754. Respondent is mistaken because the procedures under MCL 123.751 *et seq*. are applicable only if the board of public works imposes an assessment under MCL 123.743(1). That was not the case here because respondent imposed a special assessment under MCL 123.743(2) and (3), which provide, in part:

> (2) If a municipality other than a county operating under this act elects to raise moneys to pay all or any portion of its share of the cost of a project by assessing the cost upon benefited lands, its governing body shall do so by resolution and fix the district for assessment.
>
> (3) The governing body shall cause a special assessment roll to be prepared and the proceedings of the special assessment roll and the making and collection of the special assessments shall be in accordance with the provisions of the statute or charter governing special assessments in the municipality . . . .

Under MCL 123.743(4), any person assessed has the right to raise an objection to the special assessment district. Unlike MCL 123.754, MCL 123.743(4) does not state that the person objecting must submit a written

objection in writing or file an appeal before the tribunal within 30 days. We construe the Legislature's omissions as intentional. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). MCL 123.754 is not applicable, and therefore petitioner was obliged only to protest at the hearing held for the purpose of confirming the special assessment roll. MCL 205.735(2) ("For a special assessment dispute, the special assessment must be protested at the hearing held for the purpose of confirming the special assessment roll before the tribunal acquires jurisdiction of the dispute."). Respondent set a meeting for May 30, 2006, to provide a forum for residents, property owners, and interested persons to discuss the improvement, the special assessment district, and the special assessment roll. The record demonstrates that petitioner's representative attended the meeting on May 30, 2006, and, according to both the meeting minutes and the representative's affidavit, petitioner's representative objected to the special assessment district and the special assessment. Because petitioner raised an objection to the special assessment district and its inclusion on the special assessment roll in order to invoke the tribunal's jurisdiction in this matter, respondent was not entitled to summary disposition as a matter of law. MCL 123.743(4); MCL 205.735(2).

B. TIMING OF PETITIONER'S APPEAL TO THE TRIBUNAL

With respect to respondent's claim that petitioner's appeal to the tribunal was untimely, we hold that respondent's claim lacks merit. MCL 123.743(4) does not contain a deadline for filing an appeal before the tribunal. The filing deadline in MCL 123.754 is inapplicable because, as discussed, there was no hearing before the board of public works. Under MCL 205.735(3), a

party must file an appeal with the tribunal within 35 days of the final decision. "Final decision" has not been defined by our courts in cases involving a township board's final decision on a special assessment. Black's Law Dictionary (7th ed) equates "final decision" with "final judgment," which has the following relevant definition: "A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment." Additionally, under the Administrative Procedures Act, a decision without further proceedings becomes the final decision. MCL 24.281(3). Thus, the final decision on the assessment is the date that triggers the timing for filing an appeal.

The record reflects that the Dalton Township board did not render a final decision at the May 30, 2006, meeting on the special assessment. Rather, the record shows that as of May 30, respondent's board continued to consider corrections to the special assessment roll. While respondent's board ordered and directed its treasurer to collect the special assessments as identified on the special assessment roll, respondent's supervisor later informed certain business owners that respondent's board would be reconfirming the special assessment roll at its next regular meeting. There is little indication of what occurred at the subsequent hearing, other than a discussion of the sewer-line projects. However, respondent's supervisor subsequently informed business owners, including petitioner, that their assessment amounts had been recalculated and that respondent's board would be reconfirming the special assessment roll at its next meeting, on July 10, 2006. Later, respondent's counsel sent an undated letter to business owners, including petitioner, stating that "it was the recommenda-

tion and final determination not to make any adjustments in the proposed assessments." Petitioner's representative claimed that petitioner received this letter on July 26, 2006, and no evidence contradicts this assertion. Thus, it appears from the record that respondent did not confirm the special assessment roll until some time after the July 10, 2006, regular meeting of respondent's board. Accordingly, respondent did not render a final decision regarding petitioner's special assessment until some time after the July 10, 2006, regular meeting. Therefore, petitioner's August 8, 2006, petition was timely filed within the 35-day period provided under MCL 205.735(3). Respondent was not entitled to summary disposition for failure of petitioner to file a timely appeal to the tribunal.

In so ruling, we note that the tribunal improperly held that MCL 123.752 and MCL 123.754 applied here. The tribunal, nonetheless, denied respondent's motion for summary disposition. Because the tribunal reached the right result, we will not disturb the ruling. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

II. THE TRIBUNAL'S DECISION TO VACATE THE SPECIAL ASSESSMENT

Respondent claims that the tribunal's ruling that vacated the special assessment was not supported by competent, material, and substantial evidence. Absent fraud, we review a decision by the tribunal to determine whether it erred in applying the law or adopted a wrong legal principle. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). "All factual findings are final if supported by competent, material,

and substantial evidence." *Wayne Co v State Tax Comm*, 261 Mich App 174, 186; 682 NW2d 100 (2004).

"[S]pecial assessments are presumed to be valid." *Kadzban v City of Grandville*, 442 Mich 495, 505; 502 NW2d 299 (1993). Accordingly, a municipality's decision regarding a special assessment will be upheld unless "there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements." *Dixon Rd Group v City of Novi*, 426 Mich 390, 403; 395 NW2d 211 (1986). A special assessment will be deemed valid if it meets two requirements: (1) the improvement subject to the special assessment must confer a benefit on the assessed property and not just the community as a whole and (2) the amount of the special assessment must be reasonably proportionate to the benefit derived from the improvement. *Kadzban*, 442 Mich at 500-502. A key question is whether the market value of the property was increased as a result of the improvement. *Id.* at 501.

> Common sense dictates that in order to determine whether the market value of an assessed property has been increased as a *result of* an improvement, the relevant comparison is not between the market value of the assessed property *after* the improvement and the market value of the assessed property *before* the improvement, but rather it is between the market value of the assessed property with the improvement and the market value of the assessed property *without* the improvement. [*Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 496; 597 NW2d 858 (1999).]

The testimony and valuation report of petitioner's expert witness constituted competent, material and substantial evidence on which the tribunal properly based its decision. Petitioner's expert opined that the installation of a sewer line in a rural setting would not

increase a property's value, and respondent's expert did not refute the findings or conclusions of petitioner's expert. Further, the sewer line would not benefit petitioner's property because the property does not require a sewer line—petitioner disposes of its sewage by means of operational sewage lagoons.[2] Moreover, connecting to the sewer line would constitute a substantial expense to petitioner, while its continued maintenance of the sewage lagoons is relatively simple, and petitioner's costs associated with operating the sewage lagoons appear to be relatively modest. Evidence also showed that petitioner's property would not benefit from the sewer line in the future. Development of the property is not necessarily limited because of petitioner's use of sewage lagoons, but is constricted as a result of the Department of Environmental Quality's wetlands protections and because the soil on the property is not well suited for development. And although the sewer line *may* somehow benefit the property in the future, that is not a valid basis for finding a benefit to the property justifying an assessment imposed by the township on the property owner at this time. *Oneida Twp v Eaton Co Drain Comm'r*, 198 Mich App 523, 528; 499 NW2d 390 (1993).

Importantly, to protect private property rights, Michigan law also requires that the total amount of the assessment must be no greater than what was reasonably necessary to cover the cost of the work. *Id.* at 528 n 5. The special assessment at issue here fails to meet that requirment because it was undisputed that the total cost of the sewer line in front of petitioner's

[2] A sewage lagoon, also called a wastewater stabilization lagoon, is "a type of treatment system constructed of ponds or basins designed to receive, hold, and treat sanitary wastewater for a predetermined amount of time through a combination of physical, biological, and chemical processes." MCL 324.3120(11)(o).

property would be $60,000 to $80,000, whereas petitioner's special assessment was $600,000.

We hold that a reasonable person would accept the foregoing record evidence as sufficient to support the tribunal's ruling. Ultimately, the tribunal's key finding—that the property's value was not enhanced by the sewer-line improvement—was supported by competent, material, and substantial evidence. The sewer line at issue conferred little or no benefit on petitioner, resulted in no increase in the value of the land assessed, and consequently furnished no basis for this special assessment. See *Kadzban*, 442 Mich at 500-502.[3]

Affirmed.

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[3] Respondent also claims that the tribunal failed to set forth "a viable rendition of factual findings and conclusions of law" necessary for this Court to engage in appellate review. Respondent failed to include this argument in its statement of questions presented and, therefore, this argument was not properly presented for appellate consideration. MCR 7.212(C)(5). Nonetheless, the record reflects that the tribunal complied with the requirements of MCL 205.751(1) and MCL 24.285, though it did not separately identify the "findings of fact" and "conclusions of law." The tribunal provided a concise statement of facts and conclusions of law on the record, based its decision on the evidence, and correctly applied the law.

JENSON v PUSTE

Docket No. 292731. Submitted October 12, 2010, at Detroit. Decided October 21, 2010, at 9:05 a.m.

Brandi Jenson filed a petition in the Wayne Circuit Court for a personal protection order (PPO) against Paul Puste after the two were divorced. The petition was granted, and the PPO was entered in November 2006. When the PPO expired in November 2007, Jenson did not renew it. In 2009, Puste moved for entry of a consent order to vacate the PPO *nunc pro tunc* and to seal the court file. The court, Eric W. Cholack, J., denied the motion after concluding that MCR 8.119(F)(5) prohibited the court from sealing a court order or opinion. Puste appealed.

The Court of Appeals *held*:

The trial court correctly concluded it lacked authority to seal the order. MCR 8.119(F)(1) provides that a court may not seal court records unless (1) a party has filed a written motion that identifies the specific interest to be protected, (2) the court has made a finding of good cause, in writing or on the record, that specifies the grounds for the order, and (3) there is no less restrictive means to adequately protect the specific interest asserted. Although the court rule thus allows a court to exercise its discretion in sealing court records, which include orders such as the PPO in this case, MCR 8.119(F)(5) specifically prohibits a court from sealing court orders and opinions. The limited discretionary authority extended to a court deciding a motion to seal court records under MCR 8.119(F)(1) is not extended to a court deciding a motion to seal a court order or court opinion under MCR 8.119(F)(5).

Affirmed.

COURTS — RECORDS — SEALING COURT RECORDS — ORDERS.

A court may not seal court records unless (1) a party has filed a written motion that identifies the specific interest to be protected, (2) the court has made a finding of good cause, in writing or on the record, that specifies the grounds for the order, and (3) there is no less restrictive means to adequately protect the specific interest

asserted; however, the court is specifically prohibited from sealing a court order or opinion (MCR 8.119[F] [1], [5]).

Forrest & Smith, P.C. (by *Nicole L. Smith*), for Paul Puste.

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

K. F. KELLY, J. Defendant, Paul Puste, appeals as of right the trial court's order denying his motion for entry of a consent order to vacate a personal protection order (PPO) *nunc pro tunc*[1] and to seal the court file pursuant to MCR 8.119(F). Resolution of this matter requires us to determine whether a trial court has the authority to seal a PPO pursuant to MCR 8.119(F). The trial court held that it did not, and we agree. We hold that under the plain language of MCR 8.119(F)(5), a court is prohibited from sealing court orders and court opinions. We affirm.

I. BASIC FACTS

The parties to this action were divorced in March 2006 after 23 years of marriage. In November 2006, plaintiff petitioned for entry of a PPO against defendant. Plaintiff indicated that defendant was repeatedly calling her and her friends, tapping on her windows at night, and entering her home without permission. Plaintiff was fearful that defendant's actions would escalate into violence because defendant had recently lost his job as a hospital administrator and between January and March 2006 had struck her, knocked her down, and spat on her. On November 27, 2006, plain-

[1] A judgment or order entered *nunc pro tunc* is one that is entered on a day after the time that it should have been entered, as of the earlier date. See Black's Law Dictionary (9th ed), pp 920, 1174.

tiff's petition was granted and a PPO was entered against defendant. This order prohibited defendant from contacting plaintiff, from following her, and from otherwise appearing within her sight, among other prohibited contact. The order remained in effect for a year, apparently without further incident. Plaintiff did not seek to renew the PPO after it expired in November 2007.

On April 3, 2009, defendant moved for entry of a consent order to vacate the PPO *nunc pro tunc* and to seal the court file. Defendant contended that, even though the PPO had been removed from the Michigan State Police's Law Enforcement Information Network (LEIN) system, a background check of defendant through the court system revealed the existence of the expired PPO. Defendant alleged that he had been unable to obtain new employment because his background check revealed the PPO. Accordingly, defendant asked the court to find good cause to seal the court file pursuant to MCR 8.119(F)(1) and enter a consent order to vacate the PPO *nunc pro tunc*. Defendant filed a copy of the consent order with the motion, which both plaintiff and defendant had signed.

Plaintiff did not appear at the motion hearing on April 24, 2009. At that hearing, the trial court indicated that it was "not convinced [that it had] the authority to seal the file." The court suggested that it did not have the power to do so pursuant to MCR 8.119(F)(5) and that the matter was an inappropriate use of a court's power to give legal effect *nunc pro tunc*. Instead of denying the motion, the trial court allotted defendant additional time to brief the issues.

In his brief, defendant argued that he had shown good cause for sealing the record and that no less restrictive means existed to protect the interest af-

fected, i.e., his ability to find new employment, as required by MCR 8.119(F)(1). Defendant further argued that MCR 8.119(F)(5) grants a court discretion to seal a court order or opinion.[2] At the next motion hearing on May 15, 2009, the trial court denied defendant's motion, reasoning that MCR 8.119(F)(5) does not grant a court discretion to seal a court order or opinion. Plaintiff was also not present at this hearing and has not filed any documents with the trial court or this Court. Defendant now appeals.

II. STANDARDS OF REVIEW

To the extent that a trial court has discretion to seal court records, we review its decision for an abuse of discretion. See *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey*, 268 Mich App 313, 329; 708 NW2d 717 (2005), rev'd in part on other grounds 474 Mich 1097 (2006). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). We review de novo the trial court's interpretation of the court rule. *Decker v Rochowiak*, 287 Mich App 666, 674; 791 NW2d 507 (2010). The principles that apply to statutory construction apply equally to our interpretation of court rules. *Green v Ziegelman*, 282 Mich App 292, 301; 767 NW2d 660 (2009). Our goal in interpreting a court rule is to give effect to the intent of the Supreme Court, the drafter of the rules. *Vyletel-Rivard v Rivard*, 286 Mich App 13, 21; 777 NW2d 722 (2009). The first step in doing so is analyzing the language used because the words contained in the court rule are the most reliable evidence

[2] After the April hearing, defendant abandoned his argument as it related to his motion for the court to vacate the PPO *nunc pro tunc*. He also did not in this Court brief the issue or provide any supporting law.

of the drafters' intent. *Green*, 282 Mich App at 301. We must consider the provision in its entirety and its place within the context of the rules in order to produce a harmonious whole. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). If the rule's language is plain and unambiguous, then judicial construction is not permitted and the rule must be applied as written. *Vyletel-Rivard*, 286 Mich App at 22. "[W]hen reasonable minds can differ on the meaning of the language of the rule, then judicial construction is appropriate." *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 553; 652 NW2d 851 (2002).

III. ANALYSIS

On appeal, defendant contends that the trial court erred by denying his motion to seal the PPO-related court file, including the 2006 PPO. He argues that MCR 8.119 gives the trial court discretion to seal these documents and that sealing the records is justified upon his showing of good cause and the fact that no less restrictive means are available to adequately protect his interest. We disagree with defendant's interpretation of the court rule.

MCR 8.119 governs a court's maintenance of court records, the public's access to those records, and the circumstances under which a court may seal, or perpetually prohibit the public's access to, those records. The rule "applies to all actions in every trial court," MCR 8.119(A), and implicitly recognizes that court records often pertain to matters in which the public has an interest. See MCR 8.119(E) (granting public access to copy records for a "reasonable cost"); MCR 8.119(F)(1) (conditioning a party's ability to seal court records on a showing that other less restrictive means of protecting the interest affected are not available);

MCR 8.119(F)(2) (mandating that a court consider the public's interest when determining whether good cause has been shown). The rule broadly defines "court records" as including "all documents and records of any nature that are filed with the clerk in connection with the action." MCR 8.119(F)(4).

At issue here is subrule (F), MCR 8.119(F), which establishes a procedure by which a court may seal court records. Subrule (F), titled "Sealed Records," provides:

> (1) Except as otherwise provided by statute or court rule, a court *may not* enter an order that seals *courts records*, in whole or in part, in any action or proceeding, *unless*
>
> (a) a party has filed a written motion that identifies the specific interest to be protected,
>
> (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
>
> (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.
>
> (2) In determining whether good cause has been shown, the court must consider,
>
> (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
>
> (b) the interest of the public.
>
> (3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records.
>
> (4) For purposes of this rule, *"court records" includes all documents and records of any nature that are filed with the clerk in connection with the action*. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C).[3]

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[3] Pursuant to an order issued May 18, 2010, our Supreme Court amended subrule (F)(4), effective September 1, 2010, to clarify that

> (5) A court *may not seal a court order or opinion*, including an order or opinion that disposes of a motion to seal the record.
>
> (6) Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D).
>
> (7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office. [MCR 8.119(F) (emphasis added).]

Subrule (F)(1) prohibits a court from entering an order sealing "court records, in whole or in part" unless a party has filed a motion identifying the interest to be protected, the court has made a finding of good cause, and sealing the records is the least restrictive means of protecting the interest identified. MCR 8.119(F)(1). Thus, whenever a party moves to seal a "court record," the court may not do so unless it finds, in its discretionary capacity, that the party has met the requirements of subrule (F)(1)(a), (b), and (c).

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materials filed with a court that relate to a motion to seal a record are nonpublic until the court disposes of the motion. 486 Mich lxii, lxiii. Subrule (F)(4) now provides:

> For purposes of this rule, "court records" includes all documents and records of any nature that are filed with the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C). Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.

This amendment has no effect on defendant's appeal.

Clearly, the definition of "court records" encompasses court orders, like the PPO at issue in this case, as well as court opinions, which are documents or records that, in practice, are filed with a court's clerk in connection with an action. See MCR 8.119(F)(4). However, subrule (F)(5) specifically prohibits a court from sealing court orders and opinions. The subrule states, "A court *may not seal a court order or opinion*, including an order or opinion that disposes of a motion to seal the record." MCR 8.119(F)(5) (emphasis added). Significantly, this subrule does not give a court the authority to exercise discretion in deciding whether to seal these two types of court records, unlike the limited discretion that subrule (F)(1) allows when a motion involves other court records. Thus, reading subrules (F)(1) and (F)(5) together, in light of the definition of "court records," it is clear that subrule (F)(1) is an inclusive provision that applies to all court records, but subrule (F)(5) is an exclusive provision that excepts from the requirements of subrule (F)(1) court orders and opinions. In other words, the limited discretionary authority extended to a court deciding a motion to seal court records under subrule (F)(1) is not extended to a court deciding a motion to seal a court order or court opinion under subrule (F)(5).

The remaining question is whether the plain language of subrule (F)(5) provides a court with any amount of discretion under circumstances in which a party moves to seal a court order or opinion. Defendant is of the view that the words "may not" provide a court with the discretionary authority to do so. We disagree. It is true that the term "may" is typically used in a discretionary fashion. However, under some circumstances the words "may not" can mean "cannot" or "shall not." See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). And indeed, while the word

"may" denotes permissive authority or discretion, the word "not" is used to express "negation, denial, refusal, [or] prohibition." *Random House Webster's College Dictionary* (1997). Thus, coupled together, the word "not" negates the permissive authority alluded to by the word "may."

Our understanding of these words as granting a court no discretionary authority in the context of subrule (F)(5) is further supported by a reading of subrule (F) as a whole. As noted, while subrule (F)(1) prohibits a court from sealing "court records," it provides exceptions to this general rule by granting a court some discretion to seal court records under certain circumstances. Conversely, subrule (F)(5) singles out particular court records—court orders and opinions—and simply states that they "may not" be sealed; the subrule does not explicitly grant any discretionary authority similar to that provided in subrule (F)(1). For us to declare that court orders and opinions are subject to the same discretionary authority as other court records under subrule (F)(1), as defendant would have this Court do, would make subrule (F)(5) a superfluous provision and would render it nugatory. Adopting such an interpretation is contrary to the rules of statutory interpretation and to the plain language of the provision. *Johnson v White*, 261 Mich App 332, 348; 682 NW2d 505 (2004). Our viewpoint is further supported by the maxim, "[W]here a statute contains a general provision and a specific provision, the specific provision controls." *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994). Thus, there is no reason to impute the discretionary authority granted to a court ruling on a motion to seal court records under subrule (F)(1) to a court deciding whether to seal a court order or opinion under subrule (F)(5). Rather, the Supreme Court specifically drafted a separate provision that

pertains only to court orders and opinions, and the Court specifically chose not to attach any language subjecting this prohibition to any exceptions that would allow a court to exercise discretion.

Lastly, in light of the court rule's general purpose of providing public access to court records, the intent of the rule is contrary to a reading that would grant a court unbridled discretion in deciding whether to seal a court order or opinion. Arguably, a court's orders and opinions are most responsive to the public's interest in significant legal events affecting the community,[4] and public access to orders and opinions is imperative to ensuring the integrity of this state's judiciary. Accordingly, we hold that a court is prohibited from sealing court orders and court opinions under MCR 8.119(F)(5), given that subrule's plain language.

Affirmed.

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[4] See *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009) ("[A] court speaks through its written orders and judgments . . . .").

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25 v WAYNE COUNTY

Docket No. 290273. Submitted July 13, 2010, at Detroit. Decided October 26, 2010, at 9:00 a.m.

The American Federation of State, County and Municipal Employees, Council 25, and its affiliated locals 25, 101, 409, 1659, 1862, 2057, 2926, and 3317 brought an action in the Wayne Circuit Court against Wayne County, seeking, in part, an order to compel the arbitration of a dispute between the parties regarding retiree health benefits. The relevant collective-bargaining agreement (CBA) between the parties expired on July 31, 2008. The dispute did not arise until September 3, 2008, at the earliest. The arbitration provision of the CBA provided that it applied to differences that arose during the term of the agreement. Plaintiffs contended that the disputed health benefits were vested rights and, therefore, the right to arbitration provided in the CBA continued after the CBA expired. The court, Gershwin A. Drain, J., entered an order compelling arbitration of the dispute. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. The plain language of the CBA provided that the dispute was not arbitrable because it arose after the expiration of the CBA and not during the agreement's term.

2. Although the Supreme Court has held that the right to grievance arbitration survives the expiration of a CBA when the dispute concerns the kinds of rights that could accrue or vest during the term of the CBA, this rule does not negate explicit language in a CBA that contravenes the rule of postexpiration arbitrability. The CBA here explicitly provided that the right to arbitration under the CBA was extinguished when the CBA expired.

3. There is a presumption of arbitrability when a CBA contains an arbitration clause. Therefore, an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of the coverage. The arbitration clause in this

case was not susceptible of an interpretation that covers this dispute because it limited the grievance procedure to differences arising during the term of the CBA and it was undisputed here that the differences did not arise during that term. Defendant thus rebutted the presumption of arbitrability. The trial court erred by ordering arbitration.

Reversed and remanded.

1. LABOR RELATIONS — ARBITRATION — COLLECTIVE-BARGAINING AGREEMENTS — EXPIRED AGREEMENTS.

The right to grievance arbitration survives the expiration of a collective-bargaining agreement that provides the right to arbitration when the dispute concerns the kinds of rights that could accrue or vest during the term of the agreement; this rule, however, does not negate explicit language in a collective-bargaining agreement that contravenes the rule, and parties may explicitly agree that accrued and vested rights and the right to arbitrate concerning them are extinguished when their collective-bargaining agreement expires.

2. LABOR RELATIONS — ARBITRATION — COLLECTIVE-BARGAINING AGREEMENTS — PRESUMPTION OF ARBITRABILITY.

There is a presumption of arbitrability when a collective-bargaining agreement contains an arbitration clause; an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers an asserted dispute; doubts should be resolved in favor of coverage.

Miller Cohen, P.L.C. (by *Bruce A. Miller* and *Robert D. Fetter*), for plaintiffs.

William M. Wolfson, Interim Corporation Counsel, *Bruce A. Campbell*, Assistant Corporation Counsel, and *W. Steven Pearson*, Principal Attorney, for defendant.

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

SAAD, J. Defendant appeals by leave granted a circuit court order that compelled arbitration of this dispute over retiree health benefits. For the reasons set forth

below, we reverse and remand for further proceedings.[1]

Defendant argues that it is not required to arbitrate this dispute because the contract in question provides for arbitration only of those claims that arose during the term of the parties' collective-bargaining agreement (CBA).[2] There exists "a strong presumption in favor of using negotiated grievance procedures for resolving disputes over the interpretation or application of a collective bargaining agreement." *AFSCME v Highland Park Bd of Ed*, 457 Mich 74, 84; 577 NW2d 79 (1998). Notwithstanding this presumption, no duty to arbitrate a labor dispute arises solely by operation of law. *Litton Fin Printing Div v NLRB*, 501 US 190, 200; 111 S Ct 2215; 115 L Ed 2d 177 (1991). "The duty to arbitrate grievances arises from [the] contractual agreement between an employer and its employees. Absent such an agreement, neither party is obliged to submit to binding arbitration." *Ottawa Co v Jaklinski*, 423 Mich 1, 22; 377 NW2d 668 (1985) (opinion by WILLIAMS, C.J.).[3]

Though, contrary to defendant's arguments, the plain language of article 10.03 of the CBA does not

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[1] The trial court's order also denied plaintiffs' motion for a preliminary injunction, but no party has appealed that ruling.

[2] We review de novo a trial court's determination whether an issue is subject to arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 152; 742 NW2d 409 (2007). We also review de novo as a question of law issues involving contract interpretation. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

[3] When interpreting a contract, we examine the contractual language to determine the intent of the parties. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). This Court must examine the language of the contract and accord the words their ordinary and plain meanings if such meanings are apparent. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). If the language is unambiguous, courts must interpret and enforce the contract as written. *Quality Prod*, 469 Mich at 375. "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id.*

preclude arbitration in this case, arbitration *is* plainly precluded under article 10.01, which provides: "In the event differences should arise between the Employer and the Union *during the term of this Agreement* as to the interpretation and application of any of its provisions, the parties shall act in good faith to promptly resolve such differences in accordance with the following procedures . . . ." (Emphasis added.) The dispute at issue is a "difference" that arose between plaintiffs and defendant regarding the interpretation and application of article 30.11(B) of the CBA, which allows eligible employees retiring after December 1, 1997, to select a medical-benefit plan from available plans offered during open enrollment. Thus, if the dispute had arisen "during the term of [the] Agreement," article 10.01 would seemingly require that the parties employ the grievance procedure of the CBA, including arbitration. However, because the dispute arose after the agreement expired, plaintiffs are not entitled to arbitration.

It is undisputed that the 2000-2004 CBA expired on July 31, 2008, when a successor agreement was executed. It is also undisputed that the "difference" involved in this case did not arise until September 3, 2008, at the earliest, when defendant notified retirees of the modifications to their prescription-drug benefits scheduled to take effect on October 1, 2008. Thus, the dispute arose after the expiration of the 2000-2004 CBA and not "during the term of [the] Agreement . . . ." Accordingly, under the plain language of article 10.01, the dispute is not arbitrable.

Plaintiffs argue that because the retirees' health benefits are "vested" rights, the right to arbitration continued after the expiration of the 2000-2004 CBA. In *Jaklinski*, 423 Mich at 22 (opinion by WILLIAMS, C.J.), our Supreme Court held that "the right to grievance

arbitration survives the expiration of the collective bargaining agreement when the dispute concerns the kinds of rights which could accrue or vest during the term of the contract."[4] The Court noted, however, that this rule does not negate explicit language in a CBA that contravenes the rule of postexpiration arbitrability. *Id.* at 24-25. The Court stated:

> Nothing stated here should be interpreted to mean that the parties to a collective bargaining agreement cannot explicitly agree to terms which depart from any rule announced here. They may agree to their own definition of "accrued" or "vested" rights. They may explicitly agree to extend beyond contract expiration any substantive or procedural rights. They may explicitly agree that accrued and vested rights and the right to arbitrate concerning them also extinguish at contract termination. [*Id.*]

As already discussed, the language of article 10.01 reflects the parties' agreement that the right to arbitration under the CBA was extinguished when the CBA expired.

This Court analyzed a similar arbitration provision in *Highland Park v Mich Law Enforcement Union, Teamsters Local No 129*, 148 Mich App 821, 823; 385 NW2d 701 (1986), which involved a CBA between the city of Highland Park and a union representing patrolmen and corporals in the city's police department. The CBA expired on June 30, 1982. Thereafter, six command officers unexpectedly retired and, on August 6, 1982, the mayor appointed six people to fill the vacancies. The union contended that the appointments failed to comply with the CBA and ultimately demanded arbitration. The city asserted that the dispute was not arbitrable. *Id.*

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[4] See also *Litton*, 501 US at 205-206 (recognizing that there exists a presumption of arbitrability when an action taken after the expiration of a CBA infringes on a right that accrued or vested under the CBA).

This Court acknowledged that the right to arbitration may survive the expiration of a CBA when the dispute involves accrued or vested rights. *Highland Park*, 148 Mich App at 825. However, this Court ruled that the specific language in the CBA did not provide for arbitration when the grievance did not arise during the term of the agreement. The arbitration clause provided as follows: " 'It is mutually agreed that all grievances, *arising under and during* the life of the Agreement, shall be settled in accordance with the procedure herein provided.' " *Id.* This Court noted that the grievances at issue were based on events that occurred after the expiration of the CBA and held that "[a]lthough the grievances would have been arbitrable had they arisen *during* the life of the agreement, under the terms of the agreement they are not arbitrable after expiration." *Id.* The language of the CBA in *Highland Park* is similar to the language in the CBA before us.[5]

Plaintiffs correctly argue that there is a presumption of arbitrability when a CBA contains an arbitration clause. See *Cleveland Electric Illuminating Co v Utility Workers Union of America, Local 270*, 440 F3d 809, 814 (CA 6, 2006). "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is

[5] We further note that the language here is different from that at issue in *Litton*, 501 US at 205, which the Court characterized as an "unlimited arbitration clause . . . ." The clause in *Litton* provided: " 'Differences that may arise between the parties hereto regarding this Agreement and any alleged violations of the Agreement, the construction to be placed on any clause or clauses of the Agreement shall be determined by arbitration in the manner hereinafter set forth.' " *Id.* at 194. Notably absent is any language limiting the right of arbitration to the duration of the agreement. Thus, the Court held that any dispute arising under the agreement was subject to arbitration even after the expiration of the agreement. *Id.* at 205. Again, the CBA at issue here does not contain language similar to that in *Litton*.

not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). Because the arbitration clause here limited the grievance procedure to differences arising "during the term of [the] Agreement," and it is undisputed that the differences at issue in this case did not arise during the term of the 2000-2004 CBA, the clause is not susceptible of an interpretation that covers this dispute. Thus, defendant has rebutted the presumption of arbitrability.

To summarize, because the dispute in this case arose after the expiration of the 2000-2004 CBA, and the contractual language limits the right of arbitration to disputes arising "during the term of [the] Agreement," the dispute is not arbitrable and the trial court erred by ordering arbitration.

Because plaintiffs filed this action simply to enforce the arbitration provision of the CBA, and because we hold that this dispute is not arbitrable, we need not decide defendant's argument that plaintiffs lack standing to bring claims on behalf of retirees. Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

GENERAL MOTORS CORPORATION
v DEPARTMENT OF TREASURY

Docket No. 291947. Submitted August 3, 2010, at Lansing. Decided October 28, 2010, at 9:00 a.m.

General Motors Corporation (GM) filed suit in the Court of Claims against the Department of Treasury, seeking refunds of taxes it paid under the Use Tax Act, MCL 205.91 *et seq*., for its employees' use of GM-manufactured "program vehicles" for tax periods from October 1, 1996, to August 31, 2007. GM argued that the use of program vehicles was exempt from taxation because the vehicles were purchased for resale or demonstration purposes under MCL 205.94(1)(c), as interpreted by *Betten Auto Ctr, Inc v Dep't of Treasury*, 272 Mich App 14 (2006), aff'd in part 478 Mich 864 (2007). GM also argued that 2007 PA 103, which amended the Use Tax Act to obviate the holding of *Betten*, was improperly enacted special legislation and that, if applied retroactively as provided in the amendatory act itself, the amendment would violate GM's right to due process. Finally, GM contended that its employees' use of program vehicles was exempt from taxation under the act, even as amended. The court, Rosemarie E. Aquilina, J., agreed and granted GM partial summary disposition, concluding that the retroactive effect of 2007 PA 103 violated GM's right to due process because an 11-year retroactivity period was contrary to the holding of *United States v Carlton*, 512 US 26 (1994), which permitted only a modest period of retroactivity for economic legislation. The court also held that 2007 PA 103 violated the prohibition of special legislation in Const 1963, art 4, § 29, because it was enacted for the sole purpose of preventing GM from receiving use tax refunds. Finally, the court ruled that GM's program vehicles were exempt from use tax under MCL 205.94(1)(c), as amended by 2007 PA 103, because GM manufactured cars for resale and demonstration purposes and was not licensed as a new vehicle dealer and, thus, was not limited to the exemption for only 25 vehicles set forth in MCL 205.94(l)(c)(*iii*). The department appealed, and GM cross-appealed.

The Court of Appeals *held*:

1. The trial court erred by finding that the retroactive application of the legislation violated GM's due process rights. The Use Tax Act provides exemptions from use taxation for certain property. Before the enactment of 2007 PA 103, property purchased for resale or demonstration purposes was exempt under MCL 205.94(1)(c). Under *Betten*, even though automobiles in a dealer's inventory were used before being resold, because they had been purchased for resale and were eventually resold, they were exempt from use taxation under that exemption. 2007 PA 103 amended the Use Tax Act to make taxable any use of property purchased for resale other than as passive inventory and changed the definitions of some terms in the act. Those amendments were retroactively made effective beginning September 30, 2002 and for all tax years that were open under the statute of limitations provided in MCL 205.27a. Under *Carlton*, retroactive legislation to correct an unanticipated revenue loss caused by poor drafting of a law or by a judicial decision is rationally related to a legitimate legislative purpose, though the period of retroactivity must be limited by due process considerations to a modest time frame. 2007 PA 103 did not exceed the modest retroactive period allowed because it did not impose a wholly new tax but confirmed a tax assessed and paid for years. GM did not act in reliance on an expectation that its use of program vehicles would be exempt from use taxation or have a vested right to the continuation of a tax statute, and the Legislature responded promptly to *Betten* when it amended the statute. Finally, GM voluntarily waived application of the statute of limitations.

2. The trial court erred by concluding that 2007 PA 103 violated Const 1963, art 4, § 29, which prohibits enactment of a special act when a general act can be made applicable. Legislation may be general in the constitutional sense even if in its application it affects only one person or place as long as the law is general and uniform in its operation on all persons in like circumstances. Nothing in the language of 2007 PA 103 limited its application to GM only, either prospectively or retrospectively. The evidence showed that the proposed legislation was enacted in compliance with all the procedural requirements of Const 1963, art 4, §§ 22, 26, and 33.

3. Although the language of MCL 205.94(1)(c) as amended did not limit application of the exemption for property purchased for demonstration purposes to new car dealers, GM did not qualify for either that exemption or the exemption for property purchased for resale because it manufactured, rather than purchased, its program vehicles. For the same reason, it did not qualify for the

exemption that existed before the statute was amended. GM's use of program vehicles was for its own research and promotion; it did not demonstrate vehicles for the purpose of inducing actual retail sales to customers.

4. Retroactive application of 2007 PA 103 did not violate the Due Process Clause or the Taking Clause, US Const, Am V. A government's exercise of the taxing power does not constitute a Fifth Amendment taking unless the taxation is so arbitrary that it is a confiscation of property. 2007 PA 103 furthered a legitimate state interest, and its retroactive application was rationally related to that legitimate state interest.

5. The title of 2007 PA 103 satisfied the Title-Object Clause of Const 1963, art 4, § 24. No law may embrace more than one object, which must be expressed in the title of the act. The object of a law is its general purpose or aim. Every detail of an amendatory act need not be specified in its title as long as the title comprehensively declares the one main general purpose of the act. 2007 PA 103 identified its purpose as amending specific sections of the Use Tax Act, which is what it did. Nothing more was constitutionally required.

Reversed and remanded.

1. STATUTES — AMENDMENT — RETROACTIVITY.

The retroactive application of 2007 PA 103, which amended provisions of the Use Tax Act, MCL 205.91 *et seq*., to clarify the application of that act to exempt property converted to a taxable use and to remedy any misinterpretation that resulted from the holding in *Betten Auto Ctr v Dep't of Treasury*, 272 Mich App 14 (2006), aff'd in part 478 Mich 864 (2007), does not violate any due process rights (Const 1963, art 1, § 17).

2. STATUTES — SPECIAL LEGISLATION.

Const 1963, art 4, § 29 prohibits the enactment of special legislation if a general act can be made applicable; the fact that a law only applies to a limited number, however, does not make it special rather than general legislation; legislation may be general in the constitutional sense even if in its application it affects only one person or place as long as the law is general and uniform in its operation on all persons in like circumstances.

3. TAXATION — USE TAX — EXEMPTIONS — AUTOMOBILES — PURCHASED FOR RESALE OR DEMONSTRATION PURPOSES.

The exemptions from the Use Tax Act for property purchased for demonstration purposes and for property purchased for resale

require that the property be purchased, not merely manufactured, to qualify for the exemptions; a purchase requires a transfer of property for consideration from one person to another; for purposes of the exemptions, a purchase does not include a manufacturer's obtaining property that it manufactures from a subsidiary of the manufacturer (MCL 205.94[1][c][*iii*]).

4. STATUTES — TITLE-OBJECT CLAUSE — AMENDATORY ACTS.

No Michigan law may embrace more than one object, which must be expressed in the title of the act; the object of a law is its general purpose or aim; every detail of an act need not be specified in its title as long as the title comprehensively declares the one main general purpose of the act and provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose; the general object of an amendatory act is to amend provisions of a statute (Const 1963, art 4, § 24).

Honigman Miller Schwartz and Cohn LLP (by *Alan M. Valade*, *June Summers Haas*, and *John D. Pirich*) and *Sutherland Asbill & Brennan LLP* (by *Kent L. Jones*, *Daniel H. Schlueter*, and *Jeffrey N. Starkey*) for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Bruce C. Johnson*, *Drew M. Taylor*, and *Heidi L. Johnson-Mehney*, Assistant Attorneys General, for defendant.

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

PER CURIAM. Defendant, the Department of Treasury (Treasury), appeals by leave the order of the Court of Claims granting the motion of plaintiff General Motors Corporation (GM) for partial summary disposition with respect to liability on GM's two claims for refunds of taxes it paid on its employees' use of GM-manufactured "program vehicles" for tax periods from October 1, 1996, to August 31, 2007. GM asserts the use of program vehicles was exempt from taxation because the vehicles were "purchased for resale [or] demonstration

purposes" under MCL 205.94(1)(c), as interpreted by *Betten Auto Ctr, Inc v Dep't of Treasury*, 272 Mich App 14; 723 NW2d 914 (2006), aff'd in part and vacated in part 478 Mich 864 (2007). GM also asserts that 2007 PA 103, which amended the Use Tax Act, MCL 205.91 *et seq*., to obviate the holding of *Betten*, was improperly enacted special legislation and, if applied retroactively, would violate GM's constitutional right to due process. Finally, GM contends that its employees' use of program vehicles was exempt from taxation under the Use Tax Act, even as amended.

The Court of Claims agreed with GM and ruled that the retroactive effect of 2007 PA 103 violated GM's right to due process because an 11-year period of retroactive application was contrary to the holding of *United States v Carlton*, 512 US 26; 114 S Ct 2018; 129 L Ed 2d 22 (1994), which permitted only a "modest" period of retroactivity for economic legislation. The Court of Claims also held that 2007 PA 103, if applied retroactively, would violate Michigan's Constitution regarding special legislation, Const 1963, art 4, § 29, because it was enacted for the sole purpose of preventing GM from receiving use tax refunds. Finally, the Court of Claims ruled that GM's program vehicles were exempt from use tax under MCL 205.94(1)(c), as amended by 2007 PA 103, because "GM manufactured cars for resale and demonstration purposes" and "is not licensed as a new vehicle dealer, and thus, is not limited to the exemption on only 25 vehicles as set forth in MCL 205.94(l)(c)(iii)." We reverse.

I. LEGAL AND FACTUAL BACKGROUND

In its opinion and order, the Court of Claims summarized the factual background that frames the legal issues presented on this appeal:

As part of General Motors' ("GM") manufacturing and reselling business, it tests, evaluates, demonstrates, and markets its vehicles and vehicles purchased for resale for [sic] GM subsidiaries. All of GM's salaried personnel in the United States in executive, professional, technical, and other positions, with certain limited exceptions are required, to drive a GM inventory vehicle in one of the Vehicle Programs as an integral part of their job assignment. GM's employee evaluations of driving performance assist GM in the marketing, testing, research, and design of vehicles by testing and collecting data from real world vehicle operation. The vehicles are held in inventory for resale and later sold to the final consumer. The employee's family and household members are prohibited from driving program vehicles except in very limited circumstances. During all the years in issue, GM was required by the Michigan Department of Treasury ("Treasury"), through audit enforcement, to self-assess and remit use taxes on its vehicle inventory operated under the Vehicle Program, and on Marketing Vehicles.

In *Betten Auto Center v. Dep't of Treasury*, 478 Mich. 864 (2007), the Michigan Supreme Court affirmed a portion of a Court of Appeals decision where cars sold by a new car dealer are exempt from liability for any interim use to which the dealer puts them, pending resale, under the resale exemption. While *Betten* appeals were pending, GM filed two use tax refund claims. The first was filed on August 25, 2006, asking for a refund of $65,324,061 for October 1, 1996—March 26, 2002. Treasury placed the claim in abeyance. GM filed a second refund claim on September 14, 2007 seeking $51,433,651 for March 26, 2002—August 31, 2007.

On October 1, 2007, House Bill 4882 became law, as 2007 PA 103, amending the Use Tax Act. Treasury denied GM's refund claims on October 25, 2007, basing the denial on the statutory language of 2007 PA 103, which made clear GM's employees' use of the vehicles made the vehicles ineligible for the resale exemption. Enacting Section 2 of 2007 PA 103 made the amendments effective retroactively, beginning September 30, 2002, and for all tax years not

> barred by the applicable statute of limitations. GM then brought suit, timely filing its initial Complaint in the Court of Claims on December 27, 2007. GM now brings this Motion for Summary Disposition pursuant to MCR 2.116(C)(10), asserting there are no genuine issues with respect to any material fact, and thus, GM is entitled to judgment as a matter of law. Treasury asks that GM's motion to [sic] be denied and summary disposition be entered for Treasury pursuant to MCR 2.116(I)(2) and MCR 2.116(C)(8).

We summarize the legal history regarding the *Betten* decision, the Use Tax Act, and its amendment by 2007 PA 103 before addressing the parties' arguments.

The use tax is designed to complement the tax imposed under the General Sales Tax Act, MCL 205.51 *et seq*. *People v Rodriguez*, 463 Mich 466, 467 n 1; 620 NW2d 13 (2000). At all pertinent times, the Use Tax Act imposed "a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property." MCL 205.93(1). Property is exempt from use taxation if it is "sold in this state on which transaction a tax is paid under the general sales tax act" and "if the tax was due and paid on the retail sale to a consumer." MCL 205.94(1)(a). Thus, the use tax "applies to certain personal property transactions in which the seller does not collect a sales tax on behalf of the state." *Rodriguez*, 463 Mich at 467 n 1. Before its 2007 amendment, the Use Tax Act, in general, placed the ultimate responsibility for payment of its levy on the ultimate consumer or purchaser of tangible property. MCL 205.97; *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 408, 415-416; 590 NW2d 293 (1999); *Betten*, 272 Mich App at 19.

At issue in the present case are exemptions from use taxation for property "purchased for resale, demonstration purposes," which before 2007 PA 103 provided:

(1) The following are exempt from the tax levied under this act, subject to subsection (2):

* * *

(c) Property purchased for resale, demonstration purposes, or lending or leasing to a public or parochial school offering a course in automobile driving except that a vehicle purchased by the school shall be certified for driving education and shall not be reassigned for personal use by the school's administrative personnel. For a dealer selling a new car or truck, exemption for demonstration purposes shall be determined by the number of new cars and trucks sold during the current calendar year or the immediately preceding year without regard to specific make or style according to the following schedule of 0 to 25, 2 units; 26 to 100, 7 units; 101 to 500, 20 units; 501 or more, 25 units; but not to exceed 25 cars and trucks in 1 calendar year for demonstration purposes. Property purchased for resale includes promotional merchandise transferred pursuant to a redemption offer to a person located outside this state or any packaging material, other than promotional merchandise, acquired for use in fulfilling a redemption offer or rebate to a person located outside this state.

* * *

(2) The property or services under subsection (1) are exempt only to the extent that the property or services are used for the exempt purposes if one is stated in subsection (1). The exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the department. [MCL 205.94, as amended by 2004 PA 172.]

In *Betten*, the plaintiffs were "all licensed automobile dealerships selling both new and used automobiles [that] paid [Treasury] a total of $48,449.74 in use taxes on vehicles that plaintiffs purchased for resale, allowed their employees to use, and ultimately resold." *Betten*,

272 Mich App at 15. The plaintiffs had filed their claims for refunds after this Court decided *Crown Motors of Charlevoix, Ltd v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 4, 2003 (Docket No. 240555).

The *Crown* case also involved a new and used car dealership and, although the parties agreed that the plaintiff had purchased all vehicles for resale and in fact resold them, Treasury asserted that the interim use of the vehicles was subject to use tax. Relying on *Rodriguez*, 463 Mich 471-472, the *Crown* Court reasoned that the exemption for property "purchased for resale" in MCL 205.94(1)(c) was clear and unambiguous and that this language " 'conveys a legislative intent inconsistent with purchase for another purpose.' " *Crown*, unpub op at 3, quoting *Rodriguez*, 463 Mich at 472. Thus, the *Crown* Court held that the plaintiff was not liable for use tax because its inventory vehicles were purchased for resale, and although it was subject to interim use, under *Rodriquez*, "property is either purchased for resale or it is not; here, it was indeed purchased for resale." *Crown*, unpub op at 3.

The *Crown* Court also rejected Treasury's argument that the plaintiff's interim use of the vehicles resulted in their "conversion" to a taxable use. Treasury relied on MCL 205.97, which at that time provided, in part, that "[e]ach consumer storing, using or otherwise consuming in this state tangible personal property or services purchased for or subsequently converted to such purpose or purposes shall be liable for the tax imposed by this act . . . ." The Court noted that the primary purpose of this section was to impose the economic burden of the use tax on the consumers of property and that the Legislature had provided no guidance regarding "*how* or *when* property can be

'converted' from one purpose to another." *Crown*, unpub op at 3. The *Crown* Court also held that 1979 AC, R 205.9 did not apply because it addressed situations in which property purchased for resale was consumed rather than resold, whereas in *Crown*, the parties agreed that all property was ultimately resold. *Crown*, unpub op at 3. Consequently, the Court ruled that Treasury had not supported its conversion theory with applicable and binding authority. *Id*.

Because *Crown* was unpublished, it lacked binding precedential authority, MCR 7.215(C)(1), and on this basis, Treasury denied the *Betten* plaintiffs' claim for a refund. *Betten*, 272 Mich App at 16. But Treasury conceded that the plaintiffs were entitled to a demonstration exemption for up to 25 vehicles because the Legislature had adopted a formula for taxing demonstration vehicles in excess of that number. *Id*. at 16-17, 20; see 2002 PA 110.[1]

The *Betten* Court held that even though the plaintiffs' inventories of vehicles for sale were used in the interim before resale, "the vehicles in question are exempt from the imposition of a use tax under the resale exemption contained in MCL 205.94(1)(c)." *Betten*, 272 Mich App at 20. The *Betten* Court, like the *Crown* Court, relied on *Rodriguez* and the clear and unambiguous language of MCL 205.94(1)(c). The Court noted that the parties essentially agreed that the vehicles in question were purchased as inventory for resale and that the vehicles were, in fact, resold. Therefore, the Court held "the resale exemption applies to all the vehicles in question." *Betten*, 272 Mich App at 21.

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[1] 2002 PA 110 amended MCL 205.93(2), effective March 27, 2002. GM apparently bases the time frames for its refund claims on the effective date of 2002 PA 110, and the parties signed waivers keeping the statute of limitations open for claims dating back to October 1, 1996. MCL 205.27a(3)(b).

Treasury also asserted in *Betten* that the interim employee use of the inventory vehicles resulted in their "conversion" to a taxable use. In light of the *Crown* decision "and for other reasons," the *Betten* Court was not persuaded by Treasury's conversion argument. *Betten*, 272 Mich App at 21-22. One of the "other reasons" for rejecting the conversion argument, the Court explained, was that MCL 205.97 imposed liability for use tax only on a "consumer." The Court held "that plaintiffs' employees' limited use of the vehicles did not transform plaintiffs or their employees into 'consumers' of the vehicles under MCL 205.97." *Id.* at 22. The *Betten* Court also utilized a dictionary definition of "consumer" to buttress this conclusion and reasoned that our Supreme Court had held that the " 'the appropriate party to pay a use tax is the consumer, not the seller.' " *Id*., quoting *World Book*, 459 Mich at 415-416.

Although concluding the exemption for property "purchased for resale" applied, the *Betten* Court also held that vehicles in excess of 25 were taxable under MCL 205.93(2), as amended by 2002 PA 110. *Betten*, 272 Mich App at 23-26. Our Supreme Court subsequently vacated that part of the decision but affirmed this Court's decision regarding MCL 205.94(1)(c). *Betten Auto Ctr, Inc v Dep't of Treasury*, 478 Mich 864 (2007).

This Court decided *Betten* on August 1, 2006. On August 25, 2006, GM filed its first claim for a refund of the use taxes paid on its employees' use of program vehicles over the period from October 1, 1996, to March 26, 2002. Treasury held GM's claim in abeyance pending appeal of *Betten* to our Supreme Court, which issued its order on May 25, 2007. *Betten*, 478 Mich 864. On June 7, 2007, HB 4882, which later became 2007 PA 103, was introduced in the Michigan House of Representatives. Treasury and the Legislature clearly were

concerned regarding the impact of the *Betten* decision on state revenue. The legislative analysis for HB 4882 stated:

> The Department of Treasury estimates that the *Betten Auto Center* decision (See Background Information) has a potential one-time cost of $250.2 million based on refund claims received from automobile manufacturers and dealerships, and projected on-going costs of $29.2 million. To the extent the bill reduces refund claims and subjects converted property and services to taxation, the state would realize cost savings on the order of the above cited figures. [House Legislative Analysis, HB 4882, August 29, 2007, p 2.]

Our Supreme Court denied reconsideration in *Betten* on July 9, 2007. *Betten Auto Ctr v Dep't of Treasury*, 478 Mich 938 (2007). On September 14, 2007, GM filed its second claim for a refund of the use taxes paid on its employees' use of program vehicles for the period from March 28, 2002, to August 31, 2007.

Meanwhile, the Michigan House approved HB 4882 on September 24, 2007, and the Michigan Senate approved the bill on September 30, 2007. The Governor signed HB 4882 into law on October 1, 2007, and it became 2007 PA 103. The Legislature gave the act retroactive effect by providing as follows:

> Enacting section 1. It is the intent of the legislature that this amendatory act clarify that a person who acquires tangible personal property for a purpose exempt under the use tax act, 1937 PA 94, MCL 205.91 to 205.111, who subsequently converts that property to a use taxable under the use tax act, 1937 PA 94, MCL 205.91 to 205.111, is liable for the tax levied under the use tax act, 1937 PA 94, MCL 205.91 to 205.111.
>
> Enacting section 2. This amendatory act is curative and intended to prevent any misinterpretation of the ability of a taxpayer to claim an exemption from the tax levied under

> the use tax act, 1937 PA 94, MCL 205.91 to 205.111, based on the purchase of tangible personal property or services for resale that may result from the decision of the Michigan court of appeals in Betten Auto Center, Inc v Department of Treasury, No. 265976, as affirmed by the Michigan Supreme Court. This amendatory act is retroactive and is effective beginning September 30, 2002 and for all tax years that are open under the statute of limitations provided in section 27a of 1941 PA 122, MCL 205.27a. [2007 PA 103.]

2007 PA 103 thus amended the Use Tax Act to "clarify" that essentially any use of property purchased for resale other than as passive inventory results in conversion of the property such that the use is taxable. 2007 PA 103 did this by amending several provisions. It amended § 7 of the Use Tax Act by striking the word "consumer" and inserting the word "person" so that "[e]ach *person* storing, using, or consuming in this state tangible personal property or services *is* liable for the tax *levied under* this act . . . ." MCL 205.97(1) (italicized words added by 2007 PA 103). The amendments also expanded the definition of "use" to provide that "[c]onverting tangible personal property acquired for a use exempt from the tax levied under this act to a use not exempt from the tax levied under this act is a taxable use." MCL 205.92(b). In addition, MCL 205.97(2) was added to provide: "A person who acquires tangible personal property or services for any tax-exempt use who subsequently converts the tangible personal property or service to a taxable use, including an interim taxable use, is liable for the tax levied under this act." Further, the definition of "purchase" was amended to include "converting tangible personal property acquired for a use exempt from the tax levied under this act to a use not exempt from the tax levied under this act." MCL 205.92(e).

The pertinent section imposing on "every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state" was amended by 2007 PA 103 to add that the "act applies to a person who acquires tangible personal property or services that are subject to the tax levied under this act for any tax-exempt use who subsequently converts the tangible personal property or service to a taxable use, including an interim taxable use." MCL 205.93(1). The 2007 amendment also defined the word "convert" to mean

> putting a service or tangible personal property acquired for a use exempt from the tax levied under this act at the time of acquisition to a use that is not exempt from the tax levied under this act, whether the use is in whole or in part, or permanent or not permanent. [MCL 205.92(q).]

The word "consumer" was amended to include "[a] person who has converted tangible personal property or services acquired for storage, use, or consumption in this state that is exempt from the tax levied under this act to storage, use, or consumption in this state that is not exempt from the tax levied under this act." MCL 205.92(g)(*ii*). 2007 PA 103, however, did not disturb the holdings of *Crown* and *Betten* with respect to new vehicle dealers, providing in MCL 205.92(q) that "a motor vehicle purchased for resale by a new vehicle dealer licensed under section 248(8)(a) of the Michigan vehicle code, 1949 PA 300, MCL 257.248, and not titled in the name of the dealer shall not be considered to be converted before sale or lease by that dealer."

On the parties' motions for summary disposition, the Court of Claims ruled in favor of GM, holding that giving retroactive effect to 2007 PA 103 would violate GM's right to due process, that the act violated Michigan's constitutional provision regarding special legisla-

tion, Const 1963, art 4, § 29, and that GM's program vehicles were exempt from use tax under MCL 205.94(1)(c), as amended by 2007 PA 103. This Court granted Treasury's application for leave to appeal, and GM asserts in a timely cross-appeal several alternative grounds to affirm the Court of Claims.

II. STANDARD OF REVIEW

Claims that a statute is unconstitutional, as well as statutory interpretation, are questions of law this Court reviews de novo. *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). A trial court's decision to grant a motion for summary disposition is also reviewed de novo. *Id*.

Statutes are presumed to be constitutional, and this presumption is especially strong with respect to tax legislation. *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992); *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 635; 732 NW2d 116 (2007). The party challenging the constitutionality of the statute has the burden of proving the law's invalidity. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). "The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation." *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). In other words, "when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case." *Id*. A party claiming an exemption from a tax has the burden of establishing that it applies:

> Tax exemptions are disfavored, and the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption. Tax exemptions are in deroga-

> tion of the principle that all shall bear a proportionate share of the tax burden, and therefore, a tax exemption shall be strictly construed. [*Id*. at 374-375 (citations omitted).]

Furthermore,

> " 'if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant.' " [*Id*. at 375, quoting *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), § 672, p 1403.]

III. DUE PROCESS

"The Fourteenth Amendment to the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of 'life, liberty or property, without due process of law.' " *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). Although textually only providing procedural protections, the Due Process Clause has a substantive component that protects individual liberty and property interests from arbitrary government actions. *Id*. at 522-523; *Cummins v Robinson Twp*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009). But to be protected by the Due Process Clause, a property interest must be a vested right. *Detroit v Walker*, 445 Mich 682, 698-699; 520 NW2d 135 (1994); *Sherwin v State Hwy Comm'r*, 364 Mich 188, 200; 111 NW2d 56 (1961). A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Walker*, 445 Mich at 699. More specifically, a vested right

> " 'is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.' " [*GMAC*, 286 Mich App at 377, quoting *Cusick v Feldpausch*, 259 Mich 349, 352; 243 NW 226 (1932), quoting 2 Cooley, Constitutional Limitations (8th ed), p 749.]

GM's claim for a refund of use taxes it paid was not a vested right but rather a mere expectation that its claim might succeed in light of the *Betten* decision. GM's claim rests on the theory that it held a vested chose in action—its refund claim—and relies on cases involving rights of action for damages to property or personal injury. But this case involves a tax—not a right of action—and the United States Supreme Court has opined that

> "[t]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process . . . ." [*Carlton*, 512 US at 33, quoting *Welch v Henry*, 305 US 134, 146-147; 59 S Ct 121; 83 L Ed 87 (1938).]

GM, as a taxpayer, does not have a vested right in a tax statute or in the continuance of any tax law. *Walker*, 445 Mich at 703; *GMAC*, 286 Mich App at 377-778.

But we also reject Treasury's argument that GM's claim regarding retroactivity is a "red herring" because 2007 PA 103 is curative legislation merely bringing clarity to existing law. "An amendment may apply retroactively where the Legislature enacts an amendment to clarify an existing statute and to resolve a

controversy regarding its meaning." *Mtg Electronic Registration Sys, Inc v Pickrell*, 271 Mich App 119, 126; 721 NW2d 276 (2006). An amendment that affects substantive rights generally will not fall within this rule. See *Brewer v A D Transp Express, Inc*, 486 Mich 50, 57; 782 NW2d 475 (2010). Although 2007 PA 103 clarified some parts of the Use Tax Act, it also codified Treasury's theory regarding the conversion of property held for a tax-exempt use to a taxable use that this Court had held was not part of the statute before its amendment. That is, because the amendment affected substantive rights or obligations, it cannot come within the rule permitting retroactive "remedial" amendments.

On the other hand, we reject as well GM's assertion that the Legislature acted illegitimately when it enacted 2007 PA 103 for the purpose of reversing a judicial decision and thus failed to satisfy the first *Carlton* due process criterion for permissible retroactive legislation: specifically, that the Legislature's "purpose in enacting the amendment was neither illegitimate nor arbitrary." *Carlton*, 512 US at 32. This is a negative statement of the substantive due process requirement that legislation that does not affect a suspect classification or involve the deprivation of a fundamental right must merely bear a reasonable relation to a permissible legislative objective. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 404; 738 NW2d 664 (2007). Retroactive economic legislation must satisfy this rational basis test both for its prospective as well as its retrospective application. See *Carlton*, 512 US at 30-31.

GM's claim that the Legislature acted illegitimately is without merit.[2] While the Legislature may not re-

[2] Indeed, GM waived this claim by not raising it below. The Court of Claims noted that "[GM] does not claim the legislature's purpose" in enacting 2007 PA 103 "was illegitimate or arbitrary."

verse a judicial decision or repeal a final judgment, *Wylie v Grand Rapids City Comm*, 293 Mich 571, 582; 292 NW 668 (1940), that did not occur here. The *Betten* decision held the exemption for property "purchased for resale" applied to automobile dealers despite interim business use before resale. But 2007 PA 103 specifically exempted licensed new vehicle dealers from its conversion net. MCL 205.92(q). The amendment also added that the "purchased for resale" exemption includes "[m]otor vehicles purchased for resale purposes by a new vehicle dealer licensed under section 248(8)(a) of the Michigan vehicle code, 1949 PA 300, MCL 257.248." MCL 205.94(1)(c)(*iv*). Consequently, 2007 PA 103 did not "reverse a judicial decision or repeal [a] final judgment . . . ." *Wylie*, 293 Mich at 582. Moreover, it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted. See *Gen Motors v Romein*, 503 US 181, 191; 112 S Ct 1105; 117 L Ed 2d 328 (1992); *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.").

A legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as "rationally related to a legitimate legislative purpose." *Carlton*, 512 US at 35. But the Court of Claims here found that 2007 PA 103 violated due process on the basis that the *Carlton* majority held that substantive due process places temporal limits on the reach of retroactive tax legislation and that 2007 PA 103 exceeded those limits. The *Carlton* majority upheld under the Due Process Clause the retroactive legislation in that case because "[f]irst, Congress' purpose in enacting the amendment was

neither illegitimate nor arbitrary." *Carlton*, 512 US at 32. Specifically, the Court found that "Congress acted to correct what it reasonably viewed as a mistake" in the original legislation "that would have created a significant and unanticipated revenue loss." *Id*. Further, there was nothing to indicate that Congress deliberately sought to induce taxable transactions. *Id*. The *Carlton* majority also opined that Congress imposed only a "modest" period of retroactivity:

> Second, Congress acted promptly and established only a modest period of retroactivity. . . . Congress "almost without exception" has given general revenue statutes effective dates prior to the dates of actual enactment. This "customary congressional practice" generally has been "confined to short and limited periods required by the practicalities of producing national legislation." . . . In *Welch* v *Henry*, 305 US 134 (1938), the Court upheld a Wisconsin income tax adopted in 1935 on dividends received in 1933. The Court stated that the " 'recent transactions' " to which a tax law may be retroactively applied "must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment." *Id.*, at 150. Here, the actual retroactive effect of the 1987 amendment extended for a period only slightly greater than one year. Moreover, the amendment was proposed by the IRS in January 1987 and by Congress in February 1987, within a few months of [26 USC] 2057's original enactment. [*Id.* at 32-33.]

Additionally, in distinguishing cases from a different era, the *Carlton* majority opined that the retroactive legislation "at issue here certainly is not properly characterized as a 'wholly new tax,' and its period of retroactive effect is limited." *Id*. at 34. But in summarizing its holding, the Court did not specifically include a temporal "modesty" requirement: "Because we conclude that retroactive application of the 1987 amendment to § 2057 is rationally related to a legitimate legislative purpose, we conclude that the amendment as

applied to Carlton's 1986 transactions is consistent with the Due Process Clause." *Id.* at 35.

We agree that a majority of justices on the United States Supreme Court would hold that the Due Process Clause imposes some limit on the retroactive reach of tax legislation. The Kentucky Supreme Court in *Miller v Johnson Controls, Inc*, 296 SW3d 392 (Ky, 2010), attempted to synthesize the views of the justices in *Carlton* and concluded that the modesty requirement is part of the rational basis test with its length determined on a case-by-case basis considering the totality of the facts and circumstances. The Kentucky Supreme Court opined:

> Retroactive application of a statute need only be (1) supported by a legitimate legislative purpose (2) furthered by rational means, which includes an appropriate modesty requirement. This requires analysis of the facts and circumstances of each case, rather than applying a specified modesty period. The pertinent question is whether the period of retroactivity is one that makes sense in supporting the legitimate governmental purpose (rationally related).
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> * * *
>
> Clearly, eight of the nine justices viewed what may "rationally further" a legitimate governmental interest as being broader than the one year that only Justice O'Connor would impose as a "modesty" measure. Thus what is "modest" or acceptable for due process purposes depends on the facts of the case, including notice, settled expectations, detrimental reliance, etc. [*Id.* at 399.]

Balancing the government's interest in retroactive application of a statute against that of the taxpayer's interest in finality must be added to this mix of circumstances to determine whether the limit of modest retroactivity is reached. Justice O'Connor in her concur-

ring opinion in *Carlton* noted that no case had held that the government has "unlimited power to 'readjust rights and burdens . . . and upset otherwise settled expectations.' " *Carlton*, 512 US at 37 (O'Connor, J., concurring) (citation omitted). In Justice O'Connor's view, "The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." *Id*. at 37-38.

The totality of circumstances in this case establishes that the retroactive application of 2007 PA 103 does not exceed the modesty limitation of the Due Process Clause. First, the amendment does not reach back in time to assess a "wholly new tax" on long-concluded transactions. Rather, it seeks to confirm a tax that had been assessed by Treasury and paid by taxpayers for many years. Indeed, GM never sought to contest its liability for the use taxes it paid for years until after the *Betten* decision, which extended a hope that such a refund claim might be successful. Second, GM did not act in reliance on an expectation its activity would not be taxed. Instead, GM utilized some of its manufactured vehicles for its own business purposes with notice that Treasury had asserted that such activity was taxable. In short, GM did not rely on the preamendment version of the Use Tax Act to its detriment. Third, the Legislature acted promptly in response to the *Betten* decision to correct what might have resulted in a significant loss of previously collected revenue. Fourth, the nominal period to which the amendment retrospectively applies—five years—cannot be said to extend beyond the taxpayers' interest in finality and repose because the period of retroactivity is consistent with the applicable statute of limitations. Moreover, although 2007 PA 103 applies in the case of GM beyond the statute of limitations' general rule, it does so only because GM voluntarily waived application the statute of limitations. By its

waiving application of the statute of limitations, we conclude that GM has also waived any interest it may have had under the Due Process Clause to "finality and repose." *Carlton*, 512 US at 37-38 (O'Connor, J., concurring). Finally, the period of retroactive application for 2007 PA 103 is comparable to the time frames of other retroactive legislation that this Court, other state courts, and federal courts have held were within the modesty limits of the Due Process Clause.[3]

In summary, GM has not overcome the presumption that 2007 PA 103 is constitutional, and the Court of Claims erred by concluding otherwise. 2007 PA 103 does not violate due process because the act "is rationally related to a legitimate legislative purpose"—the limit-

[3] See *GMAC*, 286 Mich App at 378 (affirming a seven-year retroactive application of an amendment to MCL 205.54i); *Enterprise Leasing Co of Phoenix v Arizona Dep't of Revenue*, 221 Ariz 123; 211 P 3d 1 (Ariz App, 2008) (approving a six-year period of retroactivity amending pollution control tax credit excluding property attached to motor vehicles); *King v Campbell Co*, 217 SW3d 862 (Ky App, 2006) (upholding 2005 legislation denying refunds of county taxes overpaid since 1986 under a 2004 judicial decision); *Miller*, 296 SW3d 392 (affirming legislation adopted in 2000 that retroactively ratified a 1988 tax agency policy barring related business entities from filing unified returns, which a 1994 judicial decision had ruled violated Kentucky law); *Zaber v City of Dubuque*, 789 NW2d 634 (Iowa, 2010) (approving legislation ratifying city-imposed cable television franchise fees retroactively for 5½ years after a court had ruled the fees illegal); *Canisius College v United States*, 799 F2d 18 (CA 2, 1986) (approving tax legislation with four-year retroactivity that ratified an IRS revenue ruling of doubtful validity); *Licari v Internal Revenue Comm'r*, 946 F2d 690, 695 (CA 9, 1991) (approving the four-year retroactive application of an enhanced tax penalty approved as "a rational means by which to guard the public fisc by reimbursing the government for heavy burden of investigative and prosecutorial costs incident to ferreting out tax underpayment"); *Tate & Lyle, Inc v Internal Revenue Serv Comm'r*, 87 F3d 99 (CA 3, 1996) (upholding six-year retroactive application of a tax regulation requiring the taxpayer to use a cash method of accounting); *Montana Rail Link, Inc v United States*, 76 F3d 991 (CA 9, 1996) (approving four-year retroactive application of a tax statute).

ing of an interpretation of the Use Tax Act that might have caused significant and unanticipated loss of tax revenue that had been collected in good faith. See *Carlton*, 512 US at 32, 35. To the extent the Due Process Clause limits the reach of retroactive legislation to only a modest time frame, that limitation was not exceeded here. 2007 PA 103 does not readjust rights and burdens or upset settled expectations such that GM's "interest in finality and repose" exceeds the state's interest in revising the Use Tax Act to protect the precarious public treasury from refund claims that are as much as 11 years old. GM does not have a protected, vested right to the continuation of a tax statute, and the period of retroactivity here does not exceed the limits of the Due Process Clause. The Court of Claims' ruling to the contrary must be reversed.

IV. SPECIAL LEGISLATION

Treasury argues that the Court of Claims clearly erred by ruling that 2007 PA 103 violates the Michigan constitutional provision restricting special legislation. We agree.

Const 1963, art 4, § 29 provides:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

" 'The mere fact that a law only applies . . . to a limited number does not make it special instead of

general. It may be general within the constitutional sense and yet, in its application, only affect one person or one place.' " *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 349; 22 NW2d 433 (1946) (citation omitted). If a law is general and uniform in its operation upon all persons in like circumstances, it is general in the constitutional sense. *Id* at 350.

In this case, no language in 2007 PA 103 limits its application to only GM. Further, GM concedes that in its prospective application the act is "clearly general legislation applicable to all taxpayers." Yet there is nothing in the retrospective application of the law that changes its general character. While it is clear that 2007 PA 103 was intended to preclude large refund claims, particularly by automobile manufacturers, the language used by the statute is general and has broad application. The only evidence that GM asserts supports its claim is Treasury's revised estimates of lost revenue when it learned that other automobile manufacturers (Ford Motor Company and DaimlerChrysler Corporation) did not intend to seek use tax refunds in the wake of the *Betten* decision. However, the fact that other vehicle manufacturers decided not to seek a use tax refund does mean that the act did not apply to Ford and DaimlerChrysler. Instead, other manufacturers might have reasoned that the Legislature would act promptly to adopt legislation "to obviate a judicial interpretation." *GMAC*, 286 Mich App at 380. If so, those taxpayers might have rationally decided to invest resources on manufacturing and marketing automobiles rather than pursuing a likely futile refund claim for use taxes that had been paid and accounted for in prior years. In sum, nothing on the face of 2007 PA 103, or any evidence presented below, supports the conclusion that 2007 PA 103 is special legislation governed by Const 1963, art 4, § 29.

The Court of Claims' reasoning regarding the lack of legislative committee hearings, which GM does not appear to adopt, also does not support the court's ruling. The Court of Claims cited no legal authority for concluding that the lack of committee hearings was a basis for holding that 2007 PA 103 is special legislation. As Treasury argues, GM participated in the political process during the Legislature's deliberative process, and 2007 PA 103 was adopted in compliance with all requisite procedural requirements. Although no committee hearings were held on HB 4882 before its adoption, it became law because it satisfied the constitutional requirements of bicameralism and presentment. Const 1963, art 4, §§ 22, 26, and 33. The lack of committee hearings is irrelevant. "[T]he Journals of the House and Senate are conclusive evidence of those bodies' proceedings, and when no evidence to the contrary appears in the journal, [courts] will presume the propriety of those proceedings." *Michigan Taxpayers United, Inc v Governor*, 236 Mich App 372, 379; 600 NW2d 401 (1999). Nothing here rebuts the presumption of propriety regarding the enactment of 2007 PA 103. The Court of Claims must be reversed on this issue.

V. STATUTORY CONSTRUCTION

Treasury argues that the Court of Claims abused its discretion by allowing GM to amend its complaint and erred by ruling that GM qualified for an exemption from use taxes for demonstration purposes.[4] Treasury

[4] It is not entirely clear whether the Court of Claims based this ruling on the statute as amended by 2007 PA 103 or as the statute existed before the amendment. Because the court cited MCL 205.94(1)(c)(*iii*), which reflects the changes in the structure of subdivision (c) made by 2007 PA 103, we assume that the court based its ruling on the amended statute.

also asserts the exemption provided by MCL 205.94(1)(c)(*iii*) is only available for new car dealers. We disagree.

Treasury has not established that the Court of Claims abused its discretion by allowing GM to amend its complaint to add a claim that its program vehicles were also exempt under the "demonstration purposes" exemption. While the amendment asserted a new legal theory, it did not raise a new claim and Treasury has not shown that granting the amendment prejudiced it.

Furthermore, nothing in the first clause of MCL 205.94(1)(c)(*iii*) limits its application to new car dealers as Treasury asserts. The plain language of the amended statute provides in part: "The following are exempt from the tax levied under this act . . . : Property purchased for demonstration purposes." MCL 205.94(1)(c)(*iii*). Although the subparagraph places limits on the exemption for new vehicle dealers, the "demonstration purposes" exemption is not itself limited to new car dealers. Nevertheless, for the reasons set forth later, we conclude as a matter of statutory construction that GM does not qualify for either the "purchased for resale" or "purchased for demonstration purposes" exemption because it manufactured rather than purchased its program vehicles and because its program vehicles were not used for demonstration purposes at the retail sales level.

Although GM asserts it clearly was entitled to an exemption from use taxation under the preamendment version of MCL 205.94(1)(c) for "[p]roperty purchased for resale, demonstration purposes," its actions in not filing a claim for a refund until after this Court decided *Betten* belie this contention. We agree with Treasury that clear differences exist between GM and the *Betten* plaintiffs. Most notably, GM *manufactures* new ve-

hicles, marketing them through retailers like the *Betten* plaintiffs, who were new and used vehicle *dealers*. The *Betten* plaintiffs "purchased for resale" the vehicles in their inventory, and the exemption of MCL 205.94(1)(c) remained despite other interim business use before a resale occurred. *Betten*, 272 Mich App at 20, 23. This Court rejected Treasury's argument that the *Betten* plaintiffs' vehicles were "converted" to a taxable use by applying dictionary definitions to the word "consumer" in MCL 205.97, *Betten*, 272 Mich App at 22, but our Supreme Court criticized using a dictionary when the Use Tax Act provided its own definitions, *Betten*, 478 Mich App at 864. Thus, the Use Tax Act's own definitions must be applied if available. Before the enactment of 2007 PA 103, the Use Tax Act defined "purchase" as follows:

> "Purchase" means to *acquire for a consideration*, whether the acquisition is effected by a *transfer* of title, of possession, or of both, or a license to use or consume; whether the *transfer* is absolute or conditional, and by whatever means the *transfer* is effected; and whether *consideration is a price* or rental in money, or by way of exchange or barter. [MCL 205.92(e), as amended by 2004 PA 172 (emphasis added).]

As defined by MCL 205.92(e), "purchase" explicitly requires an acquisition of property for consideration of something of value—money or other property. Also, "purchase" explicitly requires a *transfer* of property, either of title or possession, or a license to use or consume, which implicitly must occur from one person to another. While GM might have acquired the materials and labor necessary to assemble its vehicles, it did not acquire them for consideration in a transfer from another person. The Court of Claims noted that "GM *manufactured* cars for resale and demonstration purposes through its Vehicle Programs in question." (Emphasis added.)

GM admits that it manufactured the majority of its program vehicles but that some were obtained from its subsidiaries. We conclude that GM's acquisition of vehicles from its subsidiaries does not come within the definition of "purchase" under MCL 205.92(e) because a transfer for consideration is explicitly required by subsection (e), which implicitly requires a transfer from one person to another. The use tax applies to a "person," MCL 205.93(1), and "person" is defined to include any "firm, partnership, joint venture, association, . . . company, . . . or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context." MCL 205.92(a). GM and its subsidiaries "acting as a unit" constitute a "person" under the Use Tax Act, and that person manufactures vehicles that are marketed to the public through retail dealers. We hold that GM cannot "purchase" vehicles from itself (its subsidiaries) to qualify for a use tax exemption under MCL 205.94(1)(c).

The Legislature in adopting the Use Tax Act clearly recognized the distinction between the words "purchase" and "manufacture." In the very next subdivision after defining "purchase," MCL 205.92(f) defines the word "price," in part, by defining "manufacture." In relation to defining "price" for tangible personal property affixed to real estate, MCL 205.92(f) provided before amendment by 2007 PA 103: "For purposes of this subdivision, 'manufacture' means to convert or condition tangible personal property by changing the form, composition, quality, combination, or character of the property . . . ." Thus, we find that GM did not "purchase" its inventory of vehicles as "purchase" is defined by the Use Tax Act; it "manufactured" them. Consequently, GM did not have a vested right to a refund of use tax paid under the "purchased for resale"

exemption as it existed before the enactment of 2007 PA 103. In addition, this same analysis applies to the "purchased for demonstration purposes" exemption as it existed before the enactment of 2007 PA 103. This is because the word "purchased" in the phrase "[p]roperty purchased for resale [or] demonstration purposes" in MCL 205.94(1)(c) modified both "resale" and "demonstration purposes." In other words, a prerequisite for the application of either exemption is that property be "purchased" for either "resale" or "demonstration purposes." Since GM did not "purchase" its vehicles, but "manufactured" them, GM does not qualify for either exemption. This conclusion is buttressed by the rule of statutory construction that tax exemptions must be strictly construed, must never be implied, and must be expressed by the Legislature in clear and unmistakable terms. See *GMAC*, 286 Mich App at 375.

This analysis applies with respect to GM's claims for a refund under the Use Tax Act both before and after the act's amendment by 2007 PA 103. Under both versions of the act, exemptions for resale and demonstration purposes depend on property being "purchased" for those purposes. Although the 2007 legislation did amend the definition of "purchase" to include conversion from a nontaxable use to a taxable use, this amendment does not assist GM. Specifically, 2007 PA 103 added to MCL 205.92(e) the following: "Purchase includes converting tangible personal property acquired for a use exempt from the tax levied under this act to a use not exempt from the tax levied under this act." But the definition of "purchase" as discussed earlier remains. The amended definition does not help GM because its vehicles are manufactured rather than purchased. A conversion from nontaxable to taxable use cannot occur if the property and its use do not qualify initially as exempt.

Moreover, we conclude Treasury correctly asserts the "demonstration purposes" exemption is intended to apply at the retail sales level, i.e., to permit use without tax of demonstrator vehicles for the purpose of inducing actual sales from actual prospective consumers. This conclusion is supported by GM's own argument that this Court should apply the Michigan Vehicle Code definition of "demonstrator" as "a motor vehicle used by a prospective customer or a motor vehicle dealer or his agent for testing and demonstration purposes." MCL 257.11a. This definition describes a dealer's, dealer's agent's, or customer's (an actual retail purchaser) testing or demonstrating a motor vehicle. Dealers sell and customers buy. So the only reasonable reading of this definition is that it relates to "testing and demonstration" in furtherance of a potential retail sale. In contrast, GM uses its program vehicles for purposes of quality control and to increase awareness in the general public of its products. As GM summarizes in its brief on appeal, "the purpose of the Vehicle Programs is to collect data essential to the evaluation of product quality and performance in a continuous and timely manner, and to increase the visibility of, and consumer interest in, GM vehicles." Because GM does not use its program vehicles for the purpose of inducing actual retail sales by demonstrating vehicles to actual customers but rather for quality control and marketing, it does not qualify for the "purchased for demonstration purposes" exemption of MCL 205.94(1)(c)(*iii*).

Given our construction of the statute, we hold that the Court of Claims erred by ruling that "GM is exempt from paying use tax on all vehicles used for resale and demonstration purposes." GM does not qualify for the resale exemption or the "demonstration purposes" exemption under either version of the Use Tax Act. Indeed, this construction of the statute renders GM's

constitutional claims moot because even if we were to determine that 2007 PA 103 was unconstitutional, GM would not be entitled to the relief it seeks, a refund of use taxes paid. An issue is moot if an event has occurred that renders it impossible for the court to grant relief. *City of Warren v Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004). An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy. *People v Richmond*, 486 Mich 29, 34-35; 782 NW2d 187 (2010). But we may review a moot issue if it is publicly significant and likely to recur, yet may evade judicial review. *City of Warren*, 261 Mich App at 166 n 1. We have done so here.

In sum, the Court of Claims erred by ruling as a matter of statutory construction that "GM is exempt from paying use tax on all vehicles used for resale and demonstration purposes." GM did not "purchase" its vehicle inventory as that word is defined by MCL 205.92(e); rather, GM manufactured those vehicles. MCL 205.94(1)(c) requires that property be purchased for resale or demonstration purposes to assert those exemptions from use taxation. Moreover, because GM does not use its program vehicles for the purpose of inducing actual retail sales by demonstrating vehicles to actual customers but rather for quality control and marketing in the broad sense, it does not qualify for the "purchased for demonstration purposes" exemption of MCL 205.94(1)(c)(*iii*), as amended by 2007 PA 103.

VI. GM'S CROSS-APPEAL

GM presents several arguments in its cross-appeal as alternative grounds to affirm the Court of Claims' ruling in its favor. Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal.

Polkton Twp v Pellegrom, 265 Mich App 88, 95; 693 NW2d 170 (2005). Although this Court need not address an unpreserved issue, it may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Because the issues GM raises present questions of law and the facts necessary to resolve them have been presented, this Court may address them. *Id*. In addition, Treasury concedes that the issues GM raises on cross-appeal have been properly preserved. Because the parties have briefed the issues raised, there is no impediment to this Court's deciding them.

A. THE TAKING CLAUSE

GM argues that the retroactive application of 2007 PA 103 denied it a vested right to a refund of use taxes paid in error, which violates both the Due Process Clause and the Taking Clause. US Const, Am V. We disagree.

We reject GM's claim to a vested right and its due process arguments for the reasons already discussed. GM's Fifth Amendment argument also fails. The government's exercise of its taxing power "does not constitute a Fifth Amendment taking unless the taxation is so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property . . . .' " *Quarty v United States*, 170 F3d 961, 969 (CA 9, 1999), quoting *Brushaber v Union Pacific R Co*, 240 US 1, 24; 36 S Ct 236; 60 L Ed 493 (1916). In this case, 2007 PA 103 furthered a legitimate state

interest of preserving the public treasury, and its retroactive application is rationally related to this legitimate state interest. Consequently, 2007 PA 103 does not violate the Due Process Clause. *Carlton*, 512 US at 30-31, 33. Having satisfied the Due Process Clause, it would be illogical to find the retroactive application of 2007 PA 103 so arbitrary as to offend the Taking Clause. See *Quarty*, 170 F3d at 969. GM's Taking Clause claim fails to serve as an alternative basis to sustain the Court of Claims' ruling.

B. THE TITLE-OBJECT CLAUSE

GM argues that the title of 2007 PA 103 fails to satisfy the Title-Object Clause of the Michigan Constitution. Const 1963, art 4, § 24 provides in part: "No law shall embrace more than one object, which shall be expressed in its title." The "object" of a law is its general purpose. GM contends that the title of 2007 PA 103 does not mention that it is given retroactive effect, clarifies the *Betten* decision, eliminates GM's resale exemption, and redefines the term "convert." Therefore, GM argues, the act violates Const 1963, art 4, § 24. We disagree.

The purpose of the Title-Object Clause is to ensure "that legislators and the public receive proper notice of legislative content and prevents deceit and subterfuge." *Pohutski v Allen Park*, 465 Mich 675, 691; 641 NW2d 219 (2002). "The 'object' of a law is defined as its general purpose or aim." *Id*. The constitutional requirement should be construed reasonably and permits a bill enacted into law to "include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object." *Id*.

> Finally, the constitutional requirement is not that the title refer to every detail of the act; rather, "[i]t is sufficient

> that 'the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose . . . .' " [*Id*. at 691-692, quoting *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 501; 378 NW2d 402 (1985) (citations omitted).]

Enrolled House Bill 4882 that the Governor signed into law on October 1, 2007, becoming 2007 PA 103, is titled:

> AN ACT to amend 1937 PA 94, entitled "An act to provide for the levy, assessment and collection of a specific excise tax on the storage, use or consumption in this state of tangible personal property and certain services; to appropriate the proceeds thereof; and to prescribe penalties for violations of the provisions of this act," by amending sections 2, 3, 4, and 7 (MCL 205.92, 205.93, 205.94, and 205.97), sections 2, 3, and 4 as amended by 2004 PA 172.

The title thus states that the act's general object is to amend §§ 2, 3, 4, and 7 of the Use Tax Act, which are codified in MCL 205.92, 205.93, 205.94, and 205.97. This title clearly states the act's general purpose, and all details in 2007 PA 103 are germane to this object. The particular details of the amendments of §§ 2, 3, 4, and 7 of the Use Tax Act need not be specified in the amendatory act's title to withstand scrutiny under Const 1963, art 4, § 24. *Pohutski*, 465 Mich at 691-692. Indeed, the title succinctly states its one, and only one, general purpose. Nothing more is constitutionally required. GM has not overcome the presumption that 2007 PA 103 is constitutional. *Health Care Ass'n Workers Compensation Fund v Bureau of Worker's Compensation Dir*, 265 Mich App 236, 251; 694 NW2d 761 (2005). GM's Title-Object Clause argument fails to serve as an alternative basis to sustain the Court of Claims' ruling.

C. PERIOD OF RETROACTIVITY

GM argues that assuming that 2007 PA 103 is constitutional, its plain terms limit its retroactive effect to tax periods beginning September 30, 2002. GM argues that, at a minimum, it is entitled to a tax refund for the period from October 1, 1996, to September 29, 2002. GM contends that the word "and" in enacting section 2 of 2007 PA 103 establishes two conditions for the amendment's retroactive application, both of which must be satisfied. We disagree.

First, GM's underlying premise—that it is entitled to a use tax refund under the Use Tax Act as it existed before the enactment of 2007 PA 103, as interpreted by the *Betten* decision—is misplaced for the reasons discussed in part V of this opinion. Second, the Legislature's use of the conjunction "and" does not serve to establish two criteria for the retroactive application of 2007 PA 103; rather, it sets alternative temporal markers for the extent of the act's retroactive application.

When drafting statutes, the Legislature often misuses the words "and" and "or." *Miller-Davis Co v Ahrens Const, Inc*, 285 Mich App 289, 308; 777 NW2d 437 (2009). The words used in a statute must be construed in light of the general purpose the Legislature sought to accomplish. *Id*. Further, "[o]nce the intention of the Legislature is discovered, this intent prevails regardless of any conflicting rule of statutory construction." *GMAC*, 286 Mich App at 372. The Legislature expressly sought to apply 2007 PA 103 retroactively, and the phrase at issue sets the outer limits—not conditions—for that retroactivity.

"The term 'and' is defined as a conjunction, and it means 'with; as well as; in addition to[.]' " *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428; 766 NW2d 878 (2009), quoting *Random House Webster's College Dic-*

tionary (1997). Thus, the pertinent sentence may be read: "This amendatory act is retroactive and is effective beginning September 30, 2002 [as well as; in addition to] for all tax years that are open under the statute of limitations provided in section 27a of 1941 PA 122, MCL 205.27a." See enacting section 2 of 2007 PA 103. Because MCL 205.27a, to which the Legislature specifically referred when it set its temporal limits for retroactivity, permits the tolling of the period of limitations by agreement extending back before September 30, 2002, limiting the retroactive application of 2007 PA 103 to tax periods beginning September 30, 2002, only would render the latter part of the sentence nugatory. We conclude that the Legislature intended to extend the retroactive application of 2007 PA 103 back to September 30, 2002, "as well as" or "in addition to" as far back as any tax year for which the statute of limitations may be open under MCL 205.27a. This interpretation is consistent with the general purpose of the statute to limit refund claims premised on the *Betten* decision. The Legislature intended that the act apply to all taxpayers that might still be able to claim a refund. GM's interpretation of the sentence at issue would frustrate the Legislature's intent. The intention of the Legislature prevails regardless of any conflicting rule of statutory construction. *GMAC*, 286 Mich App at 372.

D. THE SEPARATION OF POWERS

GM argues that Treasury's failure to act on GM's August 25, 2006, refund claim in light of the published *Betten* decision denied GM its right to due process and also violated the constitutional principle of the separation of powers. We disagree.

GM's argument on this issue has no merit. Indeed, GM cites no authority for the proposition that a judg-

ment in favor of one party must be applied to a different person or entity that was not a party to the judgment and has different factual circumstances. Even if GM were correct that it would be entitled to a refund if the principles of *Betten* were applied to GM's factual situation, GM cites no authority that would preclude Treasury from litigating whether the *Betten* rationale should be extended to GM's factual situation. The failure to cite authority for a position constitutes abandonment of that issue. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

In addition, as discussed already, GM is not entitled to a refund under the statute as amended pursuant to the Due Process Clause. And even under the statute before its amendment, GM was not entitled to a use tax exemption intended for "[p]roperty purchased for resale, demonstration purposes . . . ." MCL 205.94(1)(c), as amended by 2004 PA 172. Finally, Treasury's actions did not offend the constitutional principle of the separation of powers because by holding GM's claim in abeyance, Treasury was not reversing, repealing, or otherwise failing to comply with the *Betten* judgment. See *Taxpayers United for the Mich Constitution, Inc v Detroit*, 196 Mich App 463, 468-469; 493 NW2d 463 (1992), and *Wylie*, 293 Mich at 582. This argument fails to serve as an alternative basis to sustain the Court of Claims' ruling.

VII. CONCLUSION

For the reasons discussed in this opinion, we reverse and remand for entry of judgment in favor of the Department of Treasury. We do not retain jurisdiction. No taxable costs shall be assessed pursuant to MCR 7.219 because questions of public policy are involved.

THOMAS v DUTKAVICH

Docket No. 293229. Submitted October 12, 2010, at Marquette. Decided October 28, 2010, at 9:05 a.m.

Robert A. Thomas brought a quiet-title action in the Schoolcraft Circuit Court against Laverne and Marilyn Dutkavich and the Schoolcraft County Sheriff in which he also alleged slander of title. The Dutkaviches had previously obtained a judgment of approximately $30,000 against Steve Pelletier. Despite his outstanding judgment debt, Pelletier purchased the real property at issue, a condominium unit, through a warranty deed recorded in January 2007. In July 2007, the Dutkaviches filed a notice of judgment lien against the property. In September 2007, Pelletier and his wife, Kelly Jo Pelletier, executed a warranty deed transferring the property to Thomas. Although the proceeds of the sale were sufficient to satisfy the judgment, Pelletier failed to distribute any of the sale proceeds to the Dutkaviches. Several months later, following a request by the Dutkaviches, a notice of levy on real estate was executed and recorded by the Schoolcraft County Sheriff's Department. Thomas then filed suit. The Dutkaviches filed a counterclaim, asserting that Thomas should have directed a payment to them when he purchased the condominium and seeking a money judgment. Thomas moved for summary disposition. The court, William W. Carmody, J., granted Thomas's motion for summary disposition, concluding that Thomas had no duty to ensure that the Dutkaviches were paid out of the sale proceeds. The court's order also provided that the notice of judgment lien was discharged and dismissed the sheriff from the action. The Dutkaviches appealed.

The Court of Appeals *held*:

1. Under the Michigan judgment lien act (MJLA), MCL 600.2801 *et seq*., a judgment can be enforced by recording a judgment lien on appropriate property. MCL 600.2803 provides that if a judgment creditor records a notice of judgment lien with the register of deeds for the county in which the property is located, the judgment lien attaches to the judgment debtor's interest in the property.

2. Under MCL 600.2807(1), a judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the judgment was entered against both the husband and the wife. In this case, the judgment was entered against Steve Pelletier alone, but Kelly Jo Pelletier had only a dower interest in the property. The Pelletiers did not hold the property as tenants by the entirety. The Legislature did not protect those with only a dower interest in property from the filing of a judgment lien, and the judgment lien properly attached to the condominium regardless of Kelly Jo Pelletier's dower interest.

3. Under MCL 600.2819, the judgment debtor is obligated to pay the judgment creditor from the real estate sale proceeds. Because Thomas was not the judgment debtor, he was not obligated to pay the Dutkaviches, and the trial court properly dismissed the Dutkaviches' counterclaim for money damages.

4. The Legislature did not directly address the resulting status of a judgment lien when the judgment debtor, although capable of doing so, has failed to make a required payment to the judgment creditor under MCL 600.2819. However, related provisions in the MJLA indicate that a judgment lien remains attached to the property despite new ownership when a lien has not been fully discharged. The necessary corollary is that when no payment has been made to the judgment creditor from available real estate sale proceeds, the judgment lien remains attached to the property and is not dischargeable except upon full payment. Therefore, the trial court erred by discharging the lien, and Thomas's slander-of-title claim should have been dismissed.

5. Although the judgment lien remained attached to the property, MCL 600.2819 does not allow foreclosure of a lien created under the MJLA. However, the Dutkaviches might have been able to levy on the property under MCL 600.6018, which is the provision of the Revised Judicature Act traditionally governing the collection of judgments and executions against real property. Because the trial court failed to address the arguments raised by the Dutkaviches under MCL 600.6018, remand was necessary.

Affirmed in part, reversed in part, and remanded.

1. LIENS — JUDGMENT LIENS — ATTACHMENT — TENANTS BY THE ENTIRETY — DOWER INTEREST OF NONDEBTOR.

A judgment lien under the Michigan judgment lien act does not attach to an interest in real property owned as tenants by the entirety unless the judgment was entered against both the husband and the wife; however, the statute does not protect a woman who has only a dower interest in property from the filing and

attachment of a judgment lien when her spouse is the sole judgment debtor (MCL 600.2807[1]).

2. LIENS — JUDGMENT LIENS — SALE OF PROPERTY — PAYMENT REQUIRED BY JUDGMENT DEBTOR.

The judgment debtor is obligated under the Michigan judgment lien act to pay the judgment creditor from the proceeds of a sale of real estate to which a judgment lien had attached; the purchaser of the property is not obligated to pay the judgment creditor (MCL 600.2819).

3. LIENS — JUDGMENT LIENS — SALE OF PROPERTY — FAILURE OF THE JUDGMENT DEBTOR TO SATISFY THE JUDGMENT — NEW OWNER — LIEN STATUS.

A judgment lien recorded under the Michigan judgment lien act remains attached to the property and is not dischargeable if the judgment debtor has not made payment from the proceeds of a sale of the property despite the fact of new ownership of the property (MCL 600.2801 *et seq*.).

4. LIENS — JUDGMENT LIENS — FORECLOSURE.

There is no right to foreclose a judgment lien created under the Michigan judgment lien act (MCL 600.2819).

Plunkett Cooney (by *Mary Massaron Ross*, *Hilary A. Ballentine*, and *James J. Murray*) for Robert A. Thomas.

Randolph B. Osstyn for Laverne and Marilyn Dutkavich.

Amicus Curiae:

Buckles & Buckles, PLC (by *Michael H. R. Buckles*), and *Roger L. Premo* for the Michigan Creditors Bar Association.

Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

MURPHY, C.J. Defendants Laverne and Marilyn Dutkavich appeal as of right the trial court's order granting summary disposition in favor of plaintiff, Robert A.

Thomas, with respect to his action to quiet title to real property, a condominium unit, and his claim of slander of title. The order granting summary disposition in favor of Thomas also effectively dismissed a counterclaim filed by the Dutkaviches. This appeal requires us to interpret the Michigan judgment lien act (MJLA), MCL 600.2801 *et seq*., and to determine whether a judgment lien survives and can be foreclosed on after the judgment debtor's conveyance of the encumbered real property to a vendee who had record notice of the lien, but no available closing proceeds were distributed to the judgment creditor in whole or partial satisfaction of the underlying judgment. The Dutkaviches, who were the underlying judgment creditors, had sought to levy or foreclose on the property, which Thomas had purchased from the underlying judgment debtor, Steve Pelletier, without any proceeds going to pay off the judgment lien despite sufficient funds being available to discharge the lien. The trial court found that Thomas was not at fault for Pelletier's failure to use the closing proceeds to pay off the Dutkaviches, and the court ordered the discharge of the judgment lien. We hold that the MJLA, while not permitting the foreclosure of the judgment lien and not giving Thomas any statutory obligation to have made payment to the Dutkaviches, did require that the judgment lien remain attached to the property. We also hold, however, that outside the MJLA, the Dutkaviches may be able to levy on the property pursuant to MCL 600.6018, which is the traditional method of executing on realty to satisfy a judgment. A remand is necessary to explore the issue of levying pursuant to MCL 600.6018. Therefore, the trial court erred by discharging the judgment lien and erred by not considering MCL 600.6018. Consistently with our holding, the Dutkaviches' counterclaim seeking to hold Thomas personally liable was properly dismissed;

Thomas's slander-of-title claim should have been dismissed; Thomas's quiet-title count should have been dismissed with regard to his request that the court discharge the judgment lien; and, with regard to levy and foreclosure under the quiet-title count, Thomas was entitled to the favorable ruling relative to the MJLA, but levying under MCL 600.6018 needs to be examined on remand. Accordingly, we affirm in part, reverse in part, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 6, 2004, in the Delta County Circuit Court, the Dutkaviches obtained a judgment against Steve Pelletier in the amount of $29,183.[1] A warranty deed, executed on December 29, 2006, and recorded on January 24, 2007, indicates that Pelletier purchased the real property at issue, a condominium unit located in Schoolcraft County, from Miller Point Development, L.L.C. Pelletier is the only vendee named in the warranty deed. A future-advances mortgage, executed on December 29, 2006, and recorded on February 7, 2007, reflects that Pelletier, along with his wife Kelly Jo Pelletier, obtained a mortgage on the property from the State Savings Bank of Manistique (mortgagee bank).

On July 20, 2007, the Dutkaviches filed a notice of judgment lien with the register of deeds office in Schoolcraft County with respect to the condominium unit. The notice provided that the balance owing on the judgment had increased to $33,368. On September 12, 2007, a real estate closing was held in which Steve and

[1] We note that the notice of judgment lien reflects that the judgment was entered on December 6, 2003; however, the request and order to seize property and the notice of levy on real estate indicate that the judgment was entered on December 6, 2004. The judgment itself is not contained in the lower court record. The discrepancy does not affect our analysis and ruling.

Kelly Jo Pelletier executed a warranty deed conveying the property to Thomas. The warranty deed was recorded the following day. The mortgage on the property held by the mortgagee bank, with the Pelletiers as mortgagors, was discharged the day before the closing. According to the warranty deed and the closing statement, the sale price for the property was $53,000. The settlement information contained in the closing statement indicates that, after taking into account the payment of taxes, title insurance, and closing fees, the Pelletiers were paid $51,784.[2] None of the proceeds from the sale were distributed to the Dutkaviches; there was no effort to satisfy the judgment lien despite the undisputed fact that the notice of judgment lien had been recorded before the closing. The trial court record does not include any documentary evidence concerning conversations at the closing or how the closing was conducted, let alone evidence revealing why the parties decided to proceed without designating a payment for the Dutkaviches. The closing documentation reflects that Fox Real Estate, Inc., was involved in the transaction.

On January 18, 2008, pursuant to a request by the Dutkaviches, the Delta Circuit Court entered an order to seize property relative to the judgment, which now had grown to $33,556, given accruing interest and postjudgment costs. A report of collection activity under the order to seize property reveals that a deputy sheriff was unable to locate any personal property held by Steve Pelletier that exceeded the statutory exemption. About a week later, in February 2008, a notice of levy on real estate was executed and recorded by a deputy sheriff with the Schoolcraft County Sheriff's Department.

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[2] The settlement information does not show that the mortgagee bank received any distribution from the sale proceeds and, as previously noted, the mortgage was discharged the day before the closing.

On March 2, 2009, Thomas filed the instant quiet-title action in the Schoolcraft Circuit Court against the Dutkaviches and the Schoolcraft County Sheriff (SCS). Count I of the complaint, which pertained to all defendants, alleged that Thomas had purchased the property from the Pelletiers, that Steve Pelletier, but not his wife Kelly Jo, was subject to the Delta Circuit Court judgment obtained in favor of the Dutkaviches; that the Dutkaviches had recorded the notice of judgment lien before the sale of the property to Thomas; and that the Dutkaviches, through the efforts of a deputy sheriff employed by the SCS, had recorded the notice of levy on real estate following the sale. Plaintiff further alleged, as part of count I, that he owned the property free and clear of the Dutkaviches' interest and that, under MCL 600.2819, there could be no foreclosure on the lien and Thomas could not be held liable to the Dutkaviches. MCL 600.2819 provides:

> There is no right to foreclose a judgment lien created under this chapter. At the time the judgment debtor makes a conveyance, as that term is defined in section 35 of 1846 RS 65, MCL 565.35, of, sells under an executory contract, or refinances the interest in real property that is subject to the judgment lien, the judgment debtor shall pay the amount due to the judgment creditor, as determined under [MCL 600.2807(3)], to the judgment creditor.

According to Thomas, because the notice of levy was recorded after he purchased the property and after Steve Pelletier no longer held any interest in the property, the notice of levy was invalid under the MJLA. In count II of the complaint, Thomas alleged slander of title against the Dutkaviches, claiming that they had refused to discharge the judgment lien despite his requests for discharge and that their refusal constituted malice. In his prayer for relief, Thomas asked the trial court to declare the judgment

lien and notice of levy void and order them discharged, to declare the warranty deed conveying the property to Thomas as superior to any interest held by the Dutkaviches, and to compensate Thomas for the damages and costs that he had incurred as a result of the slander of title.

The Dutkaviches filed a counterclaim, alleging that Thomas had failed to direct a payment to the Dutkaviches from the money being paid by Thomas to the Pelletiers at the closing, as was necessary to discharge the judgment lien. The Dutkaviches maintained that Thomas had paid the Pelletiers $51,784 at the closing and, therefore, there was more than enough money available from which Thomas could and should have paid the Dutkaviches. This claim sought a money judgment against Thomas.

Thomas moved for summary disposition, presenting an argument that paralleled the allegations in his complaint, as previously set forth. He also argued that it was improper for the Dutkaviches to have recorded the notice of judgment lien when the judgment was solely against Steve Pelletier and that property held as a tenancy by the entirety cannot be subject to a lien and levy on the basis of a judgment entered against only one of the spouses. The Dutkaviches responded by contending that the amount due under the judgment lien was not paid to them upon sale of the property as required by the MJLA. According to the Dutkaviches, discharge of the judgment lien would only be proper if the lien had been paid in full from the proceeds of the real estate transaction between Thomas and the Pelletiers. Therefore, Thomas was not entitled to summary disposition. The Dutkaviches also argued that the property had previously been deeded to Steve Pelletier in his name

only, and not to Steve and Kelly Jo Pelletier, and thus Thomas's argument premised on the existence of a tenancy by the entirety was inapplicable. Finally, the Dutkaviches asserted that they could levy on the property pursuant to MCL 600.6018, which is the traditional method to execute on realty. The SCS also moved for summary disposition, arguing in part that, when filing the notice of levy, he was acting in accordance with various statutory requirements and was acting in good faith and without malice.

At the hearing on the motions for summary disposition, the trial court initially entered a stipulated order as between Thomas and the SCS that discharged the notice of levy and resulted in the dismissal of the SCS from the case.[3] The trial court then proceeded to hold that Thomas had no duty under MCL 600.2819 to make sure that the Dutkaviches were paid out of the sale proceeds. The court, concluding that Thomas was not at fault, granted his motion for summary disposition without any mention of MCL 600.6018. Subsequently, an order was entered that provided that Thomas's motion for summary disposition was granted, the notice of judgment lien was discharged, and the order could be recorded with the register of deeds to effectuate the discharge.[4]

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[3] Thomas's claim on appeal that the Dutkaviches joined the stipulation is not supported by the record.

[4] The trial court never specifically touched on the Dutkaviches' counterclaim at the hearing on the motions for summary disposition. But the court's finding that Thomas was without fault and had no duty relative to MCL 600.2819 would negate the counterclaim that Thomas should be held liable on a money judgment for not having directed payment of the sale proceeds to the Dutkaviches in order to satisfy the judgment lien. The final order subsequently entered by the trial court indicated that it resolved all pending claims and closed the case, which order necessarily encompassed the counterclaim.

II. ANALYSIS

A. APPELLATE ARGUMENTS

The Dutkaviches argue that payment in full is a prerequisite to discharging a judgment lien under the MJLA and there was no payment here whatsoever. They contend that the judgment lien was properly recorded before the Pelletiers sold the property to Thomas, that Thomas thus had constructive notice of the lien and was not a bona fide purchaser for value, and that the judgment lien was an appropriate cloud on Thomas's title, given that Thomas had failed to demand that the lien be discharged with proceeds from the sale. The Dutkaviches, while acknowledging that their underlying judgment was entered solely against Steve Pelletier, also maintain that the judgment lien properly attached to the property because Pelletier had purchased the property in his own name and the property was not held as a tenancy by the entirety. Next, the Dutkaviches assert that they could levy on the property pursuant to MCL 600.6018, even if they could not foreclose under the MJLA. Finally, the Dutkaviches argue that equity requires that they be paid the amount due on the judgment.

Thomas contends that MCL 600.2819 requires the judgment debtor alone to pay the judgment creditor with proceeds from a sale of the property in order to satisfy the judgment; there is no such duty with respect to the purchaser of the property, regardless of whether the purchaser has constructive notice of the judgment lien. Thomas also contends that equity does not favor the Dutkaviches, as they had available the remedy of foreclosing on the property before the sale, yet they failed to act until after Thomas acquired his interest in the condominium unit. Thomas further argues that

MCL 600.6018 is not applicable because the levy was recorded after he purchased the property. Finally, and in the alternative, Thomas maintains that the judgment lien did not properly attach to the property because the underlying judgment was solely against Steve Pelletier and the lien attempted to encumber property in which Kelly Jo Pelletier had a dower interest.

B. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). We also review de novo issues of statutory construction. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

C. PRINCIPLES OF STATUTORY CONSTRUCTION

In *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010), our Supreme Court recited the well-established principles of statutory construction:

> 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, 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 legislature is presumed to have

> used particular words in the sense in which they have been interpreted. [Citations and quotation marks omitted.]

D. DISCUSSION

The MJLA was enacted pursuant to 2004 PA 136 and made effective on September 1, 2004. Under the MJLA, a "judgment" is defined as including "a final judgment" of a "court of record of this state." MCL 600.2801(a)(*i*). Thus, the judgment obtained by the Dutkaviches against Steve Pelletier in the Delta Circuit Court qualified as a judgment for purposes of the MJLA and could be enforced by the recording of a judgment lien on appropriate property. A "judgment lien" is defined as "an encumbrance in favor of a judgment creditor against a judgment debtor's interest in real property, including, but not limited to, after acquired property." MCL 600.2801(c). If a judgment creditor records a notice of judgment lien with the register of deeds for the county in which the real property is located, the judgment lien attaches to the judgment debtor's interest in the real property. MCL 600.2803. "The judgment lien attaches at the time the notice of judgment lien is recorded or, for after acquired property, at the time the judgment debtor acquires the interest in the property." *Id.* The notice of judgment lien must conform to the technical requirements of MCL 600.2805(1) and (2) and must be served on the judgment debtor in accordance with either MCL 600.2805(3) or (4).[5]

We shall first address the argument that the judgment lien never properly attached to the property because the judgment was against Steve Pelletier but the lien was recorded against property in which Kelly Jo Pelletier held a dower interest. "A judgment lien does

[5] Thomas does not argue that the Dutkaviches failed to comply with MCL 600.2805.

not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both the husband and wife." MCL 600.2807(1). There is no dispute that the Delta County judgment was entered solely against Steve Pelletier and that the warranty deed reflecting a conveyance of the property listed only Steve Pelletier as the purchaser or vendee.

"[A]n estate by entireties refers to a form of co-ownership held by husband and wife with right of survivorship[.]" *Lilly v Schmock*, 297 Mich 513, 517; 298 NW 116 (1941). "Our longstanding common law provides that, when a deed is conveyed *to a husband and wife*, the property is held as a tenancy by the entirety." *Walters v Leech*, 279 Mich App 707, 711; 761 NW2d 143 (2008) (emphasis added). A tenancy by the entirety may be created by a deed conveying property to a husband and wife "jointly," by a deed conveying property to a husband and wife as "joint tenants," or by a deed conveying property to a husband and wife "jointly and not as tenants in common[.]" 1 Cameron, Michigan Real Property Law (3d ed), § 9.13, p 327, citing *Goethe v Gmelin*, 256 Mich 112; 239 NW 347 (1931), *Dutcher v Van Duine*, 242 Mich 477; 219 NW 651 (1928), and *Hoyt v Winstanley*, 221 Mich 515; 191 NW 213 (1922).[6] Kelly Jo Pelletier was not named in the warranty deed that conveyed the property from Miller Point Development, L.L.C., to Steve Pelletier; therefore, no tenancy by the entirety was created. And there is no deed showing that Steve Pelletier ever subsequently conveyed the property to himself and Kelly Jo jointly.

[6] Although a conveyance of land made to two or more persons is generally construed to create an estate in common and not a joint tenancy, an exception exists when the conveyance is made to a husband and wife. MCL 554.44 and MCL 554.45.

Simply because Kelly Jo Pelletier executed the warranty deed, along with Steve Pelletier, with respect to the later conveyance to Thomas does not mean that the property had been held by Steve and Kelly Jo as tenants by the entirety. Rather, this was likely done because "the statute of frauds requires both the seller and his wife with a dower interest to sign a purchase agreement in order to create a valid contract for the sale of land." *Slater Mgt Corp v Nash*, 212 Mich App 30, 32; 536 NW2d 843 (1995).

With respect to the dower-interest argument, "dower is a longstanding historical right that preexisted even the formation of our nation and that has become embedded in Michigan . . . law." *In re Miltenberger*, 482 Mich 901, 904 (2008) (CORRIGAN, J., concurring). MCL 558.1 provides, "The widow of every deceased person, shall be entitled to dower, or the use during her natural life, of 1/3 part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof."[7]

"Dower may be relinquished or conveyed as provided by law." Const 1963, art 10, § 1. This constitutional provision "makes it clear that the drafters of the Michigan Constitution intended to recognize dower as a legitimate property interest." *In re Miltenberger Estate*, 275 Mich App 47, 56; 737 NW2d 513 (2007). The right of dower is a contingent estate that becomes vested on the death of the husband and is to be protected before and after vesting. *Oades v Std S & L Ass'n*, 257 Mich 469, 473; 241 NW 262 (1932). When a husband owns an estate of inheritance in real estate, "his wife has a dower interest in that property." *Slater Mgt*, 212 Mich App at 31. "The dower interest attaches on marriage

[7] Dower interests are also addressed in MCL 700.2202, part of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*.

and applies to land the husband owned before marriage and brings into the marriage as well as land acquired during the marriage." 1 Cameron, § 8.3, p 287. No sole act of a husband can prejudice his wife's right to dower. *Oades*, 257 Mich at 473. A husband cannot deprive his wife of her dower rights, and she can only be divested of those rights by an act of the state or by or in consequence of her own voluntary actions. *Greiner v Klein*, 28 Mich 12, 17 (1873).

The Legislature referred only to "tenants by the entirety" in MCL 600.2807(1) without any mention of a wife's dower interests or rights. Given the extensive statutory and constitutional history of dower rights, we cannot deem the failure by the Legislature to include a reference to dower interests in the MJLA as an oversight but rather as a conscious decision to only protect tenancies by the entirety from the filing of a judgment lien when one spouse was not a judgment debtor. If we were to hold that a judgment lien under the MJLA cannot attach to property in which a wife has only a dower interest when the wife was not subject to the underlying judgment, we would improperly be reading language into the statute that simply does not exist. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) ("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 the statute itself.").

Furthermore, we fail to see how the recording of the judgment lien on the property, *in and of itself*, deprived or divested Kelly Jo Pelletier of any dower interest that she held under the law. There was no attempt to foreclose on the judgment lien before the sale of the property to Thomas, and we ultimately hold in this opinion that the judgment lien cannot be foreclosed on

under the MJLA, which is consistent with MCL 600.2819. Also, Kelly Jo Pelletier participated in the Pelletier-Thomas closing and executed the warranty deed conveying the property, thereby voluntarily extinguishing or relinquishing her dower interest. Const 1963, art 10, § 1; *In re Stroh Estate*, 151 Mich App 513, 516; 392 NW2d 192 (1986) ("No contract of sale or conveyance by a husband without his wife's signature will operate to divest her of her dower."). Indeed, even when we examine the issue at the point in time at which the judgment lien attached to the property, which was before the sale to Thomas, the worst case scenario from Mrs. Pelletier's perspective would be a sale or refinancing of the property resulting in a payment to the Dutkaviches under MCL 600.2819. However, she could fully protect her dower interest in either circumstance, as the sale or refinancing could not come to fruition until she was in full agreement with the terms of the transaction and executed the necessary documentation. In sum, we are not prepared to find a divestiture of a dower interest on the basis of the attachment of a judgment lien to property with respect to which a wife has a dower interest, but no liability on the underlying judgment, and when payment to a judgment creditor on a sale or refinancing is the only possible consequence flowing from the lien. Accordingly, the judgment lien here properly attached to the property regardless of any dower interest held by Kelly Jo Pelletier.

Next, we hold that the judgment lien must remain attached to the property and could not have been discharged by the sale of the property to Thomas. As indicated previously, MCL 600.2819 provides that when a judgment debtor sells an interest in the property subject to the judgment lien, "the *judgment debtor* shall pay the amount due to the judgment creditor, as determined under [MCL 600.2807(3)], to the judgment credi-

tor." (Emphasis added.) We first note that, under the clear and unambiguous language of MCL 600.2819, the obligation or duty to pay the judgment creditor from real estate sale proceeds rests solely with the judgment debtor, here Steve Pelletier. Therefore, Thomas had no such obligation, and the Dutkaviches' counterclaim seeking to hold him liable on a money judgment fails. The MJLA reflects that the Legislature did not specifically contemplate a judgment debtor capable of making the required payment to the judgment creditor under MCL 600.2819 but failing to do so, let alone directly address the resulting status of the judgment lien upon the failure. However, various statutes within the MJLA aside from MCL 600.2819 effectively answer these questions.

With respect to a sale or refinancing of the property, MCL 600.2807(3), which is cross-referenced in MCL 600.2819, provides:

> If property subject to a judgment lien recorded under this chapter is sold or refinanced, proceeds of the sale or refinancing due to a judgment creditor are limited to the judgment debtor's equity in the property at the time of the sale or refinancing after all liens senior to the judgment lien, property taxes, and costs and fees necessary to close the sale or refinancing are paid or extinguished.

Therefore, MCL 600.2807(3) contemplates situations in which a judgment debtor sells his or her property, but because of the limited equity in the property, the judgment lien may not be fully satisfied. When the funds available following a sale are insufficient to entirely satisfy the judgment lien, the MJLA requires that MCL 600.2807(3) be read in conjunction with MCL 600.2811, which provides in relevant part:

> If payment on a judgment lien is made from the judgment debtor's equity as described in [MCL 600.2807(3)]

> and is not payment in full of the amount due on the lien, the judgment creditor or the judgment creditor's attorney shall record a *partial discharge of judgment lien* for the amount paid. [Emphasis added.]

Accordingly, even after a successful conveyance of the property to a vendee who takes fee simple title and the payment of some monies to the judgment creditor, if an outstanding balance remains on the judgment lien, the lien is only *partially* discharged and effectively continues to be an encumbrance on the property despite the new ownership. Furthermore, MCL 600.2813(2) also addresses a partial payment of the judgment lien when the equity in the property falls short of the amount owing on the lien:

> If a judgment debtor has paid a judgment in full or has made a partial payment from equity as described in section [MCL 600.2807(3)], has sent a request [for discharge] under subsection (1), and is unable, after exercising due diligence, to locate the judgment creditor or the judgment creditor's attorney, the judgment debtor may record an affidavit that complies with this subsection with the register of deeds with whom the judgment lien is recorded. The judgment debtor shall state in the affidavit that the judgment debtor sent a request under subsection (1) to the judgment creditor or the judgment creditor's attorney and shall attach to the affidavit a copy of a written instrument that evidences payment of the judgment and a copy of the receipt for the certified mailing of the request. Recording the affidavit, written instrument, and receipt discharges the judgment lien completely or, *if payment is made from the judgment debtor's equity as described in* [*MCL 600.2807(3)*] *and is not payment in full of the amount due on the lien, partially to the extent of the amount paid.* [Emphasis added.]

Again, this language contemplates the continued attachment of a judgment lien on property despite new ownership when the lien has not been fully discharged.

The necessary corollary is that, when no payment whatsoever has been made to the judgment creditor from available real estate sale proceeds, as was the case here, the judgment lien remains attached to the property and is not dischargeable except upon full payment. If partial payment does not result in the full discharge of a judgment lien, no payment at all certainly cannot result in a discharge.

Although this outcome may appear unfair to Thomas at first glance, it is required by the statutory language and, moreover, Thomas had, at a minimum, constructive notice of the recorded judgment lien. See *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 93-94; 731 NW2d 99 (2006). Despite the notice, Thomas decided to proceed with the closing without demanding that payment be made to the judgment creditors, the Dutkaviches, so that the lien would be extinguished. Although the onus was on Steve Pelletier under MCL 600.2819 to make the payment to the Dutkaviches, Thomas, as the purchaser, certainly had the ability to direct and dictate where his funds would go as part of the closing settlement, at least to the extent that he could have chosen to walk away from the transaction had it not met with his satisfaction.[8] This might explain the Legislature's decision to allow judgment liens to remain attached to conveyed property when only partial payment on the lien was made. In such a scenario, the purchaser, having constructive notice of the lien, would have the ability and choice to not proceed with the closing and, if the purchaser decided to proceed, he or she would do so knowing that the judgment lien remained a cloud on the title and could be problematic. In

[8] For this reason and given the constructive notice of the judgment lien, Thomas's argument that his due process rights will be violated if the lien remains attached lacks merit.

a modern real estate transaction, it is difficult to conceive, given the general demands and requirements of new mortgagees and title insurers and escrow agents, that a transaction would be completed and closed absent full discharge of outstanding liens, yet it did occur here.

Our conclusion is further supported by MCL 600.2809. Under MCL 600.2809(1) through (4), a judgment lien expires five years after the date that it was recorded, unless the judgment itself expires beforehand, at which time the lien would also expire, or unless the lien is rerecorded, which a judgment creditor may only do once, not less than 120 days before the expiration date of the initial judgment lien. MCL 600.2809(6) addresses the extinguishment of a judgment lien, providing:

> A judgment lien is extinguished when 1 or more of the following are recorded with the office of the register of deeds where the judgment lien is recorded:
>
> (a) A discharge of judgment lien signed by the judgment creditor or the judgment creditor's attorney.
>
> (b) A certified copy of a satisfaction of judgment that has been filed with the court that issued the judgment.
>
> (c) A certified copy of a court order that discharges the judgment lien.
>
> (d) A copy of the judgment debtor's discharge in bankruptcy issued by a United States bankruptcy court and a copy of the bankruptcy schedule listing the judgment debt. This subdivision does not apply if an order entered in the judgment debtor's bankruptcy case determining that the debt is nondischargeable is recorded with the register of deeds.

Aside from the circumstance described in MCL 600.2809(6)(c), none of these events occurred in this case. With respect to MCL 600.2809(6)(c), there is of

course the trial court's order discharging the judgment lien. However, this provision cannot allow a judgment lien to be and remain discharged simply because the trial court so ordered when the order was subject to appeal and did not otherwise comply with the MJLA, as we have held. Accordingly, there is no statutory basis to discharge the judgment lien.

Despite the fact that the judgment lien must remain attached to the condominium unit, it is clear that the MJLA does not allow foreclosure of the lien. As indicated, MCL 600.2819 provides that "[t]here is no right to foreclose a judgment lien created under this chapter." The Legislature could not have been any clearer on the subject.[9] Thus, a purchaser may decide to proceed with a real estate transaction when the judgment lien has not been fully discharged, assuming that new mortgagees and title insurers allow this to occur, given that the lien cannot be foreclosed on. But doing so could create problems for the purchaser in the future if he or she seeks to sell the property, considering that a subsequent purchaser would likely be hesitant to buy clouded property. We do note that such a subsequent sale would not implicate MCL 600.2819 and the need to pay the judgment creditor because MCL 600.2819 only applies when the "*judgment debtor* makes a conveyance." (Emphasis added.)

The Dutkaviches present an argument under MCL 600.6018, claiming that this provision, which is not part of the MJLA, allows levying on the property if the conveyance between Thomas and the Pelletiers was fraudulent. MCL 600.6018 provides as follows:

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[9] For this reason, we reject the argument that resort to equity is proper to allow foreclosure of the judgment lien. When a statute governs resolution of a particular issue, a court lacks the authority to invoke equity in contravention of the statute. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590 n 65; 702 NW2d 539 (2005).

> All the real estate of any judgment debtor, including, but not limited to, interests acquired by parties to contracts for the sale of land, whether in possession, reversion or remainder, *lands conveyed in fraud of creditors*, equities and rights of redemption, leasehold interests including mining licenses, for mining ore or minerals, but not including tenancies at will, and all undivided interests whatever, are subject to execution, levy and sale except as otherwise provided by law. [Emphasis added.]

This provision is part of chapter 60 of the Revised Judicature Act (RJA), MCL 600.6001 *et seq*., and traditionally governed the collection of judgments and executions against real property. *George v Sandor M Gelman, PC*, 201 Mich App 474, 477; 506 NW2d 583 (1993). "Under the scheme provided in chapter 60, the creditor must first obtain a judgment for the amount owed, then execute that judgment against the debtor's property." *Id*. We note that the MJLA provides that "[a] judgment lien is in addition to and separate from any other remedy or interest created by law or contract." MCL 600.2817. The Legislature did not repeal MCL 600.6018 and, therefore, the MJLA and MCL 600.6018 are two different mechanisms by which a judgment creditor can attempt collection on a judgment by going after real property. There are undoubtedly differences between the MJLA and MCL 600.6018, including, most significantly, that the MJLA does not allow foreclosure, but the MJLA also does not contain the many exemptions, restrictions, and procedural requirements associated with levying against real property under MCL 600.6018. See chapter 60 of the RJA, MCL 600.6001 *et seq*. The trial court never explored the issue of allowing the Dutkaviches to levy on the property under MCL 600.6018. Whether they can levy on the property under MCL 600.6018 and the rest of chapter 60 of the RJA requires a detailed examination of the statutory scheme

and proof of a fraudulent transfer. Remand is appropriate for development of the arguments and evidence. In the meantime, the judgment lien must remain attached to the property under the MJLA, although that lien cannot be foreclosed on.

III. CONCLUSION

In sum, we hold that the MJLA, while not permitting foreclosure of the judgment lien and not giving Thomas any statutory obligation to have made payment to the Dutkaviches, requires that the judgment lien remain attached to the property. We also hold, however, that outside the MJLA, the Dutkaviches may be able to levy on the property pursuant to MCL 600.6018, which is the traditional method of executing on realty to satisfy a judgment. Remand is necessary to explore the issue of levying pursuant to MCL 600.6018. Therefore, the trial court erred by discharging the judgment lien and erred by not considering MCL 600.6018. Consistently with our holding, the Dutkaviches' counterclaim seeking to hold Thomas personally liable on a money judgment was properly dismissed; Thomas's slander-of-title claim, which pertained to the judgment lien, should have been dismissed; Thomas's quiet-title count should have been dismissed with regard to his request that the court discharge the judgment lien; and, with regard to levy and foreclosure under the quiet-title count, Thomas was entitled to the favorable ruling relative to the MJLA, but levying under MCL 600.6018 needs to be examined on remand.

Accordingly, we affirm in part, reverse in part, and remand. We do not retain jurisdiction. No party having fully prevailed, taxable costs are not awarded under MCR 7.219.

NASON v STATE EMPLOYEES' RETIREMENT SYSTEM

Docket No. 290431. Submitted October 12, 2010, at Marquette. Decided October 28, 2010, at 9:10 a.m.

Michael Nason, a corrections officer, shattered his right heel bone while on vacation and submitted an application for non-duty-related disability retirement benefits to the Office of Retirement Services, which denied the application. Nason then sought a hearing with the State Office of Administrative Hearings and Rules. Following a hearing, the hearing referee issued a proposal for decision, concluding that Nason had suffered a total and permanent disability that rendered him unable to adequately and safely perform his job and that he was entitled to benefits. The hearing referee recommended that the State Employees' Retirement Board adopt her findings of fact and conclusions of law. The State Employees' Retirement System filed exceptions, challenging the hearing referee's recommendation. The board, relying on *Knauss v State Employees' Retirement Sys*, 143 Mich App 644 (1985), determined that petitioner was not entitled to non-duty-related disability retirement status and benefits under MCL 38.24 because, on the basis of Nason's past experience and training, he was still able to perform jobs other than his corrections officer job. Nason appealed in the Marquette Circuit Court, and the court, Thomas L. Solka, J., reversed and remanded the case to the board for the entry of a decision awarding Nason non-duty-related disability retirement benefits. The Court of Appeals granted the retirement system's application for leave to appeal.

The Court of Appeals *held*:

MCL 38.24(1) sets forth the requirements for retirement from state employment because of total incapacitation not related to the employee's performance of his or her duty. The plain and unambiguous language of MCL 38.24(1)(b), which refers to the total incapacitation of a member of the retirement system for further performance of duty, only allows consideration of whether the member can perform the state job from which the member seeks retirement because of a non-duty-related injury or disease, not other employment positions or fields for which the member may be qualified by experience and training. When determining whether

the member is totally incapacitated, it is impermissible to contemplate other jobs or employment fields that might be suitable for the member. The total incapacitation must be related to the member's performance as a state employee and the member's incapacity to continue performing, or to further perform, the state job from which the member seeks retirement. To the extent that *Knauss*, which is not binding under MCR 7.215(J)(1), conflicted with this holding, it must be disavowed. The circuit court's order must be vacated, and the case must be remanded to the board to address the issue whether Nason was totally incapacitated relative to his job as a corrections officer.

Circuit court order vacated and case remanded to the State Employees' Retirement Board for further proceedings.

EMPLOYMENT — STATE EMPLOYEES — RETIREMENT — NON-DUTY-RELATED INJURY OR DISEASE — WORDS AND PHRASES — DUTY — TOTALLY INCAPACITATED.

The term "duty" in the phrase "totally incapacitated for further performance of duty" in MCL 38.24(1)(b) refers or relates solely to the state job from which the member of the State Employees' Retirement System seeks retirement on the basis of a non-duty-related injury or disease; when determining whether the member is totally incapacitated an thus eligible to retire, it is impermissible to consider other jobs or employment fields that might be suitable for the member; total incapacitation relates solely to the incapacity of the member to continue performing, or to further perform, the state job from which the member seeks retirement.

Pence & Numinen, P.C. (by *Karl P. Numinen* and *Melanie J. Rohr*), for Michael Nason.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Stephen M. Rideout* and *Kyle P. McLaughlin*, Assistant Attorneys General, for the State Employees' Retirement System.

Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

MURPHY, C.J. In this case involving petitioner's request for non-duty-related disability retirement status and benefits pursuant to § 24 of the State Employees' Retirement Act (SERA), MCL 38.1 *et seq.*, respondent,

the State Employees' Retirement System (SERS), appeals by leave granted the circuit court's order that reversed the decision of the State Employees' Retirement Board (the Board) to deny petitioner retirement benefits.[1] We vacate the circuit court's order and remand the case to the Board for further proceedings consistent with this opinion.

I. OVERVIEW

Petitioner, a corrections officer, shattered his right calcaneus or heel bone while on vacation and subsequently submitted an application for retirement benefits to the Office of Retirement Services, which denied the application. Petitioner, seeking to dispute the application denial, then filed a request for a hearing with the State Office of Administrative Hearings and Rules, and a hearing was scheduled pursuant to the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Following a hearing before a hearing referee, the referee issued a proposal for decision, determining that petitioner had suffered a total and permanent disability, that the disability rendered petitioner unable to adequately and safely perform his job as a corrections officer, and that petitioner was entitled to benefits. The hearing referee recommended that the Board adopt her findings of fact and conclusions of law. The SERS filed exceptions to the proposal for decision, challenging the hearing referee's recommendation.

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[1] We note that the administrative proceedings initiated by petitioner listed the SERS as the respondent, but in the circuit court appeal the Board was named as the respondent. On appeal in this Court, the filings by respondent-appellant refer to the SERS as the respondent. Because we believe that the SERS is the properly designated respondent, with the Board being the arbiter of the dispute, we shall treat the SERS as the respondent-appellant.

The Board, relying on *Knauss v State Employees' Retirement Sys*, 143 Mich App 644; 372 NW2d 643 (1985), determined that petitioner was not entitled to retirement status and benefits under § 24 of the SERA, MCL 38.24, because petitioner, on the basis of his past experience and training, was still able to perform jobs other than a corrections officer. On petitioner's appeal in the circuit court, the court reversed and remanded the case to the Board for entry of a decision awarding petitioner non-duty-related disability retirement benefits. The circuit court placed the focus on petitioner's experience and training as a corrections officer, reasoning that the Board had "reached too far back into [petitioner's] employment history . . . before he had any real training and experience . . . ."

We hold that, when read in context, the plain and unambiguous language of MCL 38.24(1)(b), which refers to a member's[2] "total[] incapacitat[ion] for further performance of duty," only allows consideration of whether a member can perform the state job from which the member seeks retirement because of the non-duty-related injury or disease, not other employment positions or fields for which the member may be qualified by experience and training. To the extent that *Knauss*, which is not binding on us, MCR 7.215(J)(1), conflicts with our holding, it is disavowed, given that it did not honor the comparable language in MCL 38.21, the statutory provision that governs duty-related disability retirement status and benefits. Because it is unclear from its decision whether the Board found that petitioner was totally incapacitated relative to his job as a corrections officer, we vacate the circuit court's order and remand the case to the Board to directly address that issue.

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[2] For purposes of the SERA, a "member" is "a state employee included in the membership of the retirement system[.]" MCL 38.1f(1).

II. UNDERLYING FACTS

At the administrative hearing, petitioner testified that he was 44 years of age, that he was a high school graduate, and that he had taken one semester of criminal justice courses, as required to obtain employment with the Michigan Department of Corrections (DOC). Following graduation from high school, petitioner had worked for Marquette Bottling Works as a truck driver and salesman of Pepsi products for approximately five years. He next worked for Nelson Chevy-Olds selling cars for $2\frac{1}{2}$ years. Petitioner further testified that he also worked odd jobs, including a job at his parents' store and selling satellite dishes door to door. He started working with the DOC in April 1989.

In February 2006, petitioner was in Tobago on vacation, and as he was walking out of the ocean, a roughly 15-foot wave crested, picking him up and driving his right heel into the hard sand. Petitioner suffered a shattered right calcaneus. He was placed on long-term disability in March 2006.

Petitioner originally saw an orthopedic surgeon, Dr. Robert H. Blotter, about a month after the accident. As a result of the injury, petitioner underwent various surgeries, with numerous pins and screws being placed in his heel. He had to wear a full cast and was still accommodating his injury at the time of the hearing. Petitioner was told that his injury was permanent and that he would be unable to return to work as a corrections officer. He further testified: "I can't run. I can't do steps. The ability to respond to any incident in the prison just isn't there. I don't know if I would trust myself letting somebody else being dependent on me after working in the prison for 18 years."

As of the hearing date, petitioner still suffered from sharp pain while walking, along with discomfort and a

tingling ache all day long. Petitioner testified that he was told by Dr. Blotter that he will likely need to have his ankle fused, which would cause him to completely lose mobility but would remove the pain.

In a letter dated a few months before the hearing, Dr. Blotter indicated that petitioner was stable, but he would not be able to walk effectively on uneven surfaces and might need additional surgery in several years if the pain becomes worse. Dr. Blotter stated that he did not believe that petitioner would be able to return to his old job with the DOC. However, on the basis of independent medical examinations, Dr. Russell E. Holmes opined that petitioner's injury did not render him totally disabled.[3]

On December 13, 2007, the hearing referee issued her proposal for decision. As already indicated, the referee, recommending that the Board adopt her factual findings and legal conclusions, determined that petitioner had suffered a total and permanent disability, that the disability rendered petitioner unable to adequately and safely perform his job as a corrections officer, and that he was entitled to benefits. The hearing referee focused solely on petitioner's job as a corrections officer with the DOC, observing:

> Petitioner[] submitted substantive and material evidence that he has a total and permanent disability, which shows that he has met the criteria for non-duty disability retirement benefits pursuant to Section 24 of the Act. The Petitioner['s] employment history with the State [of]

[3] We note that the parties stipulated at the hearing that petitioner's application was filed within one year of his termination from state employment and that petitioner was a state employee for at least 10 years before his termination. See MCL 38.24(1)(a) (an application for benefits must be filed no later than one year after termination of state employment) and (c) (the member must have been a state employee for a minimum of 10 years).

> Michigan has been only as a corrections officer. With his current impairment, the Petitioner would not be able to guarantee the safety and security of the prison inmates and his fellow corrections officer[s]. He walks with a limp and sometimes uses a cane when necessary, which makes his impairment apparent and obvious. The Petitioner is unable to stand for long periods of time, run, and walk on uneven surfaces. He could be a target or weak point for the inmates, which would put the other prison inmates and corrections officers at increased risk if he was to return to his job. Finally, the Petitioner's employer did not make any reasonable accommodations so that he could return to his correction officer position with his limitations.

The SERS filed exceptions with the Board with respect to the hearing referee's recommendation. The Board, declining to adopt the referee's recommendation and taking note of petitioner's work history, issued a decision and order on April 10, 2008, ruling, as follows:

> 1. In this proceeding Petitioner has the burden of proving, by a preponderance of the evidence, that he is entitled to non-duty disability retirement benefits under Section 24 of the Act. Petitioner must show that he is unable to engage in employment reasonably related to his past experience and training because of a disability that is likely to be permanent. *Knauss* [143 Mich App 644].
>
> 2. While the Petitioner presented documentation from his treating physician, Dr. Blotter, that he will not be able to run or walk effectively on uneven surfaces, the Petitioner can still perform other jobs that he has performed in the past, as he possesses experience and training in a number of occupations that he was employed in prior to working for the state.
>
> 3. As the Petitioner has not established by a preponderance of the evidence that he cannot engage in employment reasonably related to his past experience and training, the Petitioner is not eligible for non-duty disability retirement benefits pursuant to MCL 38.24.

Petitioner appealed in the circuit court, arguing that the Board's ruling was erroneous as a matter of law and that the decision was arbitrary, capricious, and based on a misapplication of the law. At oral argument in the circuit court, the court opined:

> I think the question is, is [petitioner] able to return to employment, based on his training and his experience, that he is qualified to perform. And I think we have to look at this in the context of 17 years of employment, much like the 10-year [licensed practical nurse] in the *Knauss* case, his training, taking courses to qualify to apply for employment, and then training for work with the [DOC]. It is a matter of relativity, but I think, frankly, the board reached too far back into . . . [petitioner's] employment history, all the way to post high school, before he had any real training and experience, to reach the conclusion that he was able to perform some of that work, therefore he did not meet the test of total and permanent incapacity.
>
> I find this to be an error of law by the board in application of the *Knauss* case to the statute, and by reason of that error, I'm going to remand this back to the board for entry of a decision adopting the proposal for decision of the [hearing referee] . . . . That is the decision of the Court.

In an order subsequently entered by the circuit court, the court reversed the Board's decision and remanded the case for entry of an order approving petitioner's application for non-duty-related disability retirement benefits. The SERS appeals by leave granted.

III. ANALYSIS

A. STANDARD OF REVIEW—CIRCUIT COURT

In *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002), this Court, setting forth the applicable standard of review relative to a circuit court's review of a decision of the Board, stated:

> A circuit court's review of an administrative agency's decision is limited to determining whether the 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. "Substantial" means evidence that a reasoning mind would accept as sufficient to support a conclusion. Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. [Citations omitted.]

B. OUR STANDARD OF REVIEW

We review a circuit court's decision on an administrative appeal to determine whether the circuit court applied correct legal principles and whether the court misapprehended or grossly misapplied the substantial-evidence test to the agency's factual findings, which essentially constitutes a clearly erroneous standard of review. *Jackson-Rabon v State Employees' Retirement Sys*, 266 Mich App 118, 119; 698 NW2d 157 (2005). A finding is clearly erroneous when, after review of the record, this Court is left with a definite and firm conviction that a mistake was made. *Id.* at 119-120.

Further, we ultimately decide this case on the basis of our interpretation of MCL 38.24, and this Court reviews de novo issues of statutory construction. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). "When considering an agency's statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute." *Id.* at 108. Although a court must consider an agency's interpretation of a statute, "the court's ultimate concern is a proper construction of the plain language of

the statute." *Id.* We do note that in the case at bar the Board relied on *Knauss* in regard to the interpretation of MCL 38.24 and not on any independent agency construction of the statute.

C. GOVERNING PRINCIPLES OF STATUTORY CONSTRUCTION

In *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009), this Court recited the well-established principles of statutory construction:

> Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. A necessary corollary of these principles is that 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 the statute itself. [Citations and quotation marks omitted.]

Keeping these principles of statutory construction in mind, we commence our discussion of MCL 38.24.

D. DISCUSSION

Before examining this Court's decision in *Knauss*, we shall independently construe § 24 of the SERA without contemplation of *Knauss*. MCL 38.24(1) provides:

> Except as may otherwise be provided in [MCL 38.33 and 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. [Emphasis added.]

According to MCL 38.24(1)(b), the question of total incapacitation is examined in relationship to the further performance of duty. Thus, in general, a member could be considered totally incapacitated if the member's injury prevents him or her from performing the member's particular job duties. But another member with a different job, having the exact same injury, might not be considered totally incapacitated if the member is still capable of performing his or her particular job duties. Stated otherwise, an injury that hinders one person in performing his or her job duties might not hinder another person who works in a different field given the uniqueness of tasks related to each particular job. And MCL 38.24(1)(b) requires consideration of the injury-to-duty relationship. The issue then becomes whether it is proper to consider not only the state job and associated duties from which a member wishes to retire because of an injury or disease, but also any other job that the member, taking into consideration his or

her past training and experience, may still be capable of performing. In resolving this issue, it is necessary to unravel the meaning and extent of the word "duty" as used in MCL 38.24(1)(b).

For the reasons hereinafter stated, we conclude that "duty" refers or relates solely to the state job from which the member seeks retirement on the basis of a non-duty-related injury or disease; therefore, it is impermissible, in determining whether the member is totally incapacitated, to contemplate other jobs or employment fields that might be suitable for the member.

We initially note that the term "duty" is not defined in the SERA. See MCL 38.1c (definitions of words beginning with the letter "d"). MCL 38.24(1) provides that the injury or disease cannot be "the natural and proximate result of the member's performance of duty . . . ." MCL 38.21(1)(b), on the other hand, pertains to situations in which the injury or disease "*is* the natural and proximate result of the member's performance of duty." (Emphasis added.) These causation provisions address two different scenarios: one in which a member's injury or disease arises directly from the performance of duty and one in which the injury or disease does not arise from the performance of duty. In both instances, the language "performance of duty" clearly and unambiguously refers to work-related or job-related activities, which necessarily means that "duty" can only relate to state employment. In other words, the Legislature envisioned occasions when a member is injured at work while on a state job and occasions, like that which occurred here, when the member, although employed in a state job at the time, is injured outside work. Either way, the term "duty" is a reference or relates to a state job held by the member. It would be nonsensical and unworkable to conclude, for

purposes of causation under MCL 38.24(1) and 38.21(1)(b) that performance of "duty" related to performance of a job or jobs, unrelated to state employment, for which a member had prior relevant training and experience. And where that identical language, "performance of duty," is again used in MCL 38.24(1)(b) with regard to total incapacitation, its definition, for purposes of cohesiveness and harmony, must parallel its meaning elsewhere in the statute and the SERA overall. Accordingly, the term "duty" in MCL 38.24(1)(b) refers or relates to state employment, and thus the total incapacitation must relate to the member's performance as a state employee.

Because a member may have held different state jobs during his or her career, and because a member may have been injured while performing one particular state job with the effect of the injury only becoming disabling later while in a new state job, we next need to address whether MCL 38.24(1)(b) requires contemplation of all previous state jobs or only the one from which a member seeks to retire. The answer to this question is found in the use of the word "further" in MCL 38.24(1)(b) when describing the performance of duty. This indicates that the Legislature was speaking of a duty the performance of which would have been *continuing or extended* but for the injury or disease suffered by the member. Thus, total incapacitation necessarily relates solely to the incapacity of the member to continue performing, or to further perform, the state job from which the member seeks retirement. Additional support for this conclusion is found in MCL 38.33(a), which is referred to in MCL 38.24(1). MCL 38.33(a) provides for postretirement medical examinations of persons retired under, in part, MCL 38.21 or 38.24. If, upon the medical examination, the medical advisor reports and the Board concurs that the retiree

"is physically capable of *resuming* employment," the retiree must be restored to active service with the state and the retirement benefits must be terminated. MCL 38.33(a) (emphasis added). To resume employment means that the member would be picking up where he or she left off, i.e., continuing the state job from which the member retired. Determining the physical capacity to work under MCL 38.33(a) is thus related to the capacity to perform the state job from which the member retired.

Furthermore, MCL 38.33(b) also supports our holding in this case, and it provides as follows:

> If the secretary reports and certifies to the retirement board that a person retired under . . . [MCL 38.24] . . . *is engaged in a gainful occupation* paying more than the difference between his or her disability retirement allowance and his or her final compensation, and if the retirement board concurs in the report, then his or her retirement allowance shall be reduced to an amount which together with the amount earned by him or her shall equal his or her final compensation. Should the earnings of the person retired under . . . [MCL 38.24] . . . be later changed, the amount of his or her retirement allowance shall be further modified in like manner. [Emphasis added.]

This language clearly and unambiguously contemplates situations in which a member is employed, yet has also retired from state employment because of a non-duty-related injury or disease and is collecting state disability retirement benefits. MCL 38.33(b) is completely consistent with our interpretation of MCL 38.24, given that, under our analysis, a member could be totally incapacitated from performing his or her state job and thus receive disability retirement benefits, but not be totally incapacitated relative to performing a different job and thus be "engaged in a gainful occupation," MCL 38.33(b). For example, under MCL 38.33(b),

if a member's final compensation (annual rate of pay)[4] was $50,000 at the time of retirement and the member then began receiving $25,000 in annual retirement benefits, the member would still be permitted to work at a new job and earn up to $25,000 a year without loss of any of his or her retirement benefits. Disability retirement benefits are not terminated in full merely because the member may be working at a new job for which he or she has past experience and training.

We now examine this Court's decision in *Knauss*. The panel considered whether the petitioner, Teresa Knauss, was eligible for duty-related disability retirement benefits under MCL 38.21, which, as indicated, contains the same language, "performance of duty," as MCL 38.24. Knauss worked as a licensed practical nurse at a medical facility, and she injured her right knee in the course of her employment. Because of her knee injury, Knauss could no longer perform her nursing duties. The Board denied her request for disability retirement benefits, but the circuit court, for reasons fairly consistent with our analysis in this opinion, including citation of MCL 38.33(b), reversed that ruling and awarded her benefits. The circuit court concluded that the question whether there was a total disability under the statute related to Knauss's capacity to perform her previous job as a nurse. *Knauss*, 143 Mich App at 645-648.

The *Knauss* panel essentially agreed with the circuit court's construction of the statute, but then deviated from the circuit court's analysis:

> We also read MCL 38.33(b) . . . as anticipating that a person receiving disability-retirement benefits could be employed in another job. One cannot harmonize the Legislature's allowing a disabled person to work in another job

[4] See the definitions contained in MCL 38.1e(2) and MCL 38.1b(2).

> while receiving benefits with the board's interpretation of "totally incapacitated for duty . . ." as meaning "totally incapacitated from any duty".
>
> We disagree, however, with the trial court's decision that the Legislature intended that a person who cannot perform his or her previous job should always be entitled to disability-retirement benefits. In an analogous situation dealing with total-disability benefits provided by a private insurance company, this Court recognized that there are three ways of interpreting the term "total disability"[.] [*Knauss*, 143 Mich App at 648.]

The *Knauss* panel, quoting *Chalmers v Metro Life Ins Co*, 86 Mich App 25, 30-31; 272 NW2d 188 (1978), proceeded to list the three interpretations or views and then held that the "intermediate view" would control. *Knauss*, 143 Mich App at 649. The intermediate view examines the question whether there is a total disability by looking at whether a person is able to engage in employment reasonably related to his or her past experience without limiting the examination to looking only at the job that was held when the disability arose, but also without being so expansive as to allow consideration of any job whatsoever. *Id.* The *Knauss* Court, which also cited this Court's decision in *Herring v Golden State Mut Life Ins Co*, 114 Mich App 148; 318 NW2d 641 (1982), then engaged in the following reasoning:

> We recognize that the *insurance policies* involved in *Chalmers* and *Herring* provided for benefits when the insured was unable to engage in *any and every gainful occupation for which the insured was fitted by education, training or experience.* In other jurisdictions that have also adopted the "intermediate" definition of total disability, the courts have concluded that an insurance policy requiring that the disabled person be unable to engage in *any gainful employment* should be interpreted as providing benefits when the person is unable to engage in employ-

> ment reasonably related to the person's past experience and training. [*Knauss*, 143 Mich App at 649-650 (emphasis added; citations omitted).]

Therefore, the *Knauss* panel not only entirely ignored the language of MCL 38.21 and MCL 38.33 despite agreeing with the circuit court's interpretation of those provisions, it then proceeded to rely on cases interpreting language from insurance policies that were all-encompassing—i.e., considered any gainful employment based on past experience and training—and was completely different from and contradictory to the language of MCL 38.21.[5] *Knauss* is not binding on us, MCR 7.215(J)(1), and we disavow it with respect to the issue presented, given that it did not honor the plain language of MCL 38.21, and by analogy MCL 38.24.

Finally, we acknowledge that in *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 595-596; 701 NW2d 214 (2005), a case that is binding on us under MCR 7.215(J)(1), this Court placed some reliance on *Knauss*. However, *VanZandt* did not cite *Knauss* in connection with the issue that we are addressing. Rather, *VanZandt*, in citing *Knauss*, was addressing the petitioner's criticism that the Board, in rejecting her claim for benefits, improperly relied on evidence of the petitioner's lifestyle and her ability to function outside the workplace when making the determination whether she was totally incapacitated (because of depression) relative to performing her job as a youth specialist. *VanZandt*, 266 Mich App at 594 ("[E]vidence that petitioner was able to function normally in maintaining a home and caring for three small children, two of

[5] We note that the panel ended up affirming the circuit court's decision, not its analysis, on the basis that under the intermediate standard, Knauss's only training and experience was as a nurse. *Knauss*, 143 Mich App at 650.

whom had learning disabilities, is probative relative to whether petitioner could function in a workplace setting in which her primary responsibility was supervising troubled youth."). Our holding is not in conflict with *VanZandt*, and to the extent that elements of *Knauss* supported the ruling in *VanZandt*, we are not disavowing those elements of *Knauss*. Indeed, we would agree that here, had there been any evidence showing that petitioner was engaging in physical activities at home that discredited his claim that he could not perform comparable activities at the prison, that evidence would certainly have been admissible.

IV. CONCLUSION

We hold that when read in context, the plain and unambiguous language of MCL 38.24, which refers to a member's "total[] incapacitat[ion] for further performance of duty," only allows consideration of whether a member can perform the state job from which the member seeks retirement because of the non-duty-related injury or disease, not other employment positions or fields for which the member may be qualified by experience and training. To the extent that *Knauss* conflicts with our holding, it is disavowed, given that it did not honor the comparable language in MCL 38.21, the statutory provision that governs duty-related disability retirement status and benefits. Because it is unclear from its decision whether the Board found that petitioner was totally incapacitated relative to his job as a corrections officer, we vacate the circuit court's order and remand the case to the Board to directly address that issue.

Vacated and remanded to the State Employees' Retirement Board for proceedings consistent with this opinion. We do not retain jurisdiction.

McGRATH v ALLSTATE INSURANCE COMPANY

Docket No. 289210. Submitted June 15, 2010, at Lansing. Decided November 2, 2010, at 9:00 a.m.

James P. McGrath, as personal representative of the estate of Mary J. McGrath, deceased, brought an action in the Otsego Circuit Court against Allstate Insurance Company and Inergy Propane, LLC, formerly known as Gaylord Gas, seeking damages for water damage that occurred at Mary's house in Gaylord when water pipes ruptured because of a lack of heat in the house after the propane tank ran out of propane. Allstate, which insured the property, had denied coverage on the basis that Mary had failed to comply with the requirement of the policy that she notify Allstate of any changes in the use or occupancy of the residence premises. Allstate noted that the home had not been used as Mary's residence for more than two years before the water damage occurred and that Allstate had not been notified of that fact. Gaylord Gas, which had had an agreement with Mary to keep the propane tank full in return for Mary's agreement to pay her bill and keep the driveway reasonably clear of snow, had cancelled the agreement after its delivery driver found the driveway to the property impassable. Following case evaluation, the gas company reached a settlement with plaintiff. The court, Janet M. Allen, J., denied two motions for summary disposition filed by Allstate. A jury found in favor of plaintiff and, pursuant to stipulation, Allstate was ordered to pay plaintiff $100,000. The court then denied Allstate's motion for postjudgment relief. Allstate appealed.

The Court of Appeals *held*:

1. The trial court erred when it denied Allstate's motions for summary disposition. The insurance policy did not cover the damage to the house because, at the time of the loss, the house was not a "dwelling" as defined by the policy. The policy defined "dwelling" as a family building structure "where you reside" (meaning the insured) and that was principally used as a private residence. This section thus contained a statement of coverage that required that the insured live at the premises at the time of the loss. The policy stated that the "insured premises" means the residence premises, and the coverage section stated that the

insured's "dwelling" was the covered property. The definition of "residence premises" used the word "dwelling." Therefore, the term "dwelling" was an integral part of the term "residence premises," which in turn was an independent part of the term "insured premises." Because the phrase "where you reside" was not merely used to describe the dwelling but was an independent part of the definition of "residence premises," the phrase was not merely an affirmative warranty that the insured lived in the dwelling when the insured originally entered into the insurance contract, but required that the insured reside at the premises at the time of the loss. Because Mary did not reside at the Gaylord property at the time of the loss, she failed to comply with the policy terms, and the trial court erred when it denied Allstate's motions for summary disposition.

2. The trial court erred by ascribing a technical meaning to the undefined term "reside," when the common understanding of the term required that Mary live at the Gaylord address at the time of the loss. While ambiguities in an insurance contract must be construed against the insurer, which has a superior understanding of the terms it employs, in order to bind relatively unsophisticated insureds, insureds should not be allowed to employ a sophisticated version of a term to create an ambiguity. It was undisputed that Mary did not satisfy the unambiguous requirement that she "reside" in the house when the loss occurred.

3. The court should have granted summary disposition in favor of Allstate in light of Mary's failure to provide adequate notice of the change in occupancy of the Gaylord property. The policy placed on the policyholder the responsibility to inform the insurer of a change in occupancy. That Mary's daughter notified Allstate that Mary's billing address had changed was insufficient as a matter of law to put Allstate on notice that Mary no longer lived full-time at the Gaylord property and did not obligate Allstate to inquire further about the occupancy of the home. The judgment on the jury verdict must be vacated

Reversed and judgment vacated.

1. INSURANCE — PROPERTY INSURANCE — WORDS AND PHRASES — DWELLING — RESIDE.

Language in an insurance policy providing that to be a "dwelling" covered by the policy, the building must be identified in the policy declarations, the insured must reside there, and the building must be used as a private residence indicates that the insured must reside at the property not only at the time the policy becomes

effective, but also at the time of a loss sought to be covered under the policy; the term "reside" requires that the insured actually live at the property.

2. INSURANCE — PROPERTY INSURANCE — NOTICE OF CHANGE OF BILLING ADDRESS — NOTICE OF CHANGE OF OCCUPANCY OF INSURED PREMISES.

An insured's act of notifying its real property insurer that the insured's billing address has changed is insufficient as a matter of law to put the insurer on notice that the insured no longer lived full-time at the property or to obligate the insurer to inquire further about the occupancy of the property.

Fabian, Sklar & King, P.C. (by *Patrick A. King*), for James P. McGrath.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh* and *Michael J. Swogger*), for Allstate Insurance Company.

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

SAAD, J. Defendant Allstate Insurance Company appeals an order of judgment and an order that denied its motion for postjudgment relief. Allstate also appeals two orders that denied its motions for summary disposition. For the reasons set forth below, we reverse the trial court's denials of Allstate's motions for summary disposition and vacate the judgment on the jury verdict.

I. FACTS

In July 1992, the decedent, Mary McGrath, bought a home in Gaylord, Michigan, and insured it with Allstate. Until 1998, Ms. McGrath lived in the Gaylord home for most of the year and spent winters in Florida. On November 5, 1992, Ms. McGrath executed a "keep full" agreement with defendant Inergy Propane, LLC, formerly known as Gaylord Gas (hereinafter "Gaylord Gas"), to ensure that there was sufficient propane to

heat the house during the winter. Under the agreement, Gaylord Gas would send a delivery driver to the house on a regular basis to check the amount of propane remaining in the tank and add propane if needed. The agreement with Gaylord Gas required Ms. McGrath to pay her bill and ensure that the driveway remained reasonably clear of snow.

In 1998, Ms. McGrath developed dementia and Alzheimer's disease and, as her condition deteriorated, Ms. McGrath's daughter Cathy moved into the Gaylord house with Ms. McGrath to help take care of her. By 2003, Cathy was unable to care for her mother alone, and Cathy and her siblings decided that Ms. McGrath and Cathy should move to and live in an apartment in Farmington Hills, where Ms. McGrath would be closer to family and her doctors. Cathy changed Ms. McGrath's billing address and notified Allstate that the insurance bills should be sent to their address in Farmington Hills. After Ms. McGrath moved to Farmington Hills, the Gaylord house was no longer used as a full-time residence, though Ms. McGrath left the majority of her belongings there and family members visited the house on occasion for weekends or holiday vacations. Ms. McGrath also visited the Gaylord property for a few days in October 2005. The record reflects that Cathy spent a night at the Gaylord house around Thanksgiving 2005, but no one else visited the property during the winter of 2005-2006. In late May of 2006, Brian McGrath, Ms. McGrath's son, discovered that his mother's property had suffered extensive water damage. Plaintiff, James McGrath, Ms. McGrath's son, reported the loss to Allstate, and Allstate paid for the initial cleanup and investigated the cause of the damage.

Allstate concluded that the water damage was caused by a frozen pipe that had ruptured because of a lack of heat in the house. Sometime between November 2005

and May 2006, the propane tank at the Gaylord property ran out of fuel, which rendered the furnace inoperable. The record reflects that Gaylord Gas canceled the "keep full" agreement with Ms. McGrath on December 19, 2005, after its delivery driver found the driveway impassable. It is undisputed that the driveway of the Gaylord property was not plowed during the winter of 2005-2006. On June 15, 2006, Allstate informed plaintiff over the telephone that it would not pay for the water damage, and Allstate sent a formal denial-of-coverage letter on June 22, 2006.

Plaintiff filed a complaint against Allstate for breach of contract, and he also asserted a claim of negligence against Gaylord Gas. Plaintiff settled the claim against Gaylord Gas after case evaluation. Allstate filed two motions for summary disposition pursuant to MCR 2.116(C)(10), and the trial court denied both motions. A jury found in favor of plaintiff and, pursuant to stipulation, Allstate was ordered to pay plaintiff $100,000. The trial court denied Allstate's motion for postjudgment relief on November 13, 2008.

II. ANALYSIS

We hold that the trial court erred when it denied Allstate's motions for summary disposition.[1]

[1] We review the denial of a motion for summary disposition de novo. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 291; 778 NW2d 275 (2009). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the case. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party is entitled to a grant of summary disposition if the party demonstrates that no genuine issue of material fact exists. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2007). A plaintiff must support its claim with pleadings, affidavits, depositions, admissions, and any

The rules of contract interpretation apply to the interpretation of insurance contracts. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007). The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). When the policy language is clear, a court must enforce the specific language of the contract. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 160; 534 NW2d 502 (1995). However, if an ambiguity exists, it should be construed against the insurer. *Id*. An insurance contract is ambiguous if its provisions are subject to more than one meaning. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515; 773 NW2d 758 (2009), citing *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982). An insurance contract is not ambiguous merely because a term is not defined in the contract. *Vushaj*, 284 Mich App at 515. Any terms not defined in the contract should be given their plain and ordinary meaning, *id*., which may be determined by consulting dictionaries, *Citizens Ins Co*, 477 Mich at 84.

In its motions for summary disposition, Allstate argued that the policy does not cover the damage to the Gaylord property because Ms. McGrath failed to comply with the policy terms. Specifically, Allstate asserted that, contrary to the requirements of the policy, Ms. McGrath did not reside at the Gaylord property at the time of the loss and failed to notify Allstate of the change in title, occupancy, or use of the property. In essence, Allstate claimed that because the nature of the

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other admissible evidence. *Coblentz*, 475 Mich at 569. Mere speculation and conjecture cannot give rise to a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996).

risk insured is greater for an unoccupied home, Allstate's policy required that Ms. McGrath reside in the home and notify Allstate if this changed. Allstate asserted that Ms. McGrath did not meet these obligations of the policy.

We agree with Allstate that the insurance policy does not cover the damage to the Gaylord house because, at the time of the loss, it was not a "dwelling" as defined by the policy. The policy states that Allstate will "cover sudden and accidental direct physical loss" of covered property, which includes "[**y**]**our dwelling** including attached structures." As defined in the policy, " **'You'** or **'your'**–means the person named on the Policy Declarations as the insured and that person's resident spouse." "Dwelling" is defined as "a one, two, three or four family **building structure**, identified as the insured property on the Policy Declarations, where **you** reside and which is principally used as a private residence." The policy further states that the insured "must pay the premium when due and comply with the policy terms and conditions, and inform [Allstate] of any change in title, use or occupancy of the **residence premises**." "Residence premises" is defined as "the **dwelling**, other structures and land located at the address stated on the Policy Declarations."

The critical inquiry here is whether the phrase "where you reside" in the definition of the covered "dwelling" precludes coverage because of Ms. McGrath's extended absence from the insured property. Plaintiff contends that the phrase "where you reside" is merely descriptive of the property and that it constitutes only an affirmative warranty that Ms. McGrath lived in the house when she originally entered into the insurance contract with Allstate. Allstate maintains that the phrase "where you

reside" is a statement of coverage that requires that the insured live at the premises at the time of the loss.

We agree with Allstate. *Random House Webster's College Dictionary* (2000) defines the verb "reside" in part as "to dwell permanently or for a considerable time; live." Accord *The American Heritage Dictionary of the English Language* (3d ed, 1996) ("To live in a place permanently or for an extended period."). The policy states that the "insured premises" means "the residence premises" and the coverage section states that the insured's "dwelling" is the covered property. (Boldface omitted.) The definition of "residence premises" uses the word "dwelling," which is specifically defined as a building structure "*where you reside* and which is principally used as a private residence." (Emphasis added and boldface omitted.) Thus, the term "dwelling" is an integral part of the term "residence premises," which in turn is an independent part of the term "insured premises." In *Heniser*, 449 Mich at 167, our Supreme Court ruled that, because the phrase "where you reside" was "not used to describe the dwelling but is an independent part of the definition of 'residence premises,' " the phrase is not merely an affirmative warranty, but requires that the insured reside at the premises at the time of the loss.

This differs from the policy in *Reid v Hardware Mut Ins Co of the Carolinas, Inc*, 252 SC 339, 342; 166 SE2d 317 (1969), which was contrasted by the *Heniser* Court and which described the property itself as a "one story frame constructed, approved roof, *owner occupied*, one family dwelling." (Emphasis added.) In *Reid*, the court ruled that the phrase describing the property as "owner occupied" "is a description merely and is not an agreement that the insured should continue in the occupation of it." *Id*. at 346. The *Heniser* Court further

observed that the "owner occupied" language in *Reid* "was in a list of statements describing the building covered by the policy," making it "clear that 'owner occupied' was simply a description of the dwelling in the same way that stating the building had an 'approved roof' merely commented on the structure at the time the policy was created." *Heniser*, 449 Mich at 167 n 13. Again, here, "where you reside" is an independent part of the definition of "dwelling," which not only defines the covered property, but is also incorporated in the definition of "residence premises." The language is not merely descriptive of the Gaylord house, but constitutes a statement of coverage; to be a "dwelling" covered by the policy, the building must be identified in the policy declarations, the insured must reside there, and the building must be used as a private residence. This indicates that the insured must reside at the property not only at the time the policy becomes effective, but at the time of the loss.

The trial court implicitly acknowledged that Ms. McGrath had to reside at the Gaylord property when the water damage occurred, but erroneously ruled that plaintiff had established an issue of fact on this question. Specifically, the trial court ruled that because evidence showed that, despite her move to Farmington Hills in 2003, Ms. McGrath *intended* to return to the Gaylord house at some time in the future, she "resided" in the house when the pipes burst during the winter of 2005-2006. We hold that the trial court's ruling is based on a misinterpretation of *Heniser*. In *Heniser*, the plaintiff sold his property on a land contract, and the property was destroyed by a fire a few months later. *Heniser*, 449 Mich at 157. The insurer denied coverage because Mr. Heniser did not reside in the house when the fire occurred. Our Supreme Court noted that the term "reside" may be ambiguous in some contexts, but

was not ambiguous in Mr. Heniser's policy, which, again, provided that the " 'residence premises' " are " 'where you reside . . . .' " *Id*. at 158 n 1. The Court observed that, in some circumstances, such as those involving the Freedom of Information Act, MCL 15.231 *et seq*., or the Child Custody Act, MCL 722.21 *et seq*., the term "reside" may have a legal or technical meaning beyond mere physical presence, including "the intent to live at that location at sometime in the future, a meaning similar to the legal concept of domicile." *Heniser*, 449 Mich at 163. However, the Court declined to rule that "reside" should be given a "sophisticated" meaning in the home insurance context under the policy language at issue. *Id*. The Court ultimately concluded that Mr. Heniser could not satisfy either interpretation of "reside" because, as a result of selling the house, he did not physically live there and he clearly lacked any intent to return. We hold that any discussion by the Court in *Heniser* with regard to Mr. Heniser's failure to satisfy either the "general or popular meaning" or "technical" standard was merely obiter dictum and that the term "reside" requires that the insured actually live at the property. Again, the *Heniser* Court rejected the notion that a more technical meaning should be applied in this context in order to construe an unambiguous term in favor of insurance coverage:

> The policy of interpreting ambiguities in a contract against insurers is rooted in the fact that insurers have superior understanding of the terms they employ, which should not bind relatively unsophisticated insureds. This goal is not furthered by allowing insureds to employ a sophisticated version of a term to create a claim of ambiguity. [*Id*.]

As in *Heniser*, there is no ambiguity in the Allstate policy issued to Ms. McGrath. Accordingly, it was error for the trial court to ascribe a technical meaning to the

term "reside" when the common understanding of the term required that Ms. McGrath live at the Gaylord address at the time of the loss. It is undisputed that Ms. McGrath did not physically live at the Gaylord address when the pipes froze and burst or for two years before the loss and, therefore, she did not satisfy the requirement that she "reside" in the house when the loss occurred.[2]

The multiple risks assumed by an insurer in exchange for an insurance premium are tied to an understanding that the building structure covered is where the insured dwells either permanently or for a considerable period because the risks assumed are clearly affected by the presence of the insured in the dwelling and the associated activities stemming from this presence. Unoccupied or vacant homes, with no resident present to oversee security or maintenance, are at greater risk for break-ins, vandalism, fire, and water damage of exactly the kind that occurred in this case. We recognize that an insured may be

[2] We also observe that Ms. McGrath arguably did not live at the Gaylord address when the loss occurred *or* when the policy came into effect. Justice LEVIN argued in his dissent in *Heniser* that if Mr. Heniser had resided at the property when he received his homeowners insurance renewal certificate, he may have reasonably concluded that he was covered for the policy year. *Heniser*, 449 Mich at 175 (LEVIN, J., dissenting). Here, in response to Allstate's motion for summary disposition, plaintiff pointed out that Allstate issued a renewal policy *after* Ms. McGrath had moved out of the Gaylord house in 2003, and plaintiff affirmatively argued that "[t]his was a different policy period, during which a different insurance contract was in force." Were we to conclude that the phrase "where you reside" in the policy does not require that an insured will be physically present in the dwelling throughout the policy period, plaintiff's position would suggest that Ms. McGrath had to at least reside at the Gaylord property when she received the renewal certificate or on the date it became effective. However, we decline to address this issue because our holding resolves the matter and because, despite plaintiff's assertions, the parties did not attach evidence of a policy renewal to their briefs below and this issue was not argued before or decided by the trial court.

away from a property temporarily for travel or because of illness, and the policy clearly contemplates temporary absences, without curtailing coverage. As one example, the frozen-pipes exclusion limits an insured's ability to recover for a loss when a building structure is vacant or unoccupied unless the insured takes reasonable measures to prevent such damage. This exclusion implicitly recognizes that the insured may be away from the property, but be covered for the loss. This is not inconsistent with the definition of "reside" as defined above. Indeed, the fact that Ms. McGrath had established the habit of vacationing in Florida during the winters in the 1990s did not change the character of the dwelling or her living arrangements. During that time, she resided on the property, albeit for fewer than 12 months of the year, but it remained her home base and the residence to which she regularly returned. At issue here is undisputed evidence that Ms. McGrath lived full-time in an apartment in Farmington Hills for more than two years before the loss occurred. She traveled once to the property for a very brief visit during those years, and it is clear that the Farmington Hills apartment had become her fixed residence. Because Ms. McGrath did not reside at the Gaylord property, she failed to comply with the policy terms, and the trial court erred when it denied Allstate's motions for summary disposition.

We also agree with Allstate that the trial court should have granted Allstate's motions for summary disposition in light of Ms. McGrath's failure to provide adequate notice of the change in occupancy of the Gaylord property. Allstate's argument relies on the following language in the insurance policy:

> In reliance on the information **you** have given **us, Allstate** agrees to provide the coverages indicated on the Policy Declarations. In return, **you** must pay the premium

> when due and comply with the policy terms and conditions, and inform **us** of any changes in title, use or occupancy of the **residence premises**.

Allstate also relies on the following language: "No suit or action may be brought against **us** unless there has been full compliance with all policy terms."

Again, Ms. McGrath moved to Farmington Hills in November 2003, and it is undisputed that Cathy notified Allstate of the change of billing address. The question is whether Cathy's notification was sufficient to put Allstate on notice that there might have been a change in occupancy of the insured property. The parties do not dispute that it is common in the context of insurance contracts that the insured's billing address is different from the address of the property insured.

Importantly, the term "occupancy" in this policy is found in the phrase "any change in title, use or occupancy of the **residence premises**." The use of the term "title" appears to address any changes in possessory interest of the Gaylord property. Further, the policy defines "residence premises" as "the **dwelling**, other structures and land located at the address," and "dwelling" is defined as structures where the insured "reside[s]." In keeping with our holding that Ms. McGrath did not reside on the property, the home cannot be deemed her dwelling and thus was not her residence premises. Accordingly, because Ms. McGrath did not reside on the Gaylord property, she did not occupy it, which is a change requiring notification.

Plaintiff asserts that, because Ms. McGrath lived in the Gaylord home for approximately 14 years and because no evidence showed that she had ever changed her billing address before, Allstate should have questioned why Cathy changed the billing address. However, the policy places on the policyholder the responsibility

to inform the insurer of a change in occupancy. Further, a person may change a billing address for myriad reasons that would not raise a suspicion that residency has changed. As one example, the children of an elderly person may decide to assume the responsibility for paying a parent's bills, and thus make arrangements for those bills to be sent somewhere other than the parent's residential address. Because a billing address may differ from the address of a residence premises for various reasons, the act of notifying Allstate that Ms. McGrath's billing address had changed was insufficient as a matter of law to put Allstate on notice that Ms. McGrath no longer lived full-time at the Gaylord property.

On this discrete question, we agree with the reasoning in *Luster Estate v Allstate Ins Co*, 598 F3d 903 (CA 7, 2010). In that case, Mrs. Luster was injured in a fall when she was 83 years old and, after a hospitalization, she moved to an extended-care facility, leaving unoccupied her home insured by Allstate. *Id*. at 905. Mrs. Luster executed a power of attorney to her lawyer, Rick Gikas, who notified Allstate about his appointment and changed the billing address for the insurance premiums. *Id*. Mrs. Luster never returned to the home, it remained unoccupied, and she died 4$^1/_2$ years after her injury. *Id*. Three months after her death, the house caught fire, and Mr. Gikas filed a claim with Allstate, which denied the claim after learning that the house had been unoccupied for several years. *Id*. When considering whether there was adequate notice by virtue of the change of billing address, the Court opined:

> Gikas didn't notify Allstate until after the fire that the house was unoccupied. He argues that the notice he gave Allstate, shortly after Mrs. Luster left the house for good—that he had a power of attorney and premiums should be billed to his office—gave the insurance company con-

> structive notice that the house was unoccupied, or at least obligated the company to inquire about its occupancy. That is a frivolous argument. Allstate knew that Luster was 83, so it would come as no surprise to learn that she had executed a power of attorney and that the holder of the power would be handling her finances. That did not indicate that she'd moved out of the house. [*Id*. at 906.]

As in *Luster*, we hold that the mere change of the billing address by Cathy for her elderly parent did not put Allstate on notice that Ms. McGrath had moved away from the insured property and did not obligate Allstate to inquire further about the occupancy of the home. Indeed, since Cathy notified Allstate of a change in the billing address, she could clearly have advised Allstate of the crucial fact that her mother no longer lived at the Gaylord address. We will not speculate why Cathy failed to do so, but rule only that it was the insured's obligation to do so under the policy. The failure to notify Allstate about the change in occupancy violated the terms of the contract, and Allstate could properly deny coverage for a loss that occurred more than two years later. This constituted another basis on which the trial court should have granted summary disposition to Allstate.

In light of our rulings, we need not consider the other arguments raised on appeal. For the reasons given, we reverse the trial court's denials of summary disposition to Allstate and vacate the judgment on the jury verdict.

HOFFNER v LANCTOE

Docket No. 292275. Submitted October 12, 2010, at Marquette. Decided November 2, 2010, at 9:05 a.m.

Charlotte Hoffner brought a personal injury action in the Gogebic Circuit Court against Fitness Xpress (an exercise facility), Mousie, Incorporated (which operated Fitness Xpress), Pamela Mack and Tiffani Aho (who owned Mousie), and Richard and Lori Lanctoe (who owned the building and property where Mousie leased space for Fitness Xpress) after she slipped and fell on an icy sidewalk in front of the facility. Blue Cross Blue Shield of Michigan, Hoffner's insurer, intervened as a party plaintiff. Defendants moved for summary disposition, arguing that Aho, Mack, and Fitness Xpress should be dismissed from the suit because they did not have possession and control of the sidewalk outside the facility, that all defendants had been released from liability by a release Hoffner signed as part of her membership with Fitness Xpress, and that defendants owed no duty to Hoffner because the ice was an open and obvious hazard that was avoidable. The court, Joseph D. Zeleznik, J., found there were genuine issues of material fact concerning whether Fitness Xpress, Mack, and Aho could be held responsible as possessors of the premises where Hoffner fell, the scope of the release, and the nature of the icy condition that led to Hoffner's injury. Defendants appealed.

The Court of Appeals *held*:

1. The trial court erred by finding that a genuine question of material fact existed concerning whether Fitness Xpress, Mack, and Aho possessed the premises where Hoffner fell. Premises liability is based on both possession and control over the land because the person having possession and control is normally best able to prevent harm to others. Possession for purposes of premises liability depends on the actual exercise of dominion and control over the property. The evidence included Fitness Xpress's rental contract, which expressly provided that the Lanctoes were responsible for snow removal for the sidewalks. There were several other businesses in the same building that used the same sidewalk and, although Fitness Xpress occasionally salted the sidewalk, it had not assumed the duty of doing so, nor had it taken possession

of the sidewalk. Thus, the evidence did not support a conclusion that Fitness Xpress, Mack, and Aho exercised dominion and control over the sidewalk. Those defendants were entitled to summary disposition as a matter of law.

2. The trial court did not err by finding that questions of material fact existed concerning the effect of the release signed by Hoffner. A release must be interpreted according to its plain and ordinary meaning. If the contractual language is clear, construction of the release is a question of law for the court. However, if the release is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties. The release could reasonably have been interpreted broadly, as releasing all claims, including a slip and fall, or narrowly, as releasing only claims related to the exercise and weight loss activities occurring at Fitness Xpress. Because the release was ambiguous, summary disposition was not appropriate.

3. The trial court correctly denied summary disposition on the issue of premises liability because the icy condition was effectively unavoidable. While a landowner's duty of care to invitees does not generally require the removal of open and obvious dangers, a landowner has a duty to protect invitees from an open and obvious danger when special aspects of the condition make it unreasonably dangerous, that is, when the danger is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm. A business owner cannot defend a claim by arguing that customers it has invited onto its premises technically had the option of declining the invitation and that the condition was therefore avoidable. Even though the ice in this case, which was at the facility's only customer entrance, was an open and obvious hazard, it was effectively unavoidable and therefore defendants had a duty to protect invitees from that hazard. There was no alternative route that Hoffner could have used to enter the facility, and because she had a contract with Fitness Xpress, she had been invited to enter the premises. Defendants could not avoid their duty of care owed to customers by arguing that Hoffner did not have to enter the facility.

Affirmed in part, reversed in part, and remanded.

1. NEGLIGENCE — PREMISES LIABILITY — PREMISES POSSESSOR — DUTY.

Premises liability is based on both possession and control over the land because the person having possession and control is normally best able to prevent harm to others; possession for purposes of premises liability depends on the actual exercise of dominion and control over the property; a person, however, may be under a legal

duty with respect to premises by voluntarily assuming a function that the person is not legally required to perform.

2. NEGLIGENCE — PREMISES LIABILITY — INVITEES — OPEN AND OBVIOUS DANGERS — SPECIAL ASPECTS.

A landowner generally does not have a duty to remove open and obvious dangers, but a landowner does have a duty to protect invitees from an open and obvious danger when special aspects of the condition make it unreasonably dangerous, that is, when the danger is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm; a business owner cannot defend a claim by arguing that customers it has invited onto its premises technically had the option of declining the invitation and that the condition was therefore avoidable.

A. Dennis Cossi Law Office (by *A. Dennis Cossi*) for Charlotte Hoffner.

Dean & Pope, P.C. (by *Michael K. Pope*), for Richard and Lori Lanctoe, Pamela Mack, Tiffani Aho, and Mousie, Incorporated.

Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM. Defendants appeal by leave granted an order of the trial court denying their motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) in this premises liability claim. The trial court found that there were genuine issues of material fact concerning whether certain defendants could be held responsible as "possessors" of the premises where plaintiff Charlotte Hoffner fell, the scope of a release signed by Hoffner, and the nature of the condition on defendants' premises that led to Hoffner's injury. We affirm in part, reverse in part, and remand.

On January 28, 2006, Hoffner slipped and fell on ice on the sidewalk in front of the entrance to an exercise

facility, defendant Fitness Xpress.[1] Hoffner had joined Fitness Xpress approximately two weeks before her fall and was entering the facility at its only customer entrance. Hoffner reported that she saw the sidewalk had "glare ice" on it as she approached from her vehicle, but she believed that because she was wearing good boots and it was a short distance, she could safely walk across it to enter Fitness Xpress.

I. POSSESSION AND CONTROL OF THE PREMISES

Defendants argue that Aho, Mack, and Fitness Xpress could not properly be included as defendants because they did not have possession and control of the sidewalk outside the exercise facility where Hoffner fell. We agree.

A trial court's determination of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

"[T]he invitee status of a plaintiff, alone, does not create a duty under premises liability law unless the invitor has possession and control of the premises on which the plaintiff was injured." *Orel v Uni-Rak Sales Co*,

[1] Fitness Xpress was operated by defendant Mousie, Incorporated, which was owned by defendants Pamela Mack and Tiffani Aho. Defendants Richard and Lori Lanctoe owned the building and property where Mousie, Incorporated, leased space for Fitness Xpress.

Inc, 454 Mich 564, 565; 563 NW2d 241 (1997). In the context of premises liability law, possession has been defined as " '[t]he right under which one may exercise control over something to the *exclusion of all others*.' " *Derbabian v S & C Snowplowing*, *Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002), quoting Black's Law Dictionary (7th ed). Control has been defined as " 'exercis[ing] restraint or direction over; dominate, regulate, or command,' " *Derbabian*, 249 Mich App at 703, quoting *Random House Webster's College Dictionary* (1995), p 297, and as " 'the power to . . . manage, direct, or oversee,' " *Derbabian*, 249 Mich App at 703-704, quoting Black's Law Dictionary (7th ed). While possession and control are certainly indicative of title ownership of land, ownership of the land alone is not dispositive because these possessory rights can be " 'loaned' " to another. *Orel*, 454 Mich at 568, quoting *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980). The question is whether Aho, Mack, and Fitness Xpress, as leaseholders of an area inside the Lanctoes' building, had possession and control of the sidewalk outside their facility.

In *Merritt*, 407 Mich at 552, quoting 2 Restatement Torts, 2d, § 328 E, p 170, the Court defined "possessor of land" as follows:

> "(a) a person who is in occupation of the land with intent to control it or
>
> "(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> "(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."

See also *Derbabian*, 249 Mich App at 702. Premises liability is based on both possession and control over the land because the person having such possession and

control is normally best able to prevent harm to others. *Id.* at 705, citing *Merritt*, 407 Mich at 552.

Paragraph 19 of the lease between the Lanctoes and Fitness Xpress specifically addressed who was responsible for the care of the sidewalk and parking lot:

> LANDLORD shall be responsible for removal of snow from the leased facility as LANDLORD deems necessary, including from the roof, sidewalks, and parking lots. LANDLORD shall be responsible, and shall hold TENANT harmless for, any and all injuries, accidents, or other liability related to [its] failure to maintain and remove snow according to [its] obligations under this Lease.

Additionally, evidence was presented that defendants understood that the Lanctoes were responsible for the exterior areas of the premises, but Fitness Xpress had a bucket of salt that it used to help keep the sidewalk clear. There was evidence that the Lanctoes cleared snow and ice from the area later during the day of Hoffner's fall. The Lanctoes' building also housed several other businesses, including Lori Lanctoe's, which had customers entering the building using the sidewalk that fronted Fitness Xpress.

Plaintiffs argue that ¶ 19 of the lease specifically referred to the sidewalk as part of the "leased facility," thus establishing Fitness Xpress's duty to maintain the area. However, the lease specifically stated that Fitness Xpress was leasing "approximately 2000 square feet of floor space situated in the rental unit of a building." Plaintiffs also argue that Fitness Xpress exercised control over the parking lot and sidewalk for the purposes of parking customers' cars and entrance into the building. However, this use of the premises did not necessarily establish control over the area. As noted, there were several other businesses using the same building.

Plaintiffs also argue that Fitness Xpress assumed a duty by applying salt to the sidewalk at times. "A party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform," and once "a duty is voluntarily assumed, it must be performed with some degree of skill and care." *Zychowski v A J Marshall Co*, *Inc*, 233 Mich App 229, 231; 590 NW2d 301 (1998). However, the evidence did not demonstrate that the Fitness Xpress defendants assumed care of the sidewalk from the Lanctoes, considered the sidewalk their responsibility, or endangered customers by intermittently applying additional salt. A defendant can plow or salt a sidewalk without assuming a duty or taking possession or control over the sidewalk. *Devine v Al's Lounge*, *Inc*, 181 Mich App 117, 120; 448 NW2d 725 (1989).

Possession for purposes of premises liability depends on the actual exercise of dominion and control over the property. *Derbabian*, 249 Mich App at 704. The evidence here indicated that by contract, and by the actions and intent of the parties, Fitness Xpress, Mack, and Aho did not exercise dominion and control over the sidewalk. Therefore, they were not in the best position to prevent the kind of harm incurred by Hoffner and were not the possessors of the sidewalk. See *id.* at 702, 705. We thus find that the trial court erred by finding a genuine issue of material fact regarding whether Fitness Xpress, Aho, and Mack could be assigned liability for Hoffner's fall on the sidewalk, and those defendants were entitled to summary disposition as a matter of law. See *Rose*, 466 Mich at 461.

II. SCOPE OF HOFFNER'S RELEASE

Defendants also argue that a release of liability agreed to by Hoffner and Fitness Xpress as part of her membership contract precluded liability for all defendants for slip-and-fall accidents on the sidewalk. We

disagree. Summary disposition of a plaintiff's complaint is proper when there exists a valid release of liability between the parties. MCR 2.116(C)(7). In reviewing a motion for summary disposition based on a release barring a claim, this Court considers the affidavits, depositions, admissions, and other documentary evidence to determine whether the movant is entitled to summary disposition as a matter of law. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004). The evidence is viewed in the light most favorable to the nonmoving party, and all legitimate inferences in favor of the nonmoving party are drawn. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998). A release of liability is valid if it is fairly and knowingly made. *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996).

"A contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). If contractual language is clear, construction of the contract is a question of law for the court. *Id.* at 594. A contract is not ambiguous if it fairly produces only one interpretation, even if it is inartfully worded or clumsily arranged. *Id.*

Given our finding that Fitness Xpress, Aho, and Mack were entitled to summary disposition for lack of possession and control of the premises where Hoffner fell, we focus our analysis on the applicability of the release as it pertains to the Lanctoes. Arguably, the Lanctoes could potentially have been released from liability by the language of the contract, even though they were not specifically named in the release, in light of the broad language to release and forever discharge "all others" from liability.[2] However, in light of the fact

[2] As our Supreme Court recently set forth in *Shay v Aldrich*, 487 Mich 648, 675-676; 790 NW2d 629 (2010),

that we agree with the trial court that the scope of activities released by the contract is ambiguous, and thus agree that summary disposition was not appropriate, we need not now decide this issue.

The indemnification portion of the Fitness Xpress membership contract provides, in relevant part:

> INDEMNIFICATION: Member . . . hereby agrees to indemnify, defend and hold harmless, Fitness Xpress, a division of Mousie Inc. and its officers, employees, contractors, agents, successors or assigns from any and all claims for liability against [sic] without limitation, including . . . expenses incurred either directly or indirectly by reason of, resulting from, or associated in anyway [sic] without limitation, with the Membership and/or Fitness Xpress. Member also acknowledges that she has reviewed and executed

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> to determine whether an unnamed party is released from liability by broad or vague release language, the party's status as a third-party beneficiary must be established by an objective analysis of the release language. However, traditional contract principles continue to apply to the release, and courts may consider the subjective intent of the named and unnamed parties to the release under certain circumstances, such as when there is a latent ambiguity. The third-party-beneficiary statute indicates that the Legislature intended to allow parties who are direct beneficiaries to sue to enforce their rights, but the statute expressly states that third-party beneficiaries have only the "same right" to enforce as they would if the promise had been made directly to them. MCL 600.1405. That is, the statute creates a cause of action, but it is not intended to afford third parties greater rights than they would have if they had been the original promisee.

The *Shay* Court also noted the following:

> [A] latent ambiguity has been described as one that " 'arises not upon the words of the will, deed or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe.' " " 'And where, from the evidence which is introduced, there arises a doubt as to what party or parties are to receive the benefit [of a contract], parol evidence is admissible to determine such fact.' " [*Id*. at 671-672 (citations omitted; second alteration in *Shay*).]

> the Waiver of Liability attached hereto as part of this agreement prior to engaging in any physical activities or programs at Fitness Xpress according to the RELEASE below.[3]

Nothing in the indemnification provision related to the Lanctoes; however, the release portion of the contract contained a broader disclaimer, which provided, in pertinent part:

> RELEASE: I, the member or participant . . . , understand and agree that fitness activities including weight loss may be hazardous activities and I . . . should contact a healthcare professional or doctor before beginning any new activities or weight loss program. I am voluntarily participating in these activities and using the Fitness Xpress, (Mousie Inc.) facilities and equipment, at my sole risk, with full knowledge of the dangers involved. I hereby agree to expressly assume and accept any and all risks of injury or death related hereto.
>
> In consideration of being allowed to participate in the activities and programs of Fitness Xpress (Mousie, Inc.) and use of its facilities and equipment, in the addition of any payment of any fees or charges, I do hereby waive, release and forever discharge Fitness Xpress, Mousie Inc. its officers, agents, employees, representatives, executors, *and all others* from any responsibilities or liabilities for any injuries or damage resulting from my and/or my daughter(s) [sic], or my belongings, including those caused by any negligent act or commission, in connection with participation/membership or use of equipment at Fitness Xpress and Mousie Inc. [Emphasis added.]

If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. *Genesee Foods Servs*, *Inc v Meadowbrook*, *Inc*, 279 Mich App 649, 655; 760 NW2d 259 (2008).

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[3] No waiver of liability form has ever been produced.

The Lanctoes argue that the release portion of the contract applied to their liability for Hoffner's slip and fall on the ice before entering the exercise facility because the accident was included in the contract's language releasing "all others from any responsibilities or liabilities for any injuries," including those caused by "any negligent act or commission, in connection with participation/membership" at Fitness Xpress. The contract's use of broad language releasing "all others" could potentially be interpreted as including any claim that Hoffner could bring against the Lanctoes. See *Shay*, 487 Mich at 675-676. Further, a release including language such as " 'any and all claims, demands, damages, rights of action, or causes of action, . . . arising out of the Member's . . . use of the . . . facilities' " can express an intention to disclaim liability for all negligence. *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994). However, the contract at issue released liability for claims "in connection with participation/membership or use of equipment at Fitness Xpress and Mousie Inc." and stated that Hoffner was "using the Fitness Xpress (Mousie Inc.) facilities and equipment, at my sole risk." This language provided an apparent limitation of liability related to the actual use of the fitness facility and its equipment, not liability encountered en route to the fitness center. Plaintiffs also maintain that the language "release and forever discharge . . . from any responsibilities or liabilities for any injuries or damage resulting from my and/or my daughter(s) [sic], or my belongings, including those caused by any negligent act or commission, in connection with participation/membership or use of equipment" was ambiguous concerning which actions triggered the release.

The trial court found the contract ambiguous and stated that a jury could conclude that the release applied to all activities or only to some activities. The court commented that the release seemed to pertain to

the nature of the business, i.e., fitness activities and equipment, rather than falling on a sidewalk outside the exercise facility. The language of the contract could reasonably be interpreted broadly, to include a slip and fall while attempting to enter Fitness Xpress, or narrowly, to include only activities related to exercise and weight loss that were specifically discussed in the release portion of the contract. "If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Therefore, the trial court did not err by denying summary disposition to defendants on this issue.

III. OPEN AND OBVIOUS DANGER DOCTRINE

Defendants also argue that plaintiffs' claim should be barred by application of the open and obvious danger doctrine. Hoffner was an invitee: one who is invited onto the land for a commercial purpose. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). "The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Id*.

However, this duty does not generally encompass removal of open and obvious dangers "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a danger is open and

obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). In this case, it is not disputed that the ice in front of the entrance to the exercise facility posed an open and obvious danger. Hoffner testified that she saw that the sidewalk was covered by "glare ice" as she approached it from the parking lot, but thought that she could cross it safely.

Defendants argue that the trial court erred by finding that the ice could reasonably be found to constitute a special aspect that made the condition unreasonably dangerous because it was effectively unavoidable. If special aspects of a condition make even an open and obvious risk unreasonably dangerous, the land possessor has a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo v Ameritech Corp*, *Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A special aspect exists when the danger, although open and obvious, is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm. *Id.* at 518-519. In considering what constitutes a special aspect, a court must evaluate the objective nature of the condition of the premises, not the subjective degree of care used by the plaintiff or other idiosyncratic factors related to the particular plaintiff. *Bragan v Symanzik*, 263 Mich App 324, 332; 687 NW2d 881 (2004), citing *Lugo*, 464 Mich at 523-524.

Defendants argue that the ice was avoidable because Hoffner did not have to attempt to enter the exercise facility and voluntarily confront the ice.[4] In *Lugo*, 464

[4] Defendants argued at the hearing of this matter that as an alternative to entering Fitness Xpress over the glare ice blocking the only entrance, Hoffner could have called Fitness Xpress and demanded that it salt the

Mich at 518, the Court described a hypothetical example of standing water at the only exit of a commercial building as being "effectively unavoidable" because no alternative route is available. Defendants note that the *Lugo* example considered a plaintiff who could not exit, rather than a plaintiff who could choose not to enter. Defendants assert that a danger is not unavoidable if the plaintiff is not required to confront the hazard.

However, in *Robertson v Blue Water Oil Co*, 268 Mich App 588, 590-591; 708 NW2d 749 (2005), this Court described testimony concerning an "unusually severe and uniform ice storm that covered the entire area surrounding defendant's [gas] station," causing what was described as extremely icy conditions in the parking lot where the plaintiff slipped and fell as he walked from the pump at which he had paid for fuel to the station's convenience store where he wished to purchase windshield washer fluid and coffee. The defendant argued that the condition was avoidable because the plaintiff could have gone to a different service station to make his purchases of fuel, coffee, and windshield washer fluid, but this Court concluded, emphasizing that the defendant had invited the plaintiff to the premises as a business, that the ice was unavoidable. *Id*. at 593-594. The *Robertson* Court reasoned:

> Even if there were [available alternatives], the scope of the inquiry is limited to "the objective nature of the condition of the premises at issue." Therefore, the only inquiry is whether the condition was effectively unavoidable *on the premises*. Here, there was clearly no alternative, ice-free path from the gasoline pumps to the service sta-

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sidewalk, after which she would presumably have waited for the salt to take effect. Such an alternative notably contradicts defendants' argument that Fitness Xpress had no possession or control over the sidewalk and, thus, no obligation to salt it.

> tion, a fact of which defendant had been made aware several hours previously. The ice was effectively unavoidable. [*Id*. (citations omitted).]

Moreover, the *Robertson* Court dismissed the idea that the defendant could avail itself of the argument that the condition was avoidable simply because the plaintiff could find another business to patronize, holding:

> Finally, and more significantly, plaintiff was a paying customer who was on defendant's premises for defendant's commercial purposes, and thus he was an invitee of defendant. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-598, 603-604; 614 NW2d 88 (2000). As our Supreme Court noted, "invitee status necessarily turns on the existence of an 'invitation.' " *Id*. at 597-598. Defendant's contention that plaintiff should have gone elsewhere is simply inconsistent with defendant's purpose in operating its gas station. The logical consequence of defendant's argument would be the irrational conclusion that a business owner who invites customers onto its premises would never have any liability to those customers for hazardous conditions as long as the customers even technically had the option of declining the invitation.
>
> * * *
>
> Even if the record showed that plaintiff was aware of a realistic, safe alternative location to purchase his fuel, coffee, and windshield washer fluid, where defendant has invited the public, and by extension plaintiff, onto its premises for commercial purposes, we decline to absolve defendant of its duty of care on that basis. To do so would be disingenuous. Therefore, we conclude that the trial court appropriately denied defendant's motions. [*Id*. at 594-595 (emphasis omitted).]

Further, even in the hypothetical example of standing water blocking the only exit to a building described in *Lugo*, 464 Mich at 518, the Supreme Court apparently would not have absolved the theoretical defendant of

responsibility when the theoretical plaintiff chose to leave the building and confront an unavoidable danger, rather than choosing to avoid the danger by waiting until the water had cleared.

In reaching its decision that summary disposition was inappropriate, the trial court noted that Hoffner had contracted to use Fitness Xpress and may have needed to use it for health reasons. Because there was only one customer entrance to the facility that was fronted by the icy sidewalk, "the objective nature of the condition of the premises at issue" reveals that the icy sidewalk was effectively unavoidable as it related to the use of the premises. See *id*. at 523-524; *Robertson*, 268 Mich App at 594-595. There was no alternative route Hoffner could have taken in order to enter the exercise facility.[5] Additionally, Hoffner was an invitee by virtue of her contract with Fitness Xpress, and the *Robertson* Court held that it would be disingenuous to relieve defendants of their duty of care under similar circumstances. See *Robertson*, 268 Mich App at 595. Therefore, we conclude that the trial court appropriately denied defendants' motion on this ground.

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

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[5] We find unconvincing defendants' argument at the hearing that if plaintiff had approached the glare ice from a different angle she might have had more success.

PEOPLE v BENNETT
PEOPLE v BENSON

Docket Nos. 286960 and 287768. Submitted December 9, 2009, at Detroit. Decided November 2, 2010, at 9:10 a.m.

Paula R. Bennett and Kyron D. Benson were convicted of first-degree murder following a joint trial before separate juries in the Wayne Circuit Court, Michael J. Callahan, J. Bennett was convicted on a theory of aiding and abetting Benson to commit the murder. Benson was also convicted of possession of a firearm during the commission of a felony and possession of a firearm by a felon. Both were sentenced to life in prison for the murder conviction, and Benson was also sentenced to two years in prison for the felony-firearm conviction and one to five years in prison for the felon-in-possession conviction. Bennett (Docket No. 286960) and Benson (Docket No. 287768) appealed separately. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The elements of first-degree murder are the intentional killing of a human with premeditation and deliberation. A defendant may be vicariously liable for murder on a theory of aiding and abetting. The elements of aiding and abetting are (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. An aider and abetter's knowledge of the principal's intent can be inferred from the facts and circumstances surrounding an event.

2. There was considerable evidence from which the jury could have inferred that Bennett knew of Benson's intent to kill the victim at the time that Bennett gave Benson directions to where the victim lived. The evidence belied Bennett's argument on appeal that she did not want Benson to kill the victim. The evidence did not negate the critical element of Bennett's knowledge of Benson's specific intent to kill the victim. Sufficient

evidence supported the conclusion of the jury that Bennett was guilty of first-degree murder on a theory of aiding and abetting.

3. The prosecutor did not give the jury the impression that she had special knowledge regarding the innocence of the suspects that the police had questioned before they focused on defendants by failing to elicit details regarding the alibis or other exonerating details pertaining to those prior suspects. Because the truth or falsity of the prior suspects' alibis was not directly relevant to defendants' guilt, the failure to pursue the question did not raise an inference of special knowledge regarding the innocence of the prior suspects. Nor did the prosecutor vouch for the credibility of the investigator.

4. There was legally sufficient evidence for a person of ordinary caution and prudence to have a reasonable belief that Benson committed the crime of murdering the victim. The presentation of sufficient evidence to convict at trial rendered any alleged erroneous bindover decision harmless.

5. A statement made to an acquaintance outside a formal proceeding, with no indication that it was made for the purposes of identifying the perpetrator of a crime, is a nontestimonial statement that does not implicate the Confrontation Clause. The statement may be admitted as substantive evidence at trial pursuant to MRE 804(b)(3).

6. A statement that is a command rather than an assertion is not hearsay under MRE 801.

Affirmed.

SHAPIRO, J., concurring in part and dissenting in part, concurred in the affirmance of the first-degree-murder conviction of Benson, but dissented from the affirmance of Bennett's conviction on the basis that no evidence supported the conclusion that Bennett wanted the victim to be harmed, let alone killed. In addition, the nature of the criminal jury instruction on aiding and abetting that was given by the trial court failed to have the jury consider whether Bennett subjectively knew, i.e., believed, that Benson intended to kill at the time Bennett provided assistance to Benson. The jury instruction instead asked the jury to make a determination based on an objective test, i.e., whether a reasonable person would or should have known of Benson's intent. Therefore, because it could not be determined whether the jury found that Bennett had the necessary subjective intent, Bennett's conviction should be reversed and the matter should be remanded for a new trial. Moreover, if reversal were not required on this basis, the matter should be remanded for a hearing pursuant to *People v*

Ginther, 390 Mich 436 (1973), to consider whether Bennett received effective assistance of trial counsel. There was a substantial likelihood that Bennett was convicted on the basis of a finding that she was grossly negligent in failing to recognize that Benson intended to commit a murder at the time she provided assistance to him. In the context of the unusual facts of this case, the criminal jury instruction created a standard that allowed for conviction of first-degree murder, not on the basis of an intent, but on the basis of gross negligence. The failure of Bennett's counsel to request a modification of the jury instruction fell below an objective standard of reasonableness under prevailing professional norms, and there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. The jury should have been instructed that Bennett's actions must have been taken with the actual knowledge that the assistance the actions provided would be used to accomplish a murder or some criminal plan that the murder of the victim was fairly within. Various other alleged errors by Bennett's trial counsel also required a remand for a *Ginther* hearing. Judge SHAPIRO stated that the Legislature should consider amending MCL 767.39 and MCL 750.316 so as to modify the statutory punishment for aiding and abetting first-degree murder, given the wide range of culpability within the scope of the broad definition of aiding and abetting.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jason W. Williams*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Gail Rodwan*) for Paula R. Bennett.

Burkett & Associates, Inc. (by *Raymond R. Burkett*), for Kyron D. Benson.

Before: METER, P.J., and BORRELLO and SHAPIRO, JJ.

BORRELLO, J. In these consolidated appeals, both defendants appeal their convictions arising out of the shooting death of Stephanie McClure in 2007.

In Docket No. 286960, defendant, Paula Renai Bennett, appeals as of right her conviction by a jury of first-degree murder, MCL 750.316. Bennett was sentenced to life in prison. For the reasons set forth in this opinion, we affirm.

In Docket No. 287768, defendant, Kyron Darell Benson, appeals as of right his convictions by a jury of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, possession of a firearm by a felon, MCL 750.224f, and first-degree murder, MCL 750.316. Benson was sentenced to two years in prison for the felony-firearm conviction, one to five years in prison for the felon-in-possession conviction, and life in prison for the first-degree-murder conviction. For the reasons set forth in this opinion, we affirm.[1]

I. FACTS

Defendants lived together in Bennett's apartment. The victim, Stephanie McClure, was Bennett's friend and sometimes stayed at Bennett's apartment. In October 2007, defendants discovered that several items, including a PlayStation 2, clothes, and shoes, had been stolen from Bennett's apartment. Benson became angry over the stolen items and began to blame McClure for stealing them. Benson started making threatening comments to several people about McClure, including commenting that he wanted to kill McClure for stealing the items. Benson told one of the persons to whom he had indicated that he wanted to kill McClure, Breanna Kandler, one of Bennett's friends, that he would kill

[1] Defendants were tried together before separate juries. This Court consolidated the appeals in the interest of the "efficient administration of the appellate process." *People v Bennett*, unpublished order of the Court of Appeals, entered July 23, 2009 (Docket Nos. 286960 and 287768).

Kandler too if she "[said] anything" about his threats. Benson wanted Kandler to drive him to McClure's trailer to get the apartment key back from McClure. Kandler testified that she took Benson's threats seriously and, accordingly, refused to take Benson to McClure's trailer.

Later in the evening, defendants and several of their friends were at Bennett's apartment. They noticed that defendants' puppy was missing and were looking around the apartment for the dog. Benson joked that maybe the dog was in the freezer, and when he checked in the freezer, he did indeed find the puppy, which was dead. Benson immediately accused McClure of killing the dog as well. Two of Bennett's friends testified that they thought Benson had killed the dog because of the way he reacted to finding it. After the dead dog was disposed of, defendants and their friends went to a Dairy Mart. While at the Dairy Mart, Kandler saw Benson take a gun out of his car and put it in his pants. Another friend, Jessica Fritz, testified that she had previously seen her boyfriend sell a gun to Benson. Later that evening, Bennett and Benson left their friends, stating that they were going to "get [their] stuff back."

Benson then called his friend Michael Larvaidan and asked him to meet defendants at a Kroger store. Larvaidan had spoken to Benson about the stolen items several times in the preceding days. He testified that he tried to get Benson to calm down about the incident. According to Larvaidan, while at Kroger, Benson was angry and "going on about trying to get his stuff back, . . . talking about going to kill [McClure]." Benson showed Larvaidan a gun while he was talking about this. After Larvaidan got into the car with defendants, Bennett directed Benson to go to "Holiday West," the

trailer park where McClure lived. Benson drove according to Bennett's directions. Once they reached the trailer park, Bennett specifically directed Benson to McClure's trailer. They saw McClure standing outside by the trailer, in front of a car. Benson said, "That's her."

Larvaidan testified that he told Benson, "[D]rive off." Benson drove around the trailer park and then parked the car. Larvaidan told him "just to talk to her. Don't do nothing stupid." Benson got out of the car and walked toward McClure's trailer. Bennett moved to the driver's seat, and she and Larvaidan continued to drive around the trailer park. While they were driving around, Larvaidan saw Benson talking to McClure. After several minutes they heard three or four gunshots and then saw Benson running away. Bennett started crying as soon as they heard the gunshots. Bennett drove toward where Benson was running, and Benson got back in the car. Larvaidan asked Benson, "Why?" Benson responded that "he would have lost respect in the . . . hood." Larvaidan also said, "[You] better hope she's dead . . . 'cause if she's not, [you're] going to jail."

Because Bennett was charged with murder on a theory of aiding and abetting Benson, several witnesses testified regarding the interactions between defendants and Bennett's conduct toward Benson. The evidence presented demonstrated that Bennett was present when Benson started making threats about killing McClure, as well as threats toward Kandler. Benson was also yelling at Bennett at this time, telling her that she "was dumb for giving [McClure] a key." Kandler testified before Bennett's jury only that Bennett told her that she thought Benson "looked pretty serious" about killing McClure, although Kandler testified that she never witnessed Bennett agree to kill McClure.

Fritz testified that she heard defendants arguing for an extended period before they went to McClure's trailer; Benson was again yelling at Bennett because she had given a key to McClure. Bennett told Benson that she had filed a report with the police and that the police would take care of it. Fritz could not recall Benson's response to Bennett. After the argument, Bennett told Fritz that she and Benson were "leaving to get their stuff back."

Finally, Larvaidan testified that Benson was talking openly in the car about shooting McClure just before Bennett gave Benson directions to McClure's trailer. Bennett did not respond to these comments. Larvaidan also testified that after they heard gunshots, Bennett immediately began crying and drove back around toward McClure's trailer, where they observed Benson running away.

Following numerous seemingly erroneous leads, the police eventually arrested defendants for the murder of Stephanie McClure. After defendants were arrested, Benson was observed telling Bennett under the door between their jail cells, "Don't talk."[2] Following trial, defendants were found guilty on all counts and sentenced as previously stated. These appeals ensued.

II. DOCKET NO. 286960: *PEOPLE v BENNETT*

Bennett's first argument on appeal is that there was insufficient evidence to prove that she aided and abetted Benson in the commission of first-degree murder.

This Court reviews de novo claims of insufficient evidence, viewing the evidence in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the

[2] This evidence was presented to Benson's jury only.

crime were proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005) (opinion by KELLY, J.). Further, this Court must defer to the fact-finder's role in determining the weight of the evidence and the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). "[C]onflicts in the evidence must be resolved in favor of the prosecution." *Id.* at 562. Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007); MCL 750.316(1)(a). A defendant may be vicariously liable for murder on a theory of aiding and abetting. *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1992), overruled in part on other grounds by *People v Perry*, 460 Mich 55, 64-65 (1999). The elements of aiding and abetting are

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation marks and citations omitted).]

See also MCL 767.39. Bennett asserts that the prosecution did not prove the third element of aiding and abetting—that Bennett *knew* Benson intended to kill the victim at the time she directed him to where the victim lived.

There was evidence presented to the jury that demonstrated Bennett's desire to let the police resolve the

issue of the victim's alleged theft of items from Bennett and Benson. Testimony elicited at trial clearly indicated that Bennett went to the police station to report the theft. Fritz testified that Bennett and Benson fought about the theft and that Benson blamed Bennett for giving the victim a key to their apartment. When Bennett and Benson left to go to the victim's trailer, Bennett told Fritz only that they were going to retrieve the stolen items. Nobody heard Bennett agree to help Benson kill the victim. Fritz testified that Bennett told Benson at one point while he was making his threats, "No, I can't do it." Finally, Bennett acted shocked and upset after the victim was shot.

There was also evidence presented at trial from three witnesses who testified that during the day preceding the murder, Benson threatened, in Bennett's presence, to kill the victim. Kandler testified that she took Benson's threats seriously enough to refuse to drive Benson to see the victim. Kandler also testified that Bennett told her that Benson seemed serious when he was making his threats. After Bennett's statement to Fritz about retrieving the stolen items, Benson repeated his threat in Bennett's presence, and Bennett saw Benson show a gun to Larvaidan just before the murder. Bennett agreed to direct Benson directly to the victim's trailer even after Bennett saw Benson with the gun and heard his threats to kill McClure and even though she took the threats seriously. Larvaidan also testified that Benson talked openly in the car about shooting the victim just before Bennett gave Benson directions to the victim's trailer. Testimony further indicated that after Bennett had directed Benson to the victim's trailer and Benson had got out of the vehicle after positively identifying the victim, Bennett then assumed the wheel of the car, drove around the trailer park, and drove the

car back around toward the victim's trailer after she and Larvaidan heard shots and observed Benson running away.

Pursuant to *Robinson*, 475 Mich at 6, in order for the prosecution to prevail on the element of aiding and abetting raised in Bennett's appeal, the prosecution must prove that the defendant either intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. To the extent that Bennett directs this Court to conflicts in the testimony, we note that it is the jury's role to weigh the evidence and resolve any conflicts. *Fletcher*, 260 Mich App at 561-562. An aider and abetter's knowledge of the principal's intent can be inferred from the facts and circumstances surrounding an event. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), disapproved in part on other grounds in *People v Mass*, 464 Mich 615, 628 (2001). Despite Bennett's directing this Court's attention to some evidence that suggests that it was not Bennett's desire to kill the victim, there was considerable evidence from which the jury could have inferred that Bennett knew of Benson's intent. She observed and heard Benson make multiple and serious threats to kill the victim. She saw him with a gun immediately before directing him to the location of the shooting and driving there with him. Consequently, the evidence presented at trial belies Bennett's argument on appeal that she did not want Benson to kill the victim. However, even if we concluded that the evidence established that Bennett may have been reluctant to have Benson kill the victim, that evidence does not negate the critical element of Bennett's knowledge of Benson's specific intent to kill the victim. The evidence proffered by Bennett on appeal merely demonstrates that Bennett may have been unenthusiastic about the

prospect of Benson's killing the victim. Such evidence does not negate the fact that Bennett was aware of Benson's specific intent to kill the victim. Thus, we find that there was sufficient evidence from which the jury could conclude that Bennett was guilty of first-degree murder on a theory of aiding and abetting.

Bennett next argues that the prosecutor committed misconduct by failing to adequately plumb the depths of the investigation by the officer in charge into prior suspects in the case. Bennett also argues that the prosecutor bolstered the officer's testimony in her closing argument.

In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Bennett's trial counsel objected to the prosecutor's questioning in one instance, with respect to whether the officer's investigation changed his recommendation of whom to charge in this case. Thus, with respect to this alleged error, this issue was preserved. Bennett's trial counsel did not raise any other objections concerning this issue; therefore, the issue was not preserved with respect to other alleged errors.

Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). Further, allegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context. *Id*.

Unpreserved issues are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763. "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." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id*. at 329-330.

Bennett argues that the prosecutor "vouched [for] or bolstered" Officer John Toth's testimony by eliciting answers from him about the nature of his investigation and the exoneration of prior suspects. Bennett argues that the prosecutor asked Toth whether his investigation eliminated possible suspects other than defendants but did not provide corroborating evidence to support Toth's conclusions. Bennett cites *United States v Francis*, 170 F3d 546, 551 (CA 6, 1999), which stated, in relevant part:

> A prosecutor may ask a government agent or other witnesses whether he was able to corroborate what he learned in the course of a criminal investigation. However, if the prosecutor pursues this line of questioning, she must also draw out testimony explaining how the information was corroborated and where it originated.

The *Francis* court also discussed the rationale underlying this discussion: "The prosecutor's failure to introduce to the jury whether the information was corroborated via documents, searches, conversations, or other means, would lead a reasonable juror to believe that the prosecutor was implying a guarantee of truthfulness based on facts outside the record." *Id*.

This underlying rationale is echoed in Michigan caselaw: "Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*,

448 Mich 261, 276; 531 NW2d 659 (1995). The danger is that the jury will be persuaded by the implication that the prosecutor has knowledge that the jury does not and decide the case on this basis rather than on the evidence presented. *Id*.; *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004).

In this case, the prosecutor took Toth through a lengthy discussion of his investigation of multiple suspects and drew out the chain of interviews and the investigation that led to suspicion of defendants. The questioning about which Bennett complains relates to the exoneration of the prior suspects. Bennett argues that the prosecutor left the jury with the impression that the prosecutor had special knowledge regarding the innocence of the prior suspects by failing to elicit details regarding their alibis or other exonerating details.

Bennett's entire argument relies on an analogy to the *Francis* case. However, the facts presented in this case differ substantially from the circumstances in *Francis*. In *Francis*, the officer was testifying about statements he received from a witness about the defendant. *Francis*, 170 F3d at 551. He testified that he corroborated the statements without indicating how he had done so. *Id*. In this case, the testimony Bennett questions pertained merely to the exoneration of other suspects, none of whom were on trial or witnesses against defendants in this case. The credibility of other suspects' alibis was not directly relevant to defendants' guilt or innocence. The purpose of the prosecutor's line of questioning did not pertain to evidence regarding the guilt or innocence of defendants, but merely provided a context for the jury of the officer's investigation and how it eventually led to defendants. Further, the prosecution is not required to disprove everyone else's guilt; rather, the prosecution is only required to present evidence of the

defendant's guilt. Because the truth or falsity of the prior suspects' alibis was not directly relevant to defendants' guilt, the failure to pursue the question did not raise an inference of special knowledge regarding the truth of Toth's testimony. *Bahoda*, 448 Mich at 276.

Bennett also argues that the prosecutor improperly bolstered Toth's testimony in her closing argument. A prosecutor may not vouch for the credibility of his or her witnesses. *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000), overruled in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). However, a prosecutor may comment on his or her own witnesses' credibility, especially when credibility is at issue. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004); *Schutte*, 240 Mich App at 721-722. The prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness's credibility. *Schutte*, 240 Mich App at 721. The prosecutor must refrain from commenting on his or her "personal knowledge or belief regarding the truthfulness of the . . . witnesses," *Thomas*, 260 Mich App at 455, or "convey[ing] a message to the jury that the prosecutor had some special knowledge or facts indicating the witness' truthfulness," *Bahoda*, 448 Mich at 277.

The prosecutor argued that the jury should focus on the evidence against defendants rather than consider the possibilities raised by defense counsel that someone else could have committed the crime and that the police did not adequately rule out other suspects. She stated, "[F]rankly, Martians from outer space might have done it, too. But that's not what happened. That's not what the evidence shows." Additionally, the prosecutor argued that the police conducted a proper investigation by not jumping to conclusions about possible suspects.

We cannot identify in the prosecutor's closing argument any intimation that she had special knowledge regarding Toth's investigation or that she put a "stamp of approval" on the testimony. She merely summarized Toth's testimony that the police investigated several leads before identifying defendants as suspects to rebut the suggestion that the police haphazardly identified defendants. She made no comments about the substance of Toth's investigation. The closest she came to putting her "stamp of approval" on the testimony was by stating that the officers did the investigation "to the best of their ability" and that Toth "did what an officer should do and try to get to the truth." These statements were innocuous and unspecific, again simply rebutting the suggestion that the officers did not do an adequate investigation. Further, the statements developed an argument based on the evidence and the reasonable inferences arising from the evidence. *Schutte*, 240 Mich App at 721. Finally, the prosecutor did not claim to know anything about the investigation beyond what was shown by the evidence—that the police investigated multiple leads before focusing on defendants. *Bahoda*, 448 Mich at 277. The prosecutor's remarks were proper.

We affirm the conviction and sentence of defendant Paula Renai Bennett.

III. DOCKET NO. 287768: *PEOPLE v BENSON*

Benson initially argues that the trial court erred when it denied his motion to quash the district court's bindover decision. "A circuit court's decision to grant or deny a motion to quash charges is reviewed de novo to determine if the district court abused its discretion in binding over a defendant for trial." *People v Jenkins*, 244 Mich App 1, 14; 624 NW2d 457 (2000). Questions of

constitutional law are reviewed de novo. *People v Davis*, 472 Mich 156, 159; 695 NW2d 45 (2005).

At the preliminary examination, Fritz and Kandler testified against both defendants. Fritz testified that Bennett told her after the murder that Benson "did it." This testimony was admitted only against Bennett.[3] Benson argues that, absent this testimony, the prosecution failed to produce sufficient evidence to bind him over on the charges at his preliminary examination.

"The purpose of a preliminary examination is to determine whether probable cause exists to believe that a crime was committed and that the defendant committed it." *People v Lowery*, 274 Mich App 684, 685; 736 NW2d 586 (2007). Accordingly, the prosecutor need not demonstrate guilt beyond a reasonable doubt at the preliminary-examination stage. *Id*. Probable cause is established if "a person of ordinary caution and prudence [could] conscientiously entertain a reasonable belief of the defendant's guilt." *Id*. (quotation marks and citation omitted).

At the preliminary examination, Fritz testified that Benson was angry at the victim for stealing the items and he threatened to kill the victim. Fritz testified that she witnessed Benson and Bennett leave together to find the victim just before the killing. She testified that Bennett returned from that trip and looked upset. Kandler also testified that she had heard Benson threatening to kill the victim earlier in the day before she was killed. Thus, multiple witnesses heard Benson threaten to kill the victim, Benson was observed leaving to look for the victim just before her death, and Bennett returned from the trip crying and upset. Benson argues that the district court must necessarily have considered

[3] At trial, the testimony was admitted against Benson as an excited utterance.

Fritz's further testimony that Bennett told her that Benson killed the victim because this other evidence was insufficient to establish probable cause. However, we conclude that even without Bennett's statements, there was legally sufficient evidence for a "person of ordinary caution and prudence" to have a reasonable belief that Benson committed the crime of murdering the victim. Moreover, the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

Benson next argues that the trial court erred when it admitted on several occasions testimonial hearsay that violated his right of confrontation. Benson raised these issues in a motion for a new trial and argues on appeal that the trial court should have granted a new trial. The decision whether to grant a new trial is within the trial court's discretion and is, therefore, reviewed for an abuse of discretion. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008); *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Questions of constitutional law are reviewed de novo. *Davis*, 472 Mich at 159.

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker* (*On Remand*), 273 Mich App 56, 60-61; 728 NW2d 902 (2006). In *People v Taylor*, 482 Mich 368, 378-379; 759 NW2d 361 (2008), our Supreme Court held with regard to whether a statement is testimonial:

> The overruling of [*Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980)] by the United States Supreme Court in *Crawford* and *Davis* [*v Washington*, 547 US 813;

126 S Ct 2266; 165 L Ed 2d 224 (2006)] undermines the analytical underpinnings of this Court's decision in [*People v Poole*, 444 Mich 151; 506 NW2d 505 (1993)], which was entirely predicated on *Roberts*. Thus, the holding in *Poole* that a codefendant's nontestimonial statement is governed by *both* MRE 804(b)(3) and the Confrontation Clause is no longer good law. . . . Accordingly, the admissibility of the statements in this case is governed solely by MRE 804(b)(3). This Court's MRE 804(b)(3) analysis in *Poole* remains valid, however, and provides the applicable standard for determining the admissibility of a codefendant's statement under the hearsay exception for statements against a declarant's penal interest. MRE 804(b)(3) provides:

"(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

"(3) *Statement against interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

In *Poole* [444 Mich at 161], this Court held:

"[W]here, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)."

Thus, our Supreme Court has ruled that a statement made to an acquaintance, outside a formal proceeding, is a nontestimonial statement and may be admitted as substantive evidence at trial pursuant to MRE 804(b)(3). *Taylor*, 482 Mich at 378-379. Benson argues that Fritz's testimony that Bennett told her that Benson killed the victim violated his right of confrontation. Bennett's statements were made to Fritz, a friend, and not within a formal proceeding. Thus, they were nontestimonial and do not implicate the Confrontation Clause. *Id*. Benson next argues that Kandler's testimony that Bennett told her cousin that Benson was threatening to kill the victim was a Confrontation Clause violation. Because this statement was to an acquaintance and there is no indication that it was made for the purposes of identifying the perpetrator of a crime, the statement was nontestimonial and did not implicate the Confrontation Clause. *Id.* at 378; *Walker*, 273 Mich App at 63.

Benson next argues that Larvaidan's testimony about a conversation he had with his father about whether to talk to the police violated his right of confrontation. Larvaidan's father told Larvaidan to "tell the truth." This statement was not hearsay because it did not contain an assertion; it was a command. MRE 801; *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82 (1998), mod 458 Mich 862 (1998). Moreover, the statement was nontestimonial because it had nothing to do with Benson or his alleged conduct and it was not made for testimonial purposes. *Taylor*, 482 Mich at 378; *Walker*, 273 Mich App at 63.

Finally, Benson argues that Kathleen McIntyre's testimony that her mother told her "to leave the room" while she spoke to Bennett on the phone also violated

his right of confrontation. Like Larvaidan's testimony, this statement was not even an assertion, let alone testimonial. *Taylor*, 482 Mich at 378; *Walker*, 273 Mich App at 63; *Jones*, 228 Mich App at 204-205.

Benson also argues that the prosecutor committed misconduct by referring in her opening statement to Fritz's testimony regarding Bennett's statements. However, because the statements were in fact admitted, and we have concluded that they were properly admitted, the prosecutor did not err. *People v King*, 215 Mich App 301, 307; 544 NW2d 765 (1996).

Benson finally makes the same argument as Bennett that the prosecutor improperly vouched for and bolstered Toth's testimony through her questioning and closing remarks. We have already concluded that the questioning of Toth did not constitute misconduct. Further, the prosecutor's argument to Benson's jury was largely the same as her argument to Bennett's jury, and we conclude that she was not bolstering Toth's testimony or intimating to the jury that she had special knowledge regarding Toth's investigations.[4]

We affirm the convictions and sentences of defendant Kyron Darell Benson.

Affirmed.

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[4] Benson also raises in his statement of questions presented the argument that Fritz's testimony was inadmissible hearsay erroneously admitted. Benson waived this argument because he failed to provide any support for the contention. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Benson also argued that the same testimony was a violation of the Confrontation Clause, but neglected to present the issue in his statement of questions presented. Thus, this argument is also waived. *English v Blue Cross Blue Sheild of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004).

METER, P.J., concurred.

SHAPIRO, J. (*concurring in part and dissenting in part*). I concur in the majority's affirmance of the convictions of defendant Kyron Benson in Docket No. 287768. I do not believe that any of the issues raised by Benson have merit and, further, the evidence against him for the murder of the victim was overwhelming.

It is in part because of the overwhelming evidence against Benson that I must dissent from the affirmance of defendant Paula Bennett's conviction in Docket No. 286960. Bennett was convicted of aiding and abetting a first-degree murder that was committed by her boyfriend, Benson, because she told him where the victim lived and helped direct him there. However, I find no evidence in the record to support a conclusion that Bennett wanted the victim to be harmed, let alone killed. Further, I conclude that the nature of the criminal jury instruction on aiding and abetting failed to have the jury consider the fundamental issue in this case, i.e., whether Bennett subjectively knew, i.e., believed, that Benson intended to kill at the time she provided assistance. Rather, the instruction asked the jury to make a determination based on an objective test, i.e., whether a reasonable person would or should have known of Benson's intent. Therefore, I do not believe that we can determine whether the jury found that Bennett had the necessary subjective intent, and so I would reverse the conviction and remand for a new trial. I further conclude that if reversal were not required on this basis, the case would still have to be remanded for a *Ginther*[1] hearing.

Finally, while it may be of little consequence to this defendant, I believe that the Legislature should con-

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

sider amending MCL 767.39 and MCL 750.316 to modify the statutory punishment for aiding and abetting first-degree murder. Given the wide range of culpability within the scope of the broad definition of aiding and abetting, I believe that sentencing judges should have the discretion to sentence an aider and abettor of first-degree murder to any term of years, life with parole, or life without parole.

I. FACTS RELATING TO THE INTENT AND KNOWLEDGE OF BENNETT

The victim, Stephanie McClure, had stayed for several days at the apartment shared by Benson and Bennett. When McClure left their apartment, she allegedly stole several items.[2] Bennett reported the theft to the police. She repeatedly stated that she simply wanted her things back and did not want any harm to come to McClure, whom she had known for many years and considered a friend.

There is no evidence that Bennett wanted Benson to harm, let alone shoot, McClure. Although Benson made many threats against McClure, there is no evidence that Bennett joined in the threats or approved of them. To the contrary, the evidence demonstrates that Bennett repeatedly disagreed with Benson when he made these threats and that when he made them, she "cried and freaked out," "[a]nd she didn't want him to do it." Indeed, at one point when Benson insisted that Bennett help him carry out his threats, Bennett stated: "No, I can't do it. I'm not like you." According to a witness to this interaction, Bennett was crying and "made it very clear to him that she thought it was over because she had went and made a police report. But he just kept yelling."

[2] Although the record does not contain evidence that the victim committed theft, it was not disputed by the prosecution.

Bennett's response to the theft was to take the appropriate and lawful action, i.e., going to the police to report the theft. It is difficult to understand why Bennett would identify herself to the police and link herself to accusations against McClure if her intent was to kill McClure or if she believed or expected that her boyfriend was going to kill McClure.

In addition, Benson's threats waxed and waned, and sometimes he indicated his agreement with Bennett that they should just get their things back from McClure and that could be the end of the dispute. Consistent with that fact, the uncontradicted testimony of Jessica Fritz was that when Bennett and Benson left their apartment to go to McClure's home, "Paula came out to tell me that they were leaving to go get their stuff back from [McClure] and her house keys that [McClure] had." Bennett's behavior following the shooting was consistent with her statement that her expectation was that they were going to get their things back and that she did not expect violence. Although Bennett did not see Benson shoot McClure, she heard the shots. Her reaction was to immediately begin to cry. Upon arriving at her apartment shortly thereafter, Bennett displayed shock and distress. A witness testified: "I woke up to her slamming and opening the door, opening the door real wide. Her eyes were real big. Her hands were shaking like this and she's crying."

Four witnesses other than Bennett heard Benson's threats against the victim. Three of them testified that they did not believe that Benson would carry them out. Further, none of them took any action to prevent the killing because they did not believe Benson would actually carry out his threats. Fritz testified that she heard threats by Benson. She testified that she did not like Benson

"because of the things he did to [Bennett]."[3] Fritz testified that she heard Benson make several threats to kill the victim, but that she did not believe he actually intended to because, "I didn't think he was stupid enough to shoot somebody." She further testified that when Bennett told her that Benson had shot the victim, "I didn't believe her at all. My mind was, I was in shock basically. . . . I thought she was lying."

Most significant in this regard was the testimony of Michael Larvaidan. Larvaidan knew Benson and rode with him and Bennett to the trailer park in which McClure lived. He testified that, during the drive, Benson did threaten to kill McClure, but he did not believe that Benson would actually do so. The question was put to him directly during his testimony:

> *Q*. Did you really expect that he was going to kill anybody?
>
> *A*. No.

In addition, Larvaidan testified that he had spoken with Benson two or three times by phone earlier in the day and that while Benson had seemed upset about the theft, he stated only that he was going to get his stuff from McClure and made no threats against her. Indeed, Benson's action in stopping on the way to McClure's trailer to pick up Larvaidan and bring him along for the ride would not appear, to an observer, to be consistent with an intent to commit a murder. Larvaidan testified that he sat in the front passenger seat next to Benson, that during the 10-minute drive he told Benson to cool down and not do anything stupid, and that he had previously calmed Benson down in situations when Benson was angry. He

[3] At the preliminary examination, Fritz testified that she had previously witnessed Benson beating Bennett.

testified that after he told Benson to calm down, Benson did not repeat the threat to shoot McClure.

One witness, Breanna Kandler, testified that she believed Benson's threats were serious. Kandler went with Bennett to the police department to report the alleged theft by McClure. She testified that after making the police report, she and Bennett picked up Benson, who had known of the alleged theft before Bennett made the police report. She testified that during the drive, Benson was threatening to kill McClure, during which, as already noted, Bennett was "crying and freaking out." She testified that Bennett "was scared. And she didn't want him to do it."

Kathleen McIntyre, another witness, thought Bennett had "made it very clear to [Benson] that she thought it was over because [Bennett] had went and made a police report. But [Benson] just kept yelling" despite the fact that Bennett told him several times that she had made a police report and that was all they should do. According to McIntyre, Benson alternated during this conversation between threatening to kill McClure and saying that all he wanted to do was get his stuff back from her. Fritz corroborated this with her testimony that in her statement to the prosecutor's office she stated that Benson "was talking about people walking all over [Bennett]" and that Bennett indicated that she wanted to let the police handle it.

The prosecution never argued that the evidence supported a finding that Bennett wanted Benson to shoot the victim or, indeed, harm her in any way. Further, the evidence overwhelmingly supports a determination that Bennett's purpose in going to the trailer park was to get her belongings back from McClure, that she did not want McClure hurt, and that although Benson had made remarks regarding wanting to kill

McClure, Bennett did not believe that Benson intended to shoot McClure and, like Larvaidan who was also in the vehicle, was shocked that Benson had done so. The uncontradicted evidence clearly supports the conclusion that Bennett did not share Benson's intent to harm, shoot, or kill McClure and that she did not intend to aid Benson in committing murder by directing him to the trailer park. Rather, the evidence supports the view that Bennett believed that she was directing Benson to McClure's residence in the hopes of reacquiring the belongings McClure had allegedly stolen from her. Bennett's reactions to the murder displayed shock and distress, not satisfaction. The other person in the car at the time of the shooting did not believe that Benson was going to shoot McClure, and three others who heard the threats did not consider them credible. The only one who did believe the threats to be credible testified that Bennett was frightened by Benson and that Bennett did not want McClure harmed.

II. AIDING-AND-ABETTING INSTRUCTION

The trial judge gave CJI2d 8.1, the criminal jury instruction on aiding and abetting. As a general rule, this instruction properly sets forth the required proofs for an aiding-and-abetting conviction. However, the instruction does not clearly address the very specific question of intent raised in this case. Therefore, I conclude that the instruction could not assure that the jury considered and decided the central question in the case, i.e. whether Bennett gave assistance to the killer for the purpose of aiding him in his crime.

The instruction sets forth three elements. The first is that the crime was committed. That is not at issue in Bennett's appeal, because Bennett does not now assert

that Benson did not murder the victim.[4] The second element is that "before or during the crime, the defendant did something to assist in the commission of the crime." The use of the verb form "to assist" is confusing in that it can be interpreted to mean either that the defendant acted in order to assist in the commission of the crime or that the defendant's action, though not intended to aid in the commission of a crime, had that result. The third element provides that "the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance." I believe the phrase "must have known," rather than "knew," converts the standard from a subjective one to that of a reasonable person. While this is of little consequence in most cases in which the action in question could not have had any purpose other than assisting the commission of the crime, I believe it was central to the verdict in this case.

As already discussed, there was no evidence that Bennett wanted this crime to be committed. Indeed, the prosecutor recognized this when she stated in closing argument: "I'm not going to stand here and tell you that Paula Bennett wanted [Benson] to kill [McClure] necessarily. . . . I don't have to prove that." The question for the jury, then, was whether Bennett "must have known" that Benson intended to kill McClure. This instruction is capable of allowing a conviction based on gross negligence by Bennett because it readily allows the jury to apply a "should have known" standard. If, whether because of stupidity, fear, self-delusion, or some other reason, the aider provides the assistance with the

[4] But see the discussion later in this opinion regarding ineffective assistance of trial counsel due, in part, to the decision to argue that Benson did not commit the murder.

genuine subjective belief that it will not aid in a crime, then our system, which is based on personal culpability, cannot countenance a murder conviction. See *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1992) ("[T]o be convicted of aiding and abetting first-degree murder a defendant must . . . participate in the crime while *knowing* that a coparticipant possessed the requisite intent."), overruled in part on other grounds by *People v Perry*, 460 Mich 55, 64-65 (1999) (emphasis added).

Under our law, those who commit a homicide because of gross negligence, rather than as a result of an intent to kill, are guilty of involuntary manslaughter, not murder. The statutory punishment for involuntary manslaughter, while severe, is very different from that imposed for murder. It is difficult to understand, then, why someone who did not kill, but who, through gross negligence, aided a killer, should be sentenced as a murderer. Therefore, at least in the context of this case, the proper third element of the aiding-and-abetting instruction should require that "the defendant must have given the assistance with the intent that it aid in the commission of the crime" rather than that the defendant "must have known" what the killer's intent was.[5]

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[5] This case is fundamentally different from that analyzed in *People v Kelly*, 423 Mich 261; 378 NW2d 365 (1985). In *Kelly*, the Supreme Court concluded that subjective knowledge of the precise crime ultimately committed was not an element of the offense of aiding and abetting, provided that the crime " 'was fairly within the criminal plan . . . .' " *Id.* at 278. Thus, although subjective knowledge of the precise offense ultimately committed is not required, there must still have been some "criminal plan" that the aider was aware of and chose to aid. This principle has since been applied, for example, to cases of armed robbery in which the abettor was aware of the intent to rob, but not that his or her coperpetrator planned to use a weapon. See, e.g., *Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975); *People v Young*, 114 Mich App

After a full and detailed review of the record, I conclude that there is a substantial likelihood that Bennett was convicted on the basis of a finding that she was grossly negligent in failing to recognize that her boyfriend intended to commit a murder at the time she provided the assistance. In the context of the unusual facts of this case, the criminal jury instruction creates a standard that allows for conviction of first-degree murder, not on the basis of an intent, but on the basis of gross negligence.

Bennett argues that there was insufficient evidence of her subjective intent and so her conviction should be vacated. While this is a close question, I conclude that a reasonable jury could infer that Bennett did subjectively know that Benson was going to the victim's house to kill her rather than simply recover the stolen property. However, the jury was never clearly asked to determine that question. Rather, the instruction could readily have been read to permit, *if not require*, that the jury apply an objective standard. In my view, Bennett's argument that the jury could not have found sufficient evidence of subjective intent implicitly raises the question whether the jury understood that this is what it was to determine. I recognize that defense counsel did not request a modification of the jury instruction. I believe that this failure to request a modification of the central jury instruction fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Smith v Spisak*, 558 US ___, ___; 130 S Ct 676, 685; 175 L Ed 2d 595, 604 (2010); *United States*

61, 65; 318 NW2d 606 (1982). Under *Kelly* and the other cases following it, the abettor must still be a voluntary participant in a criminal plan. The issue in this case, which the jury did not answer, is whether Bennett understood at all that she was assisting in a criminal enterprise.

v Cronic, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). And, as already discussed, I conclude there were multiple other errors that also contribute to my view regarding whether Bennett received effective assistance.

Our system is not perfect and should not be held to a standard of perfection. However, I do not believe that we can affirm a conviction of first-degree murder—particularly one based solely on an aiding-and-abetting theory—when the jury was not properly advised what the fundamental question was that it was to answer. We should not uphold the imposition of a sentence of life without parole when there remains a serious question whether the jury accurately understood the nature of the element of the offense primarily at issue. For this reason, I conclude that Bennett's conviction should be reversed and the case retried with a proper instruction, i.e., one that explicitly requires that the defendant's actions were taken with the actual knowledge that the assistance they provided would be used to accomplish a murder or some criminal plan in which the murder of the victim was " 'fairly within the criminal plan . . . .' " *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985).[6]

III. INEFFECTIVE ASSISTANCE OF COUNSEL

As already discussed, I believe defense counsel's failure to request a proper instruction on the only element at issue constituted ineffective assistance of counsel. However, I also conclude that, even absent that

[6] See n 5 of this opinion.

error, other actions by defense counsel would require that we remand this case for a *Ginther* hearing.

There was overwhelming evidence that Benson committed this cold-blooded murder. Further, there was no evidence to contradict the testimony of Larvaidan that Bennett provided Benson with the location of the victim's trailer. Both the practicality of trial tactics and the actual events as related by multiple witnesses mandated the defense that Bennett did not believe that Benson would murder the victim and that she did not want any harm to come to the victim. In terms of trial strategy, the entire defense effort would have to focus on separating Bennett's actions from Benson's in the eyes of the jury.

Even Benson's counsel expected that this would be the core of Bennett's defense, because before the onset of trial, he moved to sever his client's case from Bennett's. Benson's counsel filed an affidavit that stated "[t]hat the defenses [of Benson and Bennett] are antagonistic and [Benson] will contend that he had nothing to do with the murder of Stephanie McClure[. T]herefore *the defenses will be mutually exclusive and irreconcilable and not simply inconsistent*." (Emphasis added.) Benson's counsel recognized that the evidence of Bennett's own statements that Benson shot the victim would be admissible at a joint trial because, although they were out-of-court declarations, they were the statements of a defendant and therefore admissible under MRE 801(d)(2). At the hearing on Benson's motion, the prosecutor objected to separate trials, but indicated that she would not object to separate juries. Benson's counsel was satisfied with this approach because it ensured that his client's jury would not hear Bennett's statements that Benson shot the victim.

Bennett's counsel made no argument at the hearing, and the trial court entered an order for a single trial with separate juries.[7]

Bennett's counsel originally appeared to recognize his client's best defense because he argued at the preliminary examination:

> [T]he evidence I heard, at least indicates that [Bennett] spent all day trying to, um, basically diffuse [sic] this situation. She kept repeatedly saying all she wanted was her property back, and that she didn't want anybody to be injured or killed.
>
> * * *
>
> And, also from statements, first that, uh, she had indicated that she was trying to calm things—that the testimony indicated that she was trying to calm things down, and, no matter how aggravated, uh, Mr. Benson may have been. Secondly, uh, that she disbelieved that he was gonna act. I think that these two things are inconsistent with being an aider and abettor.

However, at trial, Bennett's counsel did little, if anything, to present this defense. Instead, he adopted what appeared to be a "team" strategy with Benson's counsel and even during closing focused on the premise that Benson did not kill McClure:

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[7] In retrospect at least, the decision to allow the cases to be tried together, but with separate juries, left Bennett with the worst of both worlds. The Bennett jury heard all the details of Benson's cold-blooded murder and were presumably justifiably outraged. In addition, they saw the two defendants and their counsel put forward a unified defense. However, the only person they could punish was Bennett. Had Bennett's case been tried separately, much of the evidence concerning Benson would not have been received by the jury. Had the two cases been tried before a single jury, that jury's outrage would have focused primarily on Benson, rather than falling solely on Bennett.

> My client is not charged with killing anybody. What she is charged with is what's called aiding and abetting. In order to be guilty of aiding and abetting, the first thing, and this is as [the prosecutor] said, regardless of the other jury, you have to be convinced that Kyron Benson committed a murder. Because if he's not guilty, she didn't aid and abet him.

Given that Bennett's jury, unlike Benson's jury, had heard multiple witnesses testify that Bennett told them that Benson killed McClure, it is difficult to fathom why her counsel tried to argue to the jury that Bennett should be acquitted because Benson did not commit the murder. This was even more peculiar given Larvaidan's eyewitness testimony clearly demonstrating that Benson committed the murder. Nevertheless, in his closing argument, Bennett's counsel spent more time arguing that there was reasonable doubt regarding the guilt of Benson than he did arguing that despite Benson's evident guilt, Bennett should not be convicted of aiding and abetting. This bizarre focus on Benson's possible innocence was not merely a useless argument; it was wholly counterproductive because, by "defending" Benson, Bennett's attorney linked her fate to his. If Bennett's counsel was going to argue that Benson did not kill McClure in the face of all the evidence to the contrary, including Bennett's own statements, he greatly undercut the argument that Bennett did not know Benson intended to kill McClure. By tying Bennett's defense to Benson, rather than conceding Benson's guilt and focusing solely on Bennett being in the wrong place at the wrong time and not realizing what Benson was going to do, Bennett's counsel created a scenario that made it appear as though both defendants were in the scheme together, making Bennett's best defense seem even less probable.

The perception that defendants were trying the case together was only enhanced when Benson's counsel deferred to Bennett's counsel to conduct the entire cross-examination of the medical examiner. Why Bennett's counsel chose to conduct that examination on behalf of both defendants remains a mystery, particularly given that the medical examiner's testimony had nothing to do with Bennett's defense. Indeed, during closing arguments, Bennett's counsel told the jury, "We spent a lot of time listening to evidence and a lot of it didn't have a darn thing to do with my client." The decision to have Bennett's counsel cross-examine the medical examiner only served to further connect both defendants in the jury's mind, thereby creating prejudice to Bennett.

In addition, I question Bennett's counsel's decision not to impeach Kandler with her preliminary-examination testimony. Kandler was the only witness who testified at trial that she believed Benson's threats. However, Kandler admitted at the preliminary examination that in her statement to the police, she wrote that she "didn't really think he was gonna do it," meaning she didn't think Benson was going to kill McClure. Kandler further testified at the preliminary examination that she thought Benson was "just blowing off steam" and agreed that she never actually thought that Benson was going to kill somebody that evening. At trial, when Benson's attorney attempted to question Kandler regarding her previous statements, the trial court sustained the prosecution's objection that whether Kandler thought Benson was serious was irrelevant. Although Kandler's testimony may have been irrelevant with regard to Benson, it was certainly relevant with regard to Bennett, particularly given that Kandler was the only person to testify at trial that she believed Benson's threats. However, Bennett's counsel

never challenged the trial court's ruling regarding the relevancy of Kandler's previous statements about Bennett and, therefore, foreclosed his opportunity to impeach the only witness who indicated that Benson's threat seemed worthy of belief.

To the extent that one may argue that the instructional error was waived, I question the decision of Bennett's counsel not to request an instruction on being an accessory after the fact. Granted, it is arguable that her attorney elected to go for an "all or nothing" defense, which is not necessarily ineffective assistance of counsel. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). However, given that the price of that decision was to risk life in prison without the possibility of parole, I believe that this should be explored at a *Ginther* hearing as well.[8]

Finally, although I recognize that the law does not require an on-the-record waiver of a defendant's decision not to testify, *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985), I am concerned about the lack of such a record under the circumstances of this case. Given the nature of the defense presented, it certainly would have been helpful to a reviewing court to have a record of the nature of Bennett's understanding regarding her rights and the risks and benefits of

[8] I recognize that the trial court would not have been required to give this instruction. *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). However, it would have been within the trial court's discretion to do so. *Id.* at 63 n 19. Further, given the risk that Bennett's "jury might have chosen to convict [her] not because it [was] persuaded that [she was] guilty of capital murder, but simply to avoid setting [her] free," *id*. at 73-74 (BRICKLEY, J., dissenting) (quotation marks and citations omitted), it seems unreasonable for her counsel not to have attempted to provide an avenue for the jury to punish Bennett without subjecting her to imprisonment for life without parole.

testifying.[9] As with the other issues just discussed, I believe this issue should be explored at a *Ginther* hearing.

IV. SENTENCING AND THE PRINCIPLE OF PROPORTIONALITY

While it may be of little consequence to Bennett, I suggest that this case is an example of why the Legislature should consider amending MCL 767.39, which mandates that someone convicted of aiding and abetting be subject to the same punishment as the primary offender. Under our system of indeterminate sentencing, a trial court retains broad discretion in fashioning the sentence of the abettor based on his or her individual culpability, extent of involvement, intent, and other factors. Thus, although the abettor will receive the same statutory maximum, his or her minimum term will vary, depending on the circumstances, from that of the primary offender. One could argue that such discretion is required by due process given that the ultimate basis for our criminal law is individual culpability. "[T]he criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." *Mullaney v Wilbur*, 421 US 684, 697-698; 95 S Ct 1881; 44 L Ed 2d 508 (1975), cited with approval by the Michigan Supreme Court in *People v Aaron*, 409 Mich 672, 711; 299 NW2d 304 (1980).

However, in the setting of first-degree murder, the sentence is not indeterminate. It is determinate—life in prison without the possibility of parole. I question

[9] This might also have cleared up any concerns arising out of statements made by Bennett's counsel at the preliminary examination that Bennett had been beaten by Benson and "there may be a basis for her being fearful of [Benson] [t]hat might lead her to, uh, say things that would be more harmful to herself and protective of [Benson]."

whether a blanket application of that punishment to an abettor, regardless of the circumstances and his or her individual level of culpability, is consistent with due process. It is certainly not consistent, at least in some cases, with the principle of proportionality. See *People v Bennett*, 241 Mich App 511, 517; 616 NW2d 703 (2000) ("By sentencing defendant to life imprisonment, the sentencing court 'has left no room for the principle of proportionality to operate on an offender convicted of [criminal sexual conduct] who has a previous record for this kind of offense or whose criminal behavior is more aggravated than in [defendant's] case.' "), quoting *People v Milbourn*, 435 Mich 630, 668-669; 461 NW2d 1 (1990) (alterations in *Bennett*); see also *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008) (" '[T]he appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history.' ") (citation omitted). Thus, I respectfully suggest that the Legislature consider allowing the sentencing court some degree of discretion in sentencing defendants who are found guilty on an aiding-and-abetting theory when the primary offense carries a determinant sentence.

V. CONCLUSION

In a system of justice based on individual culpability, I do not believe we can properly affirm a first-degree-murder conviction purely on the basis of an aiding-and-abetting theory when there is a serious question whether the jury ever made a determination regarding the defendant's subjective intent, knowledge, and individual culpability. Thus, I believe we should reverse Bennett's conviction and remand her case for a new

trial. Alternatively, I believe we should remand her case for a *Ginther* hearing to address the concerns regarding her representation I have raised in this dissent.

LAKEVIEW COMMONS LIMITED PARTNERSHIP v
EMPOWER YOURSELF, LLC

Docket No. 291728. Submitted September 9, 2010, at Detroit. Decided September 16, 2010. Approved for publication November 9, 2010, at 9:00 a.m.

Lakeview Commons Limited Partnership filed suit in the Oakland Circuit Court against Empower Yourself, L.L.C., Hamsa, L.L.C., and Troy and Phyllis Swalwell to collect payments due under a lease to Empower, a fitness and yoga business owned by the Swalwells. Empower breached the lease with plaintiff in August 2007. That same month, the Swalwells created Hamsa, L.L.C., also a fitness and yoga business. The parties filed cross-motions for summary disposition. The court, Rae Lee Chabot, J., granted both motions in part and denied both motions in part, entering judgment in favor of plaintiff against Empower, but denying plaintiff's motion with respect to the other defendants. The court also dismissed plaintiff's counts seeking to impose successor liability on Hamsa and to pierce the corporate veils of Empower and Hamsa. Plaintiff sought interlocutory appeal.

The Court of Appeals *held*:

1. The trial court erred by granting defendants summary disposition on the issue of successor liability. The principles of successor liability apply to limited liability companies as well as corporations. Under those principles, if a predecessor company acquires a successor by merger, the successor generally assumes all of the predecessor's liabilities. If the purchase occurs by the exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless an exception applies. The five recognized exceptions are (1) when there was an express or implied assumption of liability, (2) when the transaction amounted to a consolidation or merger, (3) when the transaction was fraudulent, (4) when some elements of a good-faith purchase were lacking or the transfer was without consideration and the predecessor's creditors were not provided for, and (5) when the successor is a mere continuation or reincarnation of the predecessor. A prima facie case of continuity of enterprise exists when the plaintiff establishes the following: (1) a continuation

of the predecessor company, so that there was a continuity of management, personnel, physical location, assets, and general business operations of the predecessor, (2) that the predecessor ceased its ordinary business operations, liquidated, and dissolved as soon as legally and practically possible, and (3) that the successor company assumed those liabilities and obligations of the predecessor ordinarily necessary for the uninterrupted continuation of normal business operations of the predecessor. An additional relevant consideration is whether the successor held itself out to the world as the effective continuation of the predecessor. Plaintiff presented evidence that there had been a continuation in management, personnel, assets, and general business operations of Empower by Hamsa that was sufficient to raise a genuine issue of material fact regarding whether Hamsa was merely a continuation of Empower.

2. The trial court correctly found that there was no question of material fact regarding piercing the corporate veil. The elements for piercing the corporate veil apply to limited liability companies. Those elements are (1) that the business entity was a mere instrumentality of another individual or entity, (2) that the business entity was used to commit a wrong or fraud, and (3) that there was an unjust injury or loss to the plaintiff. The corporate forms of Empower and Hamsa were respected throughout, and the fact that part of the reason Empower ceased operations was to avoid the lease agreement with plaintiff was not alone sufficient to raise a genuine issue of material fact regarding whether Empower's or Hamsa's corporate veils should be pierced.

Affirmed in part, reversed in part, and remanded.

1. CORPORATIONS — LIMITED LIABILITY COMPANIES — SUCCESSOR LIABILITY.

Under the principles of successor liability, if a predecessor company acquires a successor by merger, the successor generally assumes all of the predecessor's liabilities; if the purchase occurs by the exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless an exception applies; the five recognized exceptions are (1) when there was an express or implied assumption of liability, (2) when the transaction amounted to a consolidation or merger, (3) when the transaction was fraudulent, (4) when some elements of a good-faith purchase were lacking or the transfer was without consideration and the predecessor's creditors were not provided for, and (5) when the successor is a mere continuation or reincarnation of the predecessor.

2. CORPORATIONS — LIMITED LIABILITY COMPANIES — SUCCESSOR LIABILITY.

A successor limited liability company can be held liable for its predecessor's liabilities when the successor is a mere continuation or reincarnation of the predecessor; a prima facie case of continuity of enterprise exists when the plaintiff establishes the following: (1) a continuation of the predecessor company, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor, (2) that the predecessor ceased its ordinary business operations, liquidated, and dissolved as soon as legally and practically possible, and (3) that the successor assumed those liabilities and obligations of the predecessor ordinarily necessary for the uninterrupted continuation of normal business operations of the predecessor company; an additional relevant consideration is whether the successor held itself out to the world as the effective continuation of the predecessor.

3. CORPORATIONS — LIMITED LIABILITY COMPANIES — PIERCING THE CORPORATE VEIL.

The elements for piercing the corporate veil apply to limited liability companies; those elements are (1) that the business entity is a mere instrumentality of another individual or entity, (2) that the business entity was used to commit a wrong or fraud, and (3) that there was an unjust injury or loss to the plaintiff.

Maddin, Hauser, Wartell, Roth & Heller, P.C. (by *Michelle C. Harrell*), for plaintiff.

Law Office of Steiner & Steiner, PLLC (by *Wilfred Eric Steiner*), for defendants.

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM. Plaintiff appeals by leave granted the trial court's order granting in part summary disposition in favor of defendants. We affirm in part and reverse in part.

This action arises out of a breached lease agreement between plaintiff and Empower Yourself, L.L.C. On appeal, plaintiff argues that the trial court erred by granting defendants' motion for summary disposition

because a genuine issue of material fact existed regarding (1) whether Hamsa, L.L.C., was a mere continuation of Empower and (2) whether the corporate veil of Empower and Hamsa should be pierced to hold defendants Troy Swalwell (Troy) and Phyllis Swalwell (Phyllis) personally liable. We agree that there was a genuine issue of material fact regarding whether Hamsa was the mere continuation of Empower, but held that there was no genuine issue of material fact regarding piercing the corporate veil.

This Court reviews de novo the grant or denial of a motion for summary disposition under MCR 2.116(C)(10). *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim, and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. There is a genuine issue of material fact when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). This Court considers only the evidence that was properly presented to the trial court in deciding the motion. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Successor liability is derived from equitable principles and is reviewed de novo on appeal. *Zantel Mktg Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

The basic rule in Michigan regarding successor liability is as follows:

> The traditional rule of successor liability examines the nature of the transaction between predecessor and successor corporations. If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor's liabilities. However, where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless one of five narrow exceptions applies. The five exceptions are as follows:
>
> "(1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation." [*Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702; 597 NW2d 506 (1999), quoting *Turner v Bituminous Cas Co*, 397 Mich 406, 417 n 3; 244 NW2d 873 (1976) (citations and quotation marks omitted).]

Furthermore, *Foster* explained the "mere continuation" doctrine:

> After examining the relevant policy concerns, this Court in *Turner* concluded that a continuity of enterprise between a successor and its predecessor may force a successor to "accept the liability with the benefits" of such continuity. *Turner* held that a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation. *Turner* identified as an

> additional principle relevant to determining successor liability, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation. [*Foster*, 460 Mich at 703-704 (citation omitted).]

This Court recently held in *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 717-719; 762 NW2d 529 (2008), that successor liability applies to corporations and limited liability companies in purely commercial contexts, such as a breach of a lease agreement. In *RDM Holdings*, the plaintiff was a commercial business that entered into a lease agreement with Continental-Lighting, L.L.C. (Lighting). Lighting filed for bankruptcy and, subsequently, Continental-Coating, L.L.C. (Coating), was created. The trial court granted summary disposition, finding no genuine issue of material fact regarding whether Coating was liable for the breach of the lease agreement under a successor-liability theory. This Court reversed, concluding that the plaintiff had presented sufficient evidence to create a genuine issue of material fact because the plaintiff had presented evidence reflecting a continuation in management, personnel, assets, and general business operations of Lighting by Coating. *Id*. at 682-683, 718-719.

In looking at the record in the light most favorable to plaintiff, there was a genuine issue of material fact regarding whether Hamsa was the mere continuation of Empower. Empower ceased operations in August 2007, the same month in which Hamsa was created. Both Empower and Hamsa were in the business of health, fitness, personal training, and yoga. Empower and Hamsa served the same geographic area, Oakland County. Empower and Hamsa operated in the same manner. Both provided a venue for independent-contractor yoga teachers to teach classes to students.

Phyllis owned 80 percent and Troy owned 20 percent of both Empower and Hamsa. Phyllis was the president and managing member of both Empower and Hamsa, and Troy was the vice president and registered agent of both Empower and Hamsa. Troy also signed the annual reports and prepared the tax returns for both Empower and Hamsa. Empower and Hamsa did not keep a corporate minute book or an operating agreement. Both held informal meetings and did not keep minutes from the informal meetings. Neither Empower nor Hamsa distributed earnings to its members. Troy and Phyllis were signatories on both Empower's and Hamsa's bank accounts. Empower's business telephone number became Hamsa's business telephone number. Empower had a website from 2004 until 2007. Then, in 2007, Hamsa created a website. Hamsa's website stated that Hamsa was formerly known as Empower and gave details on its new location. Reasonable minds could differ regarding whether Hamsa was the mere continuation of Empower. Therefore, the record provided raised a genuine issue of material fact regarding whether Hamsa was merely a continuation of Empower.

Plaintiff also argues there was a genuine issue of fact regarding whether the corporate veil of Empower and Hamsa should be pierced. An appellate court's review of a decision not to pierce the corporate veil is de novo because of the equitable nature of the remedy. *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).

In general, "the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all the corporation's stock." *Id*. However, the courts can ignore this corporate fiction when it is invoked to subvert justice. *Id*. Traditionally, the "basis for piercing the corporate veil has been to

protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations." *Id*.

Piercing the corporate veil requires the following elements: (1) the corporate entity is a mere instrumentality of another individual or entity, (2) the corporate entity was used to commit a wrong or fraud, and (3) there was an unjust injury or loss to the plaintiff. *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004). "There is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic justification to determine if the corporate form has been abused."[1] *Id*. at 294.

Looking at the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether Empower's or Hamsa's corporate veils should be pierced. The corporate forms of Empower and Hamsa were respected. Troy stated that the activities of Empower and Hamsa were not commingled. Empower paid its bills through its bank account, and Hamsa paid its bills through its bank account. Empower and Hamsa each filed separate state and federal tax returns. Troy stated that the rent and other expenses incurred by Empower exceeded its revenue, so he personally loaned Empower about $100,000. Troy would directly deposit the loaned money into Empower's bank account, and then Empower itself would pay its monthly bills. Additionally, Troy personally paid for various assets of Empower, and then upon Empower's ceasing operations, he left those assets with

[1] This Court applied these same rules to determine whether the corporate veil of a limited liability company should be pierced. *RDM Holdings*, 281 Mich App at 715.

Empower. Troy stated that any check written to Troy or Phyllis by Empower was for the partial repayments of Troy's loans. Troy stated that he personally paid for Empower's leased vehicle for his personal use after Empower ceased operations. Additionally, the record does not show that plaintiff will suffer an unjust loss because plaintiff already has a valid judgment against Empower for breaching the lease agreement. While Troy admitted that part of the reason Empower ceased operations was to avoid the lease agreement with plaintiff, this alone was not sufficient to raise a genuine issue of material fact regarding whether Empower's or Hamsa's corporate veils should be pierced.

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

BEEBE v HARTMAN

Docket No. 292194. Submitted September 8, 2010, at Lansing. Decided November 9, 2010, at 9:05 a.m.

Donald and Eve Beebe brought an action in the Branch Circuit Court for medical malpractice and derivative claims against Richard J. Hartman, D.O., Community Health Center of Branch County, Christina Sheely, D.O., and Family Practice & Orthopedic Care Center, P.L.L.C. Donald Beebe had fractured his leg in an accident that occurred when he drove a snowmobile after he had been drinking beer. When he was admitted for surgery, he had a blood alcohol content showing that he was intoxicated. Sheely operated on his leg, with Hartman assisting. After surgery, Beebe suffered from intense pain and numbness and swelling of his foot. Several months later, he was diagnosed as having deep compartment syndrome in his leg, which caused pain in the leg and contracture of his toes and allegedly resulted from the surgery performed by Sheely. After the Beebes sued, Community Health Center moved for summary disposition, in which the other defendants concurred, arguing that the complaint was barred by MCL 600.2955a because Donald Beebe was intoxicated at the time of the accident and 50 percent or more the cause of the snowmobile accident. The court, Pamela L. Lightvoet, J., denied the motion. After Hartman and Community Health Center were dismissed by stipulation, the remaining defendants moved to dismiss the cause of action. The court entered the parties' stipulation that plaintiff's intoxication was 50 percent or more the cause of the snowmobile accident that resulted in his injury and, after that, granted the defendants' motion to dismiss, finding that Beebe's impaired ability to function was due to his intoxication and that, as a result, he was 50 percent or more the cause of the event that resulted in his injuries. Plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 600.2955a(1) provides an absolute defense when as a result of impairment from alcohol, the plaintiff is 50 percent or more the cause of the accident or event that resulted in the plaintiff's injury. In order for the statute to apply, the plaintiff's impairment from alcohol must have been the cause of the accident or event, and the particular accident or event must have resulted in the particular

injury. The one particular accident or event that resulted in the pain and the contracture of plaintiff's toes was defendants' alleged medical malpractice, not the snowmobile accident. Furthermore, the one specific result of defendants' alleged medical malpractice was the pain in plaintiff's leg and the contracture of his toes. This injury was separate and distinct from the leg fractures plaintiff suffered as a result of his intoxication. The trial court erred by finding that the snowmobile accident rather than the medical malpractice was the event to be analyzed under MCL 600.2955a.

2. For MCL 600.2955a(1) to apply, plaintiff's impairment from alcohol must have been the one proximate cause of plaintiff's injuries suffered as a result of compartment syndrome. Even assuming that plaintiff's impairment was a proximate cause of his injuries, defendants were also a proximate cause of those injuries when the evidence was viewed in a light most favorable to plaintiff. Thus, the defense provided by MCL 600.2955a did not apply in this case.

Reversed.

BANDSTRA, J., concurring, agreed that the relevant event was the alleged malpractice, not the snowmobile accident and that the statutory defense was thus unavailable to defendants. He would have declined to address the issue of causation because doing so resulted in dicta, but noted further that, for the statute to apply, a plaintiff's alcohol impairment need not be the one proximate cause of the event giving rise to the injury. It would be sufficient if the plaintiff's impairment, considered with any other proximate causes, constituted 50 percent or more of the cause of the event resulting in the injury.

Law Offices of David A. Priehs, P.C. (by *David A. Priehs*), for Donald and Eva Beebe.

Plunkett Cooney (by *Robert G. Kamenec*) for Christina Sheely, D.O., and Family Practice & Orthopedic Care Center, P.L.L.C.

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

BORRELLO, P.J. Plaintiffs Donald and Eva Beebe[1] appeal

[1] Eva Beebe's claim is for loss of society, services, companionship, comfort and consortium, which is a derivative action. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 163 n 1; 713 NW2d 717 (2006). Therefore, this opinion refers to Donald Beebe as "plaintiff."

as of right the trial court's order granting a motion for dismissal pursuant to MCL 600.2955a by defendants Christina Sheely, D.O., and Family Practice & Orthopedic Care Center, P.L.L.C. For the reasons set forth in this opinion, we reverse.

I. FACTS AND PROCEDURAL HISTORY

On August 26, 2004, plaintiff was celebrating his thirty-third birthday at his home while working on his snowmobile with a friend. As he worked, plaintiff consumed about 11 cans of beer between noon and 8:00 p.m. At about 8:00 p.m., plaintiff drove the snowmobile across his lawn. According to plaintiff, as he was driving the snowmobile, he "grabbed ahold of the throttle, and I just stood straight up and it dumped me off." Plaintiff put his right leg down to catch himself and injured it. He was transported to the emergency room at defendant Community Health Center of Branch County where defendant Richard J. Hartman, Jr., D.O., diagnosed him as having fractures of the tibia and fibula in his right leg. Blood alcohol testing from a sample taken at 9:10 p.m. at Community Health Center indicated that plaintiff had a blood alcohol content of 0.13 percent. On August 27, 2004, Dr. Sheely performed surgery on plaintiff's right leg, and Dr. Hartman assisted. The surgery entailed a "[c]losed reduction of right tibia and fibula with intramedullary nailing of the tibia locked both proximally and distally." Plaintiff suffered from intense postsurgical pain in his right leg, as well as numbness and swelling in his right foot. He was discharged from the hospital the day after surgery. In January 2005, plaintiff sought medical care from Dr. Tudor Tien, who concluded that plaintiff had "sustained flexion contractures of his toes in his

right foot" and that "[t]he cause of his symptoms are most likely from a deep compartment syndrome in his leg." In May 2005, Dr. Tien performed extensive reconstructive surgery of plaintiff's right leg.

In February 2007, plaintiff filed a medical malpractice complaint against defendants, alleging that defendants failed to diagnose and treat him for compartment syndrome in his lower right leg after they performed surgery on the leg and that as a result, he "has been and remains lame and disabled from many vocational, recreational, household and personal activities and in pain." According to the complaint, defendants failed to appreciate and understand the signs and symptoms of compartment syndrome, failed to recognize plaintiff's symptoms as consistent with compartment syndrome, failed to perform examinations or testing to confirm or rule out compartment syndrome, failed to diagnose and treat compartment syndrome, and failed to consult with or refer plaintiff to a physician who could recognize the signs and symptoms of compartment syndrome.

In December 2007, Community Health Center moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's complaint for damages was barred by MCL 600.2955a because plaintiff was intoxicated at the time of the snowmobile accident and plaintiff was 50 percent or more the cause of the snowmobile accident that resulted in his leg injuries. Drs. Hartman and Sheely and Family Practice & Orthopedic Care Center filed a concurrence in Community Health Center's motion for summary disposition. On April 16, 2008, the trial court ruled that in light of *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452; 702 NW2d 671 (2005), the applicable "event" under MCL 600.2955a

was the snowmobile accident and not defendants' medical treatment of plaintiff's leg. However, the trial court denied defendants summary disposition "because questions of fact remain regarding whether Mr. Beebe's intoxication was 50% or more the cause" of the snowmobile accident that resulted in his injury.

On April 21, 2009, Dr. Sheely and Family Practice & Orthopedic Care Center[2] moved to dismiss plaintiff's cause of action. Anticipating the parties' stipulation that plaintiff's consumption of alcohol was more than 50 percent the cause of the snowmobile accident that resulted in plaintiff's injury, defendants asserted that there was now no issue of material fact regarding whether plaintiff's intoxication was more than 50 percent the cause of his injury and that summary disposition was therefore proper under MCL 600.2955a. On May 5, 2009, the trial court entered the parties' order stipulating that plaintiff's "impaired ability to function due to the influence of intoxicating liquor was 50% or more the cause of the snowmobile accident of August 26, 2004 which resulted in fractures to his right tibia and fibula pursuant to MCL 600.2955(a) [sic]." On that same date, the trial court granted defendants' motion to dismiss "because [plaintiff] had an impaired ability to function due to the influence of intoxicating liquor and that as a result of that impaired ability, [plaintiff] was fifty percent or more the cause of the event that resulted in Plaintiffs' injuries as alleged in the Complaint." Plaintiffs appeal as of right the trial court's dismissal of his medical malpractice action.

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[2] By this time, Community Health Center and Dr. Hartman had been dismissed from the case by stipulation. We will refer to Dr. Sheely and Family Practice & Orthopedic Care Center as "defendants" for the remainder of this opinion

II. STANDARD OF REVIEW

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10)[3] is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.' " *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*,

[3] For review purposes, we treat the trial court's granting of defendants' motion to dismiss as a granting of summary disposition under MCR 2.116(C)(10). The trial court originally denied defendants' motion for summary disposition pursuant to MCL 600.2955a because it concluded that there was a question of material fact regarding whether plaintiff's intoxication was 50 percent or more the cause of his injury. The trial court's granting of defendants' motion to dismiss in light of the parties' stipulation that plaintiff's intoxication was 50 percent or more the cause of the snowmobile accident that resulted in the fractures to plaintiff's right tibia and fibula was tantamount to a ruling that there was no genuine issue of material fact regarding whether plaintiff's intoxication was 50 percent or more the cause of his injuries.

451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded on other grounds 477 Mich 1067 (2007).]

This case involves the construction of MCL 600.2955a. This Court reviews de novo the interpretation of a statute. *Manske v Dep't of Treasury*, 282 Mich App 464, 468; 766 NW2d 300 (2009).

III. ANALYSIS

At issue in this case is the interpretation and application of MCL 600.2955a.[4] MCL 600.2955a provides an absolute defense when impairment from alcohol is 50 percent or more the cause of the accident or event that resulted in the plaintiff's injury:

> (1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.
>
> (2) As used in this section:
>
> (a) "Controlled substance" means that term as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws.

[4] Plaintiff argues on appeal that MCL 600.2955a does not apply to medical malpractice actions. We decline to address this issue because plaintiff did not raise the issue below and the trial court did not address it; therefore, it is unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). For purposes of this case, we presume, without deciding, that MCL 600.2955a applies to medical malpractice actions.

> (b) "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, a presumption would arise that the individual's ability to operate a vehicle was impaired.

"[T]he absolute defense of impairment provided by MCL 600.2955a serves a unique legislative purpose." *Harbour*, 266 Mich App at 460. By enacting the statute, the Legislature " 'sought to place more responsibility on intoxicated plaintiffs who are equally or more to blame for their injuries, therefore marking a shift toward personal responsibility envisioned by overall tort reform.' " *Id.* at 461, quoting *Wysocki v Felt*, 248 Mich App 346, 358-359; 639 NW2d 572 (2001).

The primary objective in construing a statute is to discern and give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The words used in a statute provide the most reliable evidence of the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). "Every word or phrase of a statute will be assigned its plain and ordinary meaning unless defined in the statute." *Piccalo v Nix (On Remand)*, 252 Mich App 675, 679; 653 NW2d 447 (2002). If the language of the statute is clear and unambiguous, the Court must follow it, and further judicial construction is neither

permitted nor required. *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

MCL 600.2955a provides an absolute defense in this case if plaintiff "was 50% or more the cause of the accident or event that resulted in the death or injury." MCL 600.2955a(1). The trial court ruled that the applicable "event" under MCL 600.2955a(1) that resulted in plaintiff's injury was the snowmobile accident and not defendants' medical treatment of plaintiff's leg. In *Piccalo*, this Court interpreted the word "event" in MCL 600.2955a(1) broadly, meaning " 'something that happens or is regarded as happening; an occurrence, especially one of some importance' or 'the outcome, issue, or result of anything.' " *Piccalo*, 252 Mich App at 680, quoting *The Random House Dictionary of the English Language: Second Edition Unabridged*, p 671.

Analogous caselaw arising from this Court's and our Supreme Court's interpretations and applications of the governmental tort liability act is instructive. MCL 691.1407(2) provides that when certain conditions are met, governmental employees are immune from tort liability for damages they caused. For purposes of our discussion, the relevant language of MCL 691.1407(2) states that a governmental employee is immune from tort liability if, among other conditions, "[t]he . . . employee's . . . conduct does not amount to gross negligence that is *the* proximate cause of the injury or damage." MCL 691.1407(2)(c) (emphasis added).

In 1994, our Supreme Court held that the word "the" preceding "proximate cause" in MCL 691.1407(2)(c) did not indicate that the conduct was required to be the sole proximate cause of the injury in order to overcome immunity. *Dedes v Asch*, 446 Mich 99, 107; 521 NW2d 488 (1994). Six years later, the Supreme Court overruled *Dedes* in part in *Robinson*, 462 Mich at 458-459.

According to our Supreme Court's decision in *Robinson*, the Legislature's use of the definite article indicated the Legislature's intent to limit tort liability except when the governmental employee's gross negligence was "the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." *Robinson*, 462 Mich at 462. This Court has followed *Robinson* in strictly limiting tort liability when a governmental employee's negligence is merely *a* cause, rather than *the* cause of the plaintiff's injuries. See *Costa v Community Emergency Med Servs, Inc*, 263 Mich App 572, 579; 689 NW2d 712 (2004).

A. THE INJURY

Applying the same analysis used by our Supreme Court in its interpretation and application of the governmental tort liability act to MCL 600.2955a(1), we first must identify "the injury." Here, the trial court failed to properly identify "the injury" that was the basis for the action. Under MCL 600.2955a(1), a plaintiff's impaired ability to function because of intoxicating liquor is an absolute defense if the plaintiff's impaired ability to function "was 50% or more *the* cause of *the* accident or event that resulted in *the* death or injury." (Emphasis added.) "[T]he Legislature is presumed to understand the meaning of the language it enacts into law . . . ." *Robinson*, 462 Mich at 459. Furthermore, "[e]ach word of a statute is presumed to be used for a purpose." *Id.* As previously discussed, the Legislature's repeated use of the word "the" rather than "a" in MCL 600.2955a(1) is significant. Thus, in order for the absolute defense of impairment statute to apply, the plaintiff's impairment from alcohol must have been "the cause of the accident or event," and the particular accident or

event must have resulted in the particular injury. The one particular accident or event that resulted in the pain and the contracture of the toes of plaintiff's right foot was defendants' alleged medical malpractice, not the snowmobile accident. Furthermore, the one specific result of defendants' alleged medical malpractice was the pain in plaintiff's right leg and the contracture of the toes of his right foot.

In this case, there were two distinct injuries that were the result of two separate accidents or events. The first accident or event was plaintiff's snowmobile accident; the injuries that resulted from this accident or event were tibia and fibula fractures in plaintiff's right leg. The second accident or event was defendants' alleged medical malpractice in failing to diagnose and treat plaintiff's compartment syndrome; the injuries from this accident or event included pain and the contracture of the toes of plaintiff's right foot. The basis of a medical malpractice action is an injury to an individual that is the proximate result of alleged medical malpractice. See MCL 600.2912a. The relevant injury for purposes of plaintiff's medical malpractice action was not the fractures of the bones in his right leg, but the separate and distinct injury to plaintiff that resulted from defendants' alleged medical malpractice. According to plaintiff, defendants' medical malpractice in failing to diagnose and treat the compartment syndrome that developed in his right leg after Drs. Sheely and Hartman performed surgery on the leg caused injury in the form of pain and contracture of the toes on plaintiff's right foot. Hence, the injury giving rise to plaintiff's complaint is based on plaintiff's medical malpractice action, which was a separate and distinct injury from those suffered as a result of plaintiff's intoxication.

B. THE CAUSE

Under the plain language of MCL 600.2955a(1), the plaintiff's impairment from alcohol must have been "the cause," meaning the proximate cause that resulted in the particular injury. MCL 600.2955a(1). Causation includes both cause in fact and legal, or proximate, causation. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact requires a showing that but for the defendant's actions, the plaintiff's injury would not have occurred, while legal causation relates to the foreseeability of the consequences of the defendant's conduct. *Id.* at 163.

As noted previously, when considering a decision on a motion for summary disposition under MCR 2.116(C)(10), we must review " 'the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.' " *Odom v Wayne Co*, 482 Mich 459, 466-467; 760 NW2d 217 (2008), quoting *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Viewing the evidence in a light most favorable to plaintiff, plaintiff was not the "proximate cause" of the pain in his right leg and the contracture of the toes of his right foot. *Robinson*, 462 Mich at 462. For this reason alone, summary disposition based on the absolute defense of impairment provided by MCL 600.2955a would be improper.

For the absolute defense of impairment provided by the statute to apply, plaintiff's impairment from alcohol must also have been the one proximate cause of plaintiff's injuries suffered as a result of compartment syndrome.[5] "[L]egal cause or 'proximate cause' normally

[5] We recognize that the proper standard for proximate causation in a negligence action is that the negligence must be "a proximate cause" not "the proximate cause." *Kirby v Larson*, 400 Mich 585, 605-606; 256

involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner*, 445 Mich at 163. "To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct 'may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable.' " *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997), quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977). There may be more than one proximate cause of an injury. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988). Frequently, two causes will operate concurrently so that both constitute a direct proximate cause of the injury that results. *Id*.

Even assuming that plaintiff's impairment because of the influence of intoxicating liquor was *a* proximate cause of the leg injuries that resulted from the compartment syndrome, defendants would also be *a* proximate cause of those injuries if the evidence is viewed in a light most favorable to plaintiff. There was evidence that compartment syndrome can be a complication of fractures of the tibia and fibula and that plaintiff developed a deep compartment syndrome in his right leg after defendants performed surgery on the leg. There was also evidence that defendants did not diagnose or treat plaintiff's compartment syndrome and that plaintiff suffered pain and contracture in the toes of his right foot as a result of the compartment syndrome. In this case, we do not decide whether both plaintiff and defendants were proximate causes of the pain or the

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NW2d 400 (1977). However, we are analyzing causation in the context of the language used in the statute providing an absolute defense for impairment, and the language in the statute requires that the impairment be "the" one "cause of the accident or event that resulted in the . . . injury." MCL 600.2955a(1).

contracture of the toes of plaintiff's right foot and, if they both were proximate causes, whether plaintiff's impairment was a substantial factor in producing the pain and the contractures. We also do not decide whether defendants' alleged medical malpractice was foreseeable or whether it was an independent, intervening cause sufficient to sever the causal connection between plaintiff's impairment from alcohol and the injuries that resulted from defendants' alleged malpractice. Generally, proximate cause is a factual issue to be decided by the trier of fact.[6] *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). Our task in this case is limited to determining whether plaintiff was the proximate cause of the pain and the contracture of the toes of his right foot under MCL 600.2955a(1). Viewing the evidence in a light most favorable to plaintiff, we conclude that defendants may have been the proximate cause of the injuries plaintiff suffered as a result of the compartment syndrome; consequently, MCL 600.2955a does not apply to the facts of this case.

C. POLICY CONSIDERATIONS

Policy reasons support our construction of MCL 600.2955a. Concluding that the applicable accident or event in this case was the snowmobile accident rather than the alleged medical malpractice would effectively provide a blanket shield to medical care providers from medical malpractice actions in all cases in which the plaintiff patient was impaired when he or she sought treatment even if the medical care providers committed medical malpractice and caused a separate and discrete

[6] The court should decide proximate causation as a matter of law only if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

injury to the impaired plaintiff. Any construction of MCL 600.2955a that would result in such a blanket shield from liability for medical care providers is contrary to the policy in this state that allows patients injured by medical malpractice to seek recourse for their injuries in the form of a medical malpractice action. Moreover, interpreting MCL 600.2955a in a manner that would shield medical care providers from liability when the patient was impaired would not further the purposes and policies underlying the defense. Although the Legislature's purpose in enacting MCL 600.2955a was " 'to place more responsibility on intoxicated plaintiffs who are equally or more to blame for their injuries' " by " 'marking a shift toward personal responsibility,' " *Harbour*, 266 Mich App at 461, quoting *Wysocki*, 248 Mich App at 358-359, this purpose would not be served if a plaintiff, albeit an intoxicated plaintiff, were precluded from bringing an action to recover for separate and discrete injuries that were the result of medical malpractice and not the plaintiff's intoxication. Such an outcome would result in an inequitable shifting of the blame that would favor a negligent medical care provider who was more at fault for the injury than the intoxicated plaintiff.

D. *HARBOUR* IS DISTINGUISHABLE

Furthermore, our decision in *Harbour* does not require a contrary result in this case because *Harbour* is distinguishable both factually and legally from the instant case.[7] In *Harbour*, the plaintiff's decedent was arrested for driving while under the influence of intoxicating liquor and taken to jail. *Harbour*, 266 Mich App

[7] Plaintiff asserts that this Court's decision in *Harbour* was wrongly decided and requests this Court to convene a conflict panel pursuant to MCR 7.215(J)(3). We decline to do so.

at 454. At the jail, a nurse assessed him and placed him on "sick call" in a holding cell. *Id.* Approximately two hours after the nurse assessed him, the plaintiff's decedent "died as a result of irregular heart rhythms caused by acute alcohol withdrawal." *Id.* This Court ruled that alcohol withdrawal meets the broad definition of an "event" under MCL 600.2955a(1). *Id.* at 459. Because the decedent's alcohol-related impairment caused the acute withdrawal that was the most immediate, efficient and direct cause of the decedent's death, the defendant was entitled to the absolute defense of impairment provided by MCL 600.2955a. *Id.* at 463.

Unlike the facts of this case, there was only one injury in *Harbour*, the decedent's death. In the instant case, there were two distinct injuries: plaintiff's fractured tibia and fibula and the injuries to plaintiff's right leg that resulted from the compartment syndrome. Significantly, the causal connection between the decedent's impairment from alcohol and his death was unusually strong in *Harbour* because the decedent literally drank himself to death. In *Harbour* it was difficult for the plaintiff to dispute that the decedent's impairment from alcohol resulted in his death when "[p]laintiff's own evidence was unequivocal that the decedent's chronic alcohol abuse and . . . his alcohol-related impairment caused the acute withdrawal that was the 'most immediate, efficient, and direct cause' of his death." *Id.*, quoting *Robinson*, 462 Mich at 446. Furthermore, the plaintiff's expert witness in *Harbour* admitted that what might have happened if the decedent had been treated differently by the nurse was "pure speculation." *Id.* In contrast to *Harbour*, the causal connection between plaintiff's impairment in this case and the pain and contracture of the toes in his right foot was not as clear-cut because viewing the evidence in a light most favorable to plaintiff, there may

have been more than one cause that resulted in the pain and contractures, and for MCL 600.2955a to apply, plaintiff's impairment from alcohol must have been the one cause that resulted in the pain and the contracture of the toes of his right foot. *Harbour* is also distinguishable on the basis that the alleged medical malpractice was not a discrete injurious event because the decedent's own consumption of alcohol resulted in his death from acute alcohol withdrawal, whereas in the instant case, the injuries that plaintiff suffered as a result of compartment syndrome were discrete injuries that were not influenced by plaintiff's impairment from alcohol.

In sum, we hold that the applicable "accident or event" under MCL 600.2955a(1) was defendants' alleged medical malpractice. Viewing the evidence in a light most favorable to plaintiff, there was more than one cause that resulted in the pain and the contracture of the toes in plaintiff's right foot. Therefore, MCL 600.2955a(1) does not apply to the facts of this case.

Reversed.

JANSEN, J., concurred.

BANDSTRA, J. (*concurring*). I concur with the decision of the majority because, as explained in part III(A) of its opinion, for purposes of MCL 600.2955a(1), the relevant "event that resulted in the . . . injury" here was not the snowmobile accident and leg fractures suffered by plaintiff but, as alleged, the malpractice and resulting pain and contracture of plaintiff's right foot. Accordingly, the majority correctly concludes that the defense provided by the statute is unavailable to defendants.

There is thus no need to further consider whether the defense is unavailable because of the language in

the statute concerning the causal relationship between plaintiff's alleged injury and his liquor-impaired ability to operate the snowmobile. To do so, as the majority does in part III(B) of its opinion, results in dicta. Further, the majority incorrectly says that "[f]or the absolute defense of impairment provided by the statute to apply, plaintiff's impairment from alcohol must also have been the one proximate cause of plaintiff's injuries suffered as a result of compartment syndrome." *Ante* at 523. Unlike the statute at issue in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), which apparently provides the majority the logical basis for this conclusion, the statute here does not refer to "the proximate cause." Instead, MCL 600.2955a(1) limits its protection to situations in which the plaintiff "was 50% or more the cause of the . . . event that resulted in the . . . injury." MCL 600.2955a(1). Thus, for the statute to apply, a plaintiff's alcohol impairment need not be "the one proximate cause" of the event giving rise to an injury; it is sufficient if a plaintiff's impairment, considered alongside any other proximate causes, constituted 50 percent or more of the cause of the event resulting in the injury.

BARROW v DETROIT MAYOR

Docket No. 298128. Submitted November 2, 2010, at Detroit. Decided November 9, 2010, at 9:10 a.m.

Tommy Joe Barrow sought leave in the Wayne Circuit Court to file a complaint for quo warranto under MCL 600.4505 against the mayor of Detroit, the city of Detroit, elections officials of Detroit and Wayne County, and others after he lost the 2009 Detroit mayoral election. He alleged that there was a likelihood that he was in fact elected and that the mayor had usurped the office as a result of ballot tampering. The Wayne County Board of Canvassers granted Barrow a recount, which confirmed the results of the election, but when he requested the county prosecutor and the Attorney General to initiate quo warranto proceedings, each declined. The Secretary of State conducted an inquiry in response to a letter Barrow sent to that office, but concluded that no fraudulent vote manipulation had occurred. After a hearing on the Barrow's application for leave to file a quo warranto action, the court, Isidore B. Torres, J., denied Barrow's application, concluding that Barrow had failed to provide sufficient factual support for his allegations that election irregularities resulted in the mayor usurping his office and thus that the application lacked sufficient apparent merit to justify further inquiry by quo warranto. Barrow appealed.

The Court of Appeals *held*:

The trial court did not abuse its discretion by denying leave to file the action. Under MCR 3.306(B)(3)(a) and MCL 600.4501, a person may apply to the Attorney General to bring an action for quo warranto alleging a usurpation of office. If the Attorney General refuses the request, the person may apply privately to the court under MCR 3.306(B)(3)(b) for leave to file the action. An application for leave to file an action for quo warranto must make a precise and positive showing of a clear case of right and that public policy will be served by the proceeding. The application must disclose sufficient facts and grounds and sufficient apparent merit to justify further inquiry by quo warranto proceedings. Leave should not be granted if the applicant swears to a conclusion only. The only specific facts Barrow alleged in his application were

the number of ballots deemed uncountable, the number of votes in the original election, and the number of votes it would take to change the outcome. The other allegations were beliefs, suspicions, and conclusions without specific factual support.

Affirmed.

QUO WARRANTO — APPLICATION FOR LEAVE TO FILE ACTION — SUFFICIENCY OF PLEADINGS.

A person may apply to the Attorney General to bring an action for quo warranto alleging a usurpation of office; if the Attorney General refuses the request, the person may apply privately to the court for leave to file the action; an application for leave to file an action for quo warranto must make a precise and positive showing of a clear case of right and that public policy will be served by the proceeding; the application must disclose sufficient facts and grounds and sufficient apparent merit to justify further inquiry by quo warranto proceedings; leave should not be granted if the applicant swears to a conclusion only (MCL 600.4501; MCR 3.306[B][3][b]).

Clarence B. Tucker, Sr., P.L.L.C. (by *Clarence B. Tucker, Sr.*), for Tommy Joe Barrow.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Andrea L. Hansen*) for the Mayor of Detroit.

Krystal A. Crittendon, Corporation Counsel, and *Joanne D. Stafford*, Assistant Corporation Counsel, for the city of Detroit, the Detroit Board of Canvassers, the Detroit Election Commission, the Detroit City Clerk, and members of the board of canvassers and elections commission.

Marianne Talon, Corporation Counsel, and *Janet Anderson-Davis*, Assistant Corporation Counsel, for the Wayne County Board of Canvassers and its members.

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM. Appellant, Tommy Joe Barrow, appeals as of right an opinion and order denying his emergency application for leave to file a complaint for quo warranto. Appellant filed this action for quo warranto in order to challenge the outcome of the November 2009 election of appellee Dave Bing as mayor of the city of Detroit. Because the trial court did not err by denying appellant's application for leave for the reason that appellant failed to allege specific facts warranting further inquiry by quo warranto, we affirm.

I

This action arises out of the November 3, 2009, general election in which both appellant and Dave Bing appeared on the ballot as candidates for mayor of the city of Detroit. On November 16, 2009, the board of city canvassers declared that appellant had received 50,785 votes and Bing received 70,166 votes in the mayoral election and certified Mayor Bing as the winner. On November 20, 2009, appellant filed a recount petition alleging "fraud, deliberate mistake and electronic manipulation" of the ballots cast in the election. At a meeting on November 23, 2009, the Wayne County Board of Canvassers approved appellant's recount petition. Thereafter, the Wayne County Board of Canvassers informed appellant that the recount would commence on December 9, 2009.

Before the recount date, on November 24, 2009, appellant sent a letter to the Wayne County Clerk requesting that she secure the ballots pending the recount, alleging that the ballots were "under the sole control of the building Janitor." On the same day, the Wayne County Board of Canvassers, through its attorney, sent appellant an e-mail informing him that Michigan election law contained procedures for ballot secu-

rity pending a recount and that "[a]bsent a court order, the statutory procedures will be followed." It is undisputed that appellant did not seek a court order.

The recount was held on December 9, 2009, as scheduled. Following the recount, the Wayne County Board of Canvassers met and addressed appellant's various challenges at a series of meetings on December 11, 15, 18, 22, and 23, 2009. On December 23, 2009, the Wayne County Board of Canvassers approved a motion to certify the election, despite appellant's assertion "that there were 49,386 votes that were not recountable." The Wayne County Board of Canvassers' certification of the results of the recount as 47,062 votes for appellant and 65,946 votes for Mayor Bing was filed on December 24, 2009.

On December 30, 2009, appellant wrote letters of complaint to the Wayne County Prosecutor, the Michigan Attorney General, and the Bureau of Elections of the Michigan Secretary of State, asking each to initiate an investigation. On January 5, 2010, appellant again wrote to the Attorney General, asking him to initiate quo warranto proceedings. On January 15, 2010, the prosecutor declined to proceed. On February 9, 2010, the Attorney General informed appellant by letter that he had routed appellant's letter to the criminal division for review and that review of the appellant's complaint materials was complete. In the letter, the Attorney General explained that there was a "lack of evidence of criminal intent to defraud," contrary to appellant's allegations, and declined to take further action at that time. On February 23, 2010, the Attorney General also declined to seek a writ of quo warranto. On February 23, 2010, the Secretary of State issued a letter informing appellant that she had conducted an inquiry into appellant's complaint, that the investigation revealed

"no evidence to indicate or suggest that any type of fraudulent vote manipulation occurred during or after the administration of the election," and that the investigation was concluded.

On April 2, 2010, appellant filed an "Emergency Application for Leave to File Quo Warranto Action" in the circuit court, alleging that various election law errors, mistakes, and violations were committed that undermined any confidence in the outcome of the election. The Wayne County appellees[1] filed an answer on April 7, 2010, denying appellant's allegations that Mayor Bing had usurped the office of mayor and was not entitled to that office on the basis of the election of November 3, 2009. On April 8, 2010, the Wayne County appellees filed a brief in support of their answer, arguing that appellant had failed to make out a prima facie case of fraud or error or show that he was entitled to the mayor's position. They also argued that appellant's application was time-barred or barred by laches.

Mayor Bing filed an answer to the application, denying appellant's allegations on April 9, 2010. On May 3, 2010, Mayor Bing filed a brief in support, arguing that appellant had failed to show factual support for his allegations. The city of Detroit appellees[2] filed an appearance on May 4, 2010, but did not file an answer or a brief in opposition to appellant's application. On May 7, 2010, appellant filed a reply brief in support of his application, arguing that a "monumental number of irregularities which may have indeed derived from

[1] The Wayne County appellees consist of the Wayne County Board of Canvassers and its members: Krista Hartounian, Carol Larkin, Joseph Xuereb, and John Doe #2.

[2] The city of Detroit appellees consist of (1) the city of Detroit, (2) the Detroit Board of Canvassers and its members, Dorothy Burrell, Edward Hartounian, and Walter Kroppy, and (3) the Detroit Elections Commission and its members, Daniel Baxter, Edwin Ukagbu, and George Azzuz.

fraud or gross errors" justified inquiry by quo warranto. Appellant also denied that his application was time-barred or barred by laches or would cause harm or undue expense to the public.

At a hearing on May 10, 2010, appellant argued that the trial court should grant his request for leave to proceed in quo warranto because of appellees' failure to comply with mandatory provisions concerning ballot container seals and calibration of clocks in the voting machines, resulting in 59,135 ballots not being recounted, which were more than enough to change the outcome of the election. Appellant maintained that he was not asserting material fraud or error, which would have been subject to a 30-day limitations period.

The county appellees countered that because propositions B and S were on the same ballot as the mayor's race, the statutory subsection of MCL 600.4545 dealing with material fraud or error applied and appellant's application was time-barred. The county appellees argued that if the election were declared invalid, a new election would be required, including a new primary, at substantial public cost. The county appellees argued that appellant had failed to plead specific facts necessary for the court to conclude that fraud or irregularities existed and, instead, had simply promised to develop supporting evidence at a later date. Further, the county appellees argued that appellant's allegations were unsupported because the Attorney General and the Secretary of State had both investigated the matter and neither had found evidence of fraud or vote manipulation.

Mayor Bing adopted the county appellees' arguments, noting that appellant had stated in his reply brief that he observed numerous irregularities that "may have indeed derived from fraud or gross errors."

Mayor Bing also observed that such speculation was insufficient to meet the required specificity standard. Mayor Bing then summarized the substantive allegations of appellant's application and argued that appellant had failed to make allegations that were factually specific enough to justify further inquiry by quo warranto. Mayor Bing noted that approximately 80 out of 100 absentee precincts were counted before those ballots were deemed unrecountable and that the results of that recount (before it was halted) agreed with the original results. Further, there was no evidence that the polls were open fewer hours than required by law, so those 9,649 ballots (while unrecountable) were unremarkable. Moreover, Michigan election law requires that when precincts are deemed unrecountable because of sealing issues, the original results stand.

The city appellees adopted the arguments made by the other attorneys, adding that holding a new election would cost approximately $2 million and would cause "extreme" financial hardship. In reply, appellant's counsel admitted that "we don't know how [the irregularities] happened. Could have been inadvertence, incompetence, could have been any number of reasons," so "[w]e didn't plead that." The trial court took the matter under advisement.

On May 11, 2010, the trial court issued an opinion and order denying appellant's application. The trial court stated that when determining whether to grant leave, it was required to determine "whether the application discloses sufficient apparent merit to justify further inquiry by *quo warranto* proceedings." The trial court found that appellant's essential claim was that

> Detroit election officials had made such numerous errors, and mistakes, and had engaged in such numerous violations of Michigan election law that the number of ballots

> deemed not to be recountable or tainted was more than six (6) times the number necessary to alter the outcome of the city's general election for mayor.

The trial court observed that appellant claimed in particular that 41,485 absentee ballots and 8,001 other ballots were deemed unrecountable; that another 9,649 ballots had dates and times calling into question whether the precincts were open during the hours required by law; that a total of 59,135 ballots (47.4 percent of the total vote for mayor) were found to be unrecountable; that " 'an additional unknown number of countable ballots have likely been tampered with and manipulated, further eliminating any reasonable certainty as to the true outcome of the election' "; and, thus, that " 'there exists no reasonable certainty that any winner could be determined accurately and with the required legal certainty.' "

The trial court specifically found the following:

> As the aforementioned portions of Plaintiff's[3] application illustrate, Plaintiff has failed to allege any specific facts establishing that ballots were tampered with and/or manipulated, or that Defendants engaged in unlawful acts. Even assuming that Plaintiff's action is premised on irregularities as opposed to actual ballot tampering or other illegal acts, he has failed to state facts sufficient to support an inquiry into whether Bing usurped the office of mayor on the basis of those irregularities. Specifically, Plaintiff has failed to allege facts in support of his conclusion that any ballots which were not recounted were not valid as cast. He has also failed to provide factual support for his allegations that the Detroit Board of Canvassers "repeatedly violated statute election law and procedures."

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[3] Although no suit was filed in this case, the trial court proceedings consistently refer to appellant as "Plaintiff" and appellees as "Defendants." For simplicity's sake, we have not changed these designations in quoted material.

The trial court concluded that appellant had failed to show that his application had "sufficient apparent merit to justify further inquiry by quo warranto" proceedings into Mayor Bing's position as mayor of the city of Detroit and denied appellant's application for leave. This appeal followed.[4]

II

Appellant's sole argument on appeal is that the trial court erred by denying his application for leave to file an action for quo warranto because the application disclosed sufficient merit to justify further inquiry by quo warranto proceedings. Appellant asserts that he proceeded under MCL 600.4505 and alleged usurpation due to the massive number of irregularities (i.e., errors, mistakes, and violations of Michigan election laws). Appellant maintains that his application was based on the 59,135 irregular ballots resulting from numerous election law violations that were disclosed by the December 2009 recount and that he did *not* allege election fraud and did *not* seek to set aside the entire November 2009 election.

The county appellees, the city appellees, and Mayor Bing all respond that the trial court correctly held that appellant failed to allege specific facts warranting further inquiry by quo warranto and, for that reason, properly denied appellant's application. The county appellees argue that caselaw requires appellant to offer "critical facts" in support of his applica-

[4] On June 16, 2010, this Court denied appellant's motion for peremptory reversal. *Barrow v Detroit Mayor*, unpublished order of the Court of Appeals, entered June 16, 2010 (Docket No. 298128). On June 18, 2010, this Court granted in part the city of Detroit's motion to expedite this appeal. *Barrow v Detroit Mayor*, unpublished order of the Court of Appeals, entered June 18, 2010 (Docket No. 298128).

tion for leave to file an action for quo warranto showing a prima facie case of usurpation and that he did not do so. The county appellees contend that the trial court could not determine from the face of appellant's application that fraud or errors were committed. Additionally, the county appellees assert that appellant failed to include allegations showing his entitlement to the office of mayor, not mere uncertainty concerning the true outcome.

The city appellees argue that appellant's application for leave to proceed by quo warranto alleged no facts to support his claims that ballots were tainted, that the winner of the election could not be ascertained, that errors and mistakes were made, or that Detroit election officials engaged in numerous election law violations. Similarly, Mayor Bing asserts that appellant failed to allege, much less offer proof of, any actual facts that would warrant further investigation by quo warranto. Mayor Bing contends that appellant has offered speculation rather than any facts tending to show that the election was improper and simply complains that various authorities failed to take the steps he requested concerning his various concerns.

III

A court's decision whether to grant or deny an application for leave to proceed by quo warranto is reviewed for an abuse of discretion. *Shoemaker v City of Southgate*, 24 Mich App 676, 680-681; 180 NW2d 815 (1970); *McDonald v Jackson*, 3 Mich App 287, 288-290; 142 NW2d 42 (1966). An abuse of discretion occurs only when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

IV

"Quo warranto" literally means "by what authority." Black's Law Dictionary (8th ed), p 1285. It is "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." *Id*. MCR 3.306 governs actions for quo warranto. The rule provides, in pertinent part:

> (A) Jurisdiction.
>
> (1) An action for quo warranto against a person who usurps, intrudes into, or unlawfully holds or exercises a state office, or against a state officer who does or suffers an act that by law works a forfeiture of the office, must be brought in the Court of Appeals.
>
> (2) All other actions for quo warranto must be brought in the circuit court.
>
> (B) Parties.
>
> (1) Actions by Attorney General. An action for quo warranto is to be brought by the Attorney General when the action is against:
>
> (a) a person specified in subrule (A)(1);
>
> (b) *a person who usurps, intrudes into, or wrongfully holds or exercises an office in a public corporation created by this state's authority*[.]
>
> * * *
>
> (3) Application to Attorney General.
>
> (a) A person may apply to the Attorney General to have the Attorney General bring an action specified in subrule (B)(1). The Attorney General may require the person to give security to indemnify the state against all costs and expenses of the action. The person making the application, and any other person having the proper interest, may be joined as parties plaintiff.
>
> (b) *If, on proper application and offer of security, the Attorney General refuses to bring the action, the person may*

> *apply to the appropriate court for leave to bring the action himself or herself*.
>
> (C) Person Alleged to be Entitled to Office. *If the action is brought against the defendant for usurping an office, the complaint may name the person rightfully entitled to the office, with an allegation of his or her right to it, and that person may be made a party*. [Emphasis added.]

MCL 600.4501 echoes the court rule's provision allowing a private party to bring an action for quo warranto by leave of court if the Attorney General refuses to act. A quo warranto action may be brought under MCL 600.4505, which provides:

> (1) In actions brought *against persons* for *usurpation of office*, the judgment may determine the right of the defendant to hold the office. If a party plaintiff alleges that he is entitled to the office, the court may decide which of the parties is entitled to hold the office.
>
> (2) If judgment is rendered in favor of a party who is averred to be entitled to the office, he is entitled, after taking the oath of office, and executing any official bond which is required by law, to take the office. Such party shall be given all the books and papers in the custody of the defendant, or within his power, belonging to the office. [Emphasis added.]

An action under MCL 600.4505 is appropriate when the plaintiff seeks to challenge the defendant's right to hold office, but fraud or error is not alleged. See *People ex rel Wexford Co Prosecuting Attorney v Kearney*, 345 Mich 680, 692; 77 NW2d 115 (1956). A plaintiff can prevail under MCL 600.4505 only by showing "his own good title" to the office. *Ebright v Buck*, 326 Mich 208, 212; 40 NW2d 122 (1949); see also *Marian v Beard*, 259 Mich 183, 185-187; 242 NW 880 (1932).

"[A]ny damages sustained because of the usurpation" can be recovered under MCL 600.4511, and such a claim may be asserted independently, or as part of the

plaintiff's action for quo warranto. Additionally, under MCL 600.4515, a court may award costs and may fine a defendant "found or adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office . . . ."

An action in the nature of quo warranto may be brought under MCL 600.4545, which provides:

> (1) An action may be brought in the circuit court of any county of this state 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.
>
> (2) Such action *shall be brought within 30 days* after such election by the attorney general or the prosecuting attorney of the proper county on his own relation, or on the relation of any citizen of said county without leave of the court, or by any citizen of the county by special leave of the court or a judge thereof. *Such action shall be brought against the municipality* wherein such fraud or error is alleged to have been committed.
>
> (3) *After such action is brought the procedure shall conform as near as may be to that provided by law for actions for quo warranto*. [Emphasis added.]

Accordingly, the 30-day limit applies only if the plaintiff alleges material fraud or error under MCL 600.4545. *Kearney*, 345 Mich at 692. Under MCL 600.4545, "material fraud or error" means fraud or error that "might have affected the outcome of the election." *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." *Id*.

A traditional quo warranto action under MCL 600.4505 seeks to "try title" to the disputed office. *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 390 n 1; 760 NW2d 510 (2008). An action in the nature of quo warranto is brought to challenge the validity of the election itself. *Id*. MCL 600.4545 "does not apply to quo warranto actions to try title to a particular office, but only to test the validity of an election with regard to a constitutional amendment, question or proposition." *Stokes v Clerk of the Monroe Co Canvassers*, 29 Mich App 80, 84; 184 NW2d 746 (1970). "[H]owever, . . . actions in the nature of quo warranto . . . are functionally equivalent to traditional quo warranto actions and are consequently reviewable in the same manner." *Risk*, 279 Mich App at 390-391 n 1.

MCR 3.301(A)(1)(d) and (2) "govern the procedure for seeking the writs or relief formerly obtained by the writs," including a writ of quo warranto. In that regard, MCR 3.301(A)(3) provides that "[t]he general rules of procedure apply except as otherwise provided in this subchapter." MCR 2.111(A)(1) requires that allegations made in a pleading be clear, concise, and direct. MCR 2.112(B)(1) requires that fraud and mistake be pleaded with particularity. Other matters, including malice, intent, and knowledge, can be pleaded generally under MCR 2.112(B)(2). MCR 3.301 does not otherwise contain pleading requirements for a petition for leave to proceed by quo warranto. Nonetheless, our Supreme Court has held that an application for leave to file an action for quo warranto "should be so clear and positive in its statement of facts as to make out a clear case of right; and should be so framed as to sustain a charge of perjury if any material allegation is false." *Boucha v Alger Circuit Judge*, 159 Mich 610, 611; 124 NW 532

(1910), citing *Cain v Brown*, 111 Mich 657, 660; 70 NW 337 (1897); see also *Vrooman v Michie*, 69 Mich 42, 46; 36 NW 749 (1888).

Vrooman was "the first instance of [quo warranto] proceedings by a private relator . . . ." *Vrooman*, 69 Mich at 46. On appeal, the Supreme Court held that the trial court had properly dismissed the action because the plaintiff failed to respond substantively to the defendant's argument that, as supervisor, the plaintiff was disqualified from holding the appointed office in question. *Id*. at 45-46. Nonetheless, the Supreme Court found it "proper to remark on some peculiarities of the present record." *Id*. at 46. In dicta, the *Vrooman* Court stated that leave had been improperly granted by the trial court because the statute "does not contemplate that leave shall be granted without some showing [that the plaintiff is entitled to the office], as it was in this case." *Id*. at 46. The Court stated that when leave of the court is required for a given action, "[c]ourts can never act unless upon some responsible showing, and, as it is contrary to public policy to allow persons to be needlessly annoyed by vexatious claims, the statute . . . does not, as construed, permit a relator to proceed without exacting a very precise and positive showing." *Id*. The Court observed that

> a chief object in requiring leave is to prevent vexatious prosecutions; and the rule is inflexible that there must be affidavits so full and positive from persons knowing the facts as to make out a clear case of right in such a way that perjury may be brought if any material allegation is false. [*Id*.]

The Court stated that "the relator is not allowed to proceed without showing, not merely a good case in law against respondent, but also that public policy will be subserved by the proceeding." *Id*. at 46-47. Finally, the

Court stated that "[a]s no showing was made to obtain leave to file the information in the present case, leave should not have been granted."[5] *Id*. at 47.

In *Boucha*, 159 Mich at 610-611, the petition alleged that the election board had failed to count 11 votes in the relator's favor, allegedly because the ballots contained distinguishing marks when in fact they did not, that the real reason the election board refused to count those votes was that a majority of the board opposed the relator's election as township supervisor, and that the board had illegally counted "between one and ten ballots" for the relator's rival even though those ballots contained distinguishing marks and were therefore illegal. The *Boucha* Court stated that "[t]he law requires a precise and positive showing before the court will interfere" in the results of an election. *Id*. at 611. It also stated that an application for leave to file a complaint for quo warranto must "make a showing sufficiently clear and definite as to facts, to make out a *prima facie* case . . . ." *Id*. (quotation marks omitted). The Court also observed that leave should not be granted where the applicant "swears to a conclusion only." *Id*.

In *Penn Sch Dist No 7 v Lewis Cass Intermediate Sch Dist Bd of Ed*, 14 Mich App 109, 117; 165 NW2d 464 (1968), this Court stated that *Vrooman* and *Boucha*, among others, did not apply to actions brought under MCL 600.4545. In that case, however, the Court was discussing standing, not pleading requirements, and accordingly concluded that, unlike the plaintiff in an

[5] The Court also observed that in the "information" filed after being granted leave of the court, the plaintiff did "not point out the defect supposed to exist in respondent's title, but simply denies its validity." *Id*. at 43. The plaintiff also "does not claim to hold any title himself to the office, except as asserting a right to hold over under an old appointment . . . ." *Id*.

action under MCL 600.4505, a plaintiff in an action under MCL 600.4545 need not show a special interest in, or entitlement to, the position in question. *Id*. at 117-118. However, the Court agreed with *Vrooman* and *Boucha* that the controlling considerations in determining whether to grant leave are whether the applicant made the appropriate request to the Attorney General and "whether the application discloses sufficient apparent merit to justify further inquiry by quo warranto proceedings." *Id*. at 118.

In sum, leave to file an action for quo warranto is properly denied (as futile) when the application fails to disclose sufficient facts and grounds, and sufficient apparent merit, to justify further inquiry by quo warranto proceedings. 4 Longhofer & McKenna, Michigan Court Rules Practice (5th ed), pp 444-445; *Grand Rapids v Harper*, 32 Mich App 324, 329; 188 NW2d 668 (1971).

V

In the present case, appellant's application alleged that Mayor Bing usurped the office of mayor. Appellant requested leave to file an action for quo warranto under MCL 600.4505, based on the Attorney General's refusal to proceed. As far as his own entitlement to the office, appellant alleged that "[t]here is *a likelihood* that Plaintiff was in fact elected and Defendant David Bing has usurped the office." (Emphasis added.) Appellant alleged that before the primary election he "suspected" that ballot tampering would occur at the primary and that the authorities refused to act on those concerns before or after the primary. Appellant also alleged in his application that before the general election he was "concern[ed]" that "computer manipulation and ballot tampering" would occur at the general election, but the

authorities again refused to act before the election. After the general election, appellant sought a recount "based on computer manipulation and absentee ballot tampering," and his request for a recount was approved.

Appellant further alleged in his application, in particular:

> 8. The facts of this case and the evidence *to be developed* will show that:
>
> * * *
>
> e. Upon being granted the recount, Plaintiff immediately requested, in writing, that the county impound and secure the ballots as he believed that absentee and other voter ballot tampering would occur before the recount could begin. The county refused to act upon his request.
>
> f. During the recount conducted by the Wayne County Board of Canvassers it was revealed that Detroit election officials had made such numerous errors, and mistakes, and had engaged in such numerous violations of Michigan election law that the number of ballots deemed not to be recountable and or tainted was more than six (6) times than [sic] the number necessary to alter the outcome of the city's General election for mayor.
>
> g. The recount also revealed that Detroit election officials had failed to perform and enforce numerous procedures and requirements set forth by the State of Michigan designed to ensure the integrity of elections.
>
> h. As a direct and proximate result, the Wayne County Board of Canvassers determined:
>
> *i.* that 100% of the city's 41,485 absentee voter ballots were not recountable.
>
> *ii.* that an additional 8,001 of the city's polling precincts' voter ballots were not recountable.
>
> *iii*. that no less than an additional 9,649 precinct polling voter ballots had dates and times for which it could not be

determined with certainty that they had been cast in compliance with the state law requiring polls to remain open from 7am until 8pm.

iv. [t]hat the total number of ballots tainted and or deemed not recountable by the Board of Canvassers was 59,135. [Emphasis added.]

Appellant also alleged that the official results of the election were 70,166 votes for Mayor Bing and 50,785 votes for appellant, a difference of 19,381 votes. Appellant further specifically alleged:

11. While the Board of Canvassers determined that 59,135 ballots were deemed not recountable and or tainted (47.4% of the total cast for mayor), Plaintiff believed and continues to believe that an additional unknown number of the countable ballots have likely been tampered with and manipulated, further eliminating any reasonable certainty as to the true outcome of the election.

12. The actual number of ballots necessary to change and alter the outcome of the election was only 9,692 (19,381 divided by 2 plus 1).

13. Had a full County canvass resulted in a deduction of 9,692 ballots from Defendant and, of necessity, an addition of 9,692 ballots to Plaintiff, it would have altered the outcome of the election.

14. Insofar as 59,135 ballots were deemed not recountable or tainted, there exists no reasonable certainty that any winner could be determined accurately and with the required legal certainty.

15. Defendant Wayne County Board of Canvassers erred, breached its duty and abused its authority and discretion when despite having 59,135 out of a total of 124,802 (Defendant's 70,166, Plaintiff's 50,785, all others 3,851) ballots cast being tainted at [sic] which only 9,692 ballots separated Defendant from Plaintiff, it issued a certificate of election to the Defendant.

16. Defendant Detroit Board of canvassers similarly erred, breached its duty and abused its authority and

> discretion when it repeatedly violated state election law and procedures in furtherance of the errors and irregularities.
>
> 17. As a direct and proximate result of the foregoing, there exists no reasonable certainty as to which candidate received the greatest number of legitimate, valid, and legal votes and thus remediation is required.

Finally, appellant alleged that the trial court had the authority to "see that this challenge to title is heard and resolved."

Our review of the record reveals that the only specific facts alleged by appellant were the number of ballots deemed unrecountable, the number of votes in the original election, and the number of votes it would take to change the outcome. Appellant "suspected" that ballot tampering occurred in the general election, but did not allege that it did. Appellant alleged that Detroit election officials committed "numerous errors, and mistakes," and engaged in "numerous violations of Michigan election law," but did not state what those errors, mistakes, or violations were or whether they were committed before, during, or after the election. Appellant further alleged that, after the election, Detroit election officials "failed to perform and enforce numerous procedures and requirements" to ensure the integrity of the ballots, but did not specify what protocols were violated or how. Appellant alleged that 59,135 ballots were found to be "tainted and or deemed not recountable," but did not state how or why. Appellant expressed his belief that "an additional unknown number of the countable ballots have likely been tampered with and manipulated," but again failed to state how or when.

Appellant alleged that, given the number of unrecountable ballots, there was no certainty concerning the outcome. He alleged that, given the uncertainty, the

county board of canvassers erred, breached its duty, and abused its authority and discretion by certifying Mayor Bing as the winner. Appellant alleged that the Detroit Board of Canvassers similarly erred, breached its duty, and abused its authority and discretion when it repeatedly violated state election laws and procedures in furtherance of the errors and irregularities, but again failed to state what those errors or violations were, or when and how they occurred.

Since filing his application, appellant has made some effort to specify the particular errors and violations of law of which he complains and discusses them at length on appeal. However, appellant never attempted to amend his application to add any specific, precise, definite, or clear and positive factual allegations. Thus, we conclude that the trial court correctly concluded that appellant's application failed to disclose sufficient facts and grounds and sufficient apparent merit to justify further inquiry by quo warranto proceedings. Appellant's conclusory allegations that mistakes, errors, and election law violations occurred were simply insufficient to justify granting leave to file an action for quo warranto.

VI

We conclude that the trial court correctly held that appellant had failed to allege specific facts warranting further inquiry by quo warranto and properly denied appellant's application. For this reason, we need not reach any of the remaining issues raised by appellant—none of which the trial court decided. Nonetheless, the irregularities appellant alleges do not tend to show that any unrecountable ballots were not valid as originally cast or that Mayor Bing usurped the office of mayor.

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

MEGEE v CARMINE

Docket No. 292207. Submitted November 2, 2010, at Detroit. Decided November 16, 2010, at 9:00 a.m.

Joan C. Carmine moved in the Macomb Circuit Court, seeking to enforce a 1989 divorce judgment and an incorporated qualified domestic relations order (QDRO) that awarded her as part of the property division 50 percent of the disposable retirement pay that Ronald A. Megee would receive as a result of his service in the United States Navy. The QDRO provided that Megee could not make another benefit election that would reduce the monthly pension allotment without Carmine's written consent. However, Megee made a unilateral and voluntary postjudgment election to waive the retirement pay and instead receive monthly combat-related special compensation (CRSC), 10 USC 1413a, contrary to the terms of the divorce judgment. As a result, Carmine had ceased receiving funds under the QDRO. The court, Mary A. Chrzanowski, J., entered an order requiring Megee to act as trustee for the benefit of Carmine with respect to half of his monthly CRSC, which funds were then to be delivered to Carmine. Megee appealed by leave granted.

The Court of Appeals *held*:

1. Following a divorce, a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of their divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. The compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay may come from any source the military spouse chooses, but it must be paid to avoid contempt of court. The military spouse may use CRSC funds to satisfy the obligation if he or she chooses to do so. Because the ordered replacement compensation must relate to the military spouse's retirement-pay obligation and not the disability pay being received, and because the military spouse, having made the election, will no longer actually be receiving the retirement

pay, it may be necessary on occasion to review and determine whether any adjustments to the retirement pay would have been made had the military spouse continued receiving the retirement pay.

2. The Uniformed Services Former Spouses' Protection Act, specifically 10 USC 1408(c)(1), permits a court to treat only "disposable retired pay" as property of the service member and his or her spouse subject to division in a state court divorce decree. CRSC is not retired pay. Therefore, the trial court erred by dividing plaintiff's CRSC.

3. The ruling of the trial court that required Megee to pay Carmine from CRSC funds in an amount equal to half of his CRSC was reversed and the case remanded to the trial court for the entry of an order requiring Megee to compensate Carmine with monthly payments, from any source or combination of sources he chose, in an amount equal to 50 percent of the retirement pay that Megee would have been receiving but for his election to waive the retirement pay in favor of disability benefits.

Reversed and remanded.

ARMED SERVICES — DIVORCE — PROPERTY DIVISIONS — RETIREMENT PAY — POSTJUDGMENT ELECTIONS TO WAIVE RETIREMENT PAY — DISABILITY BENEFITS.

A military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of their divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment; the compensation to be paid the former spouse as his or her share of the property division in lieu of the retirement pay can come from any source the military spouse chooses and must be paid to avoid contempt of court.

Steven S. Vernier for Ronald A. Megee.

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

MURPHY, C.J. Plaintiff appeals by leave granted the trial court's order that directed him to act as trustee for the benefit of defendant with respect to half of plaintiff's monthly combat-related special compensation

(CRSC), 10 USC 1413a, which funds were then to be delivered to defendant. We reverse and remand.

I. OVERVIEW

Pursuant to a divorce judgment entered in September 1989, defendant was awarded 50 percent of plaintiff's Navy disposable retirement pay as part of the property division, and the judgment incorporated a qualified domestic relations order (QDRO) to enforce that provision. The QDRO acknowledged the 50 percent division of plaintiff's disposable retirement pay, also referred to therein as his pension, and it prevented plaintiff from making another benefit election "that would otherwise reduce the monthly pension allotment without the written consent of [defendant]."According to defendant, she began receiving her share of plaintiff's retirement pay in January 2008, although plaintiff claims that defendant had been receiving her share of his retirement pay since 1994. In 2008, plaintiff was officially diagnosed, for purposes of entitlement to disability benefits, as being disabled as a result of combat-related activities and exposure to Agent Orange in Vietnam. He was declared eligible to elect CRSC, but that election would require plaintiff to waive further receipt of his retirement pay. Plaintiff elected to receive CRSC, resulting in termination of his retirement pay and thus the cessation of funds flowing to defendant under the QDRO. Defendant moved to enforce the divorce judgment and the QDRO, and the trial court entered the challenged order that effectively forces plaintiff to pay defendant half of his CRSC.

We hold that following a divorce, a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former

spouse as part of the divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired. In these situations, because the ordered replacement compensation must relate to the military spouse's retirement-pay obligation and not the disability pay now being received, and because the military spouse, having made the election, will no longer actually be receiving the retirement pay, it may be necessary on occasion to review and determine whether any adjustments to the retirement pay would have been made had the military spouse continued receiving the retirement pay.

Accordingly, although we agree with the trial court that plaintiff must compensate defendant, we reverse the trial court's ruling because its order required plaintiff to pay defendant from CRSC funds and required plaintiff to pay an amount equal to half of his CRSC and not half of his envisioned retirement pay. We remand for entry of an order requiring plaintiff to compensate defendant with monthly payments, from any source or

combination of sources chosen, in an amount equal to 50 percent of the retirement pay that he would be receiving but for his election to waive the retirement pay in favor of disability benefits.

II. FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in June 1966 and had two children who were born in 1968 and 1971. Plaintiff is a veteran who served in the Navy from September 1966 to June 1970 and then again from March 1974 to June 1994. He engaged in combat-related activities and was exposed to Agent Orange while serving in Vietnam. On July 26, 1988, plaintiff filed a complaint for divorce, and subsequently defendant filed a counterclaim for divorce. On September 12, 1989, a divorce judgment was entered and, although not titled a consent judgment, it is clear from the record that it was entered with the consent of the parties; there was no trial. The divorce judgment dissolved the marriage; awarded defendant $100 a week in periodic spousal support for five years, or until her death or remarriage, whichever occurred first; ordered plaintiff to pay child support arrearages at the rate of $25 a week until the balance was paid in full; and divided the parties' property. The property-settlement portion of the judgment indicated that defendant was awarded a mortgagee's interest in a parcel of property located in Georgia, that plaintiff was ordered to pay all joint marital debts previously incurred, that plaintiff was awarded the entire interest in a vacation-resort membership, that defendant was awarded two motor vehicles, that the parties were awarded their own personal property that was in their possession, and that certain bonds were to be divided 60 percent to 40 percent, with defendant taking the larger share. The judgment further provided:

> IT IS FURTHER ORDERED AND ADJUDGED that JOAN C. MEGEE shall be awarded 50% interest in RONALD A. MEGEE'S U.S. Navy disposable retirement or retainer pay at such time as he receives it. The parties approve and incorporate by reference a [QDRO] attached as Exhibit A of this Judgment of Divorce.

With respect to the QDRO referred to in the divorce judgment, it provided, in pertinent part, as follows:

> 7.) The parties agree and the Court orders that JOAN C. MEGEE shall receive fifty (50%) percent of RONALD A. MEGEE'S Navy disposable retirement or retainer pay as property settlement when he begins receiving the same.
>
> * * *
>
> 11.) RONALD A. MEGEE shall make no other benefit election included but not limited to an annuity or survivorship option that would otherwise reduce the monthly pension allotment without the written consent of JOAN C. MEGEE.
>
> * * *
>
> 13.) The parties agree that their mutual intent is to provide JOAN C. MEGEE with fifty (50%) percent of RONALD A. MEGEE's disposable retirement or retainer pay.

According to military records contained in the lower-court file, plaintiff ceased working at his job in May 2004.[1] The military was in possession of a record from the Social Security Administration (SSA) indicating that the SSA had characterized plaintiff as being disabled since February 2005. Plaintiff suffers from posttraumatic stress disorder (PTSD), peripheral neuropathy of the lower

[1] Plaintiff was no longer in the military at this point, and the record does not contain any information on the nature of the job that plaintiff stepped down from in May 2004.

extremities (left and right side), and diabetes mellitus. The Department of Veterans Affairs (VA), pursuant to a decision in August 2008, determined that "[t]he effective date of individual unemployability [was] June 30, 2006," for purposes of entitlement to VA combat-related disability pay, which is different from CRSC, as discussed hereinafter. The VA document indicates that plaintiff sought but was denied VA disability benefits in 2007, but the 2008 assessment found a "clear and unmistakable error" in the 2007 decision relative to ratings or percentages that the VA ascribes for each service-connected disability on the basis of severity and that affect the decision to award benefits.

Also in 2008, the Secretary of the Navy's Combat-Related Special Compensation Board (Board) approved plaintiff's application for CRSC, predicated, in part, on the VA's finding of a compensable disability, along with the Board's own independent findings that plaintiff's PTSD, neuropathies, and diabetes all resulted from either direct engagement in an armed conflict or through an instrumentality of war, in this case exposure to Agent Orange. The retroactive effective date for plaintiff's entitlement to CRSC was January 2008. As will be explained later in our review of the United States Code, plaintiff could not legally receive, in combination, his disposable retirement pay, VA disability benefits, and CRSC. Rather, he had to elect either retirement pay coupled with VA disability benefits or choose CRSC standing on its own. While there is a lack of documentary evidence on the subject, there is no dispute that plaintiff elected CRSC, effectively discontinuing receipt of his retirement pay and defendant's share of that pay.

Defendant argued in the trial court that she began receiving her assigned share of plaintiff's retirement

pay in January 2008 and received it through August 1, 2008, at which time she ceased receiving anything. Plaintiff claimed that defendant started receiving her 50 percent share of his disposable retirement pay in June 1994, not January 2008. The dispute on this matter was never addressed in the trial court, but we do note that plaintiff's military service ended in June 1994.

Defendant moved to enforce the divorce judgment and the QDRO in February 2009, asserting that plaintiff had elected, in violation of the judgment and the QDRO, to receive disability benefits, i.e., CRSC, instead of his retirement pay. Defendant requested that the trial court order plaintiff to withdraw his election to receive CRSC in place of retirement pay or, in the alternative, order plaintiff to act as a trustee relative to 50 percent of his benefits, given the clear intent to provide for an equal division reflected in the divorce judgment and the QDRO, and then order him to deliver the funds to defendant. In response, plaintiff admitted that he currently received CRSC, but countered that CRSC is not disposable retirement pay and that, for purposes of the divorce judgment and the QDRO, his election did not need defendant's approval because the approval provision only pertained to elections relative to variations under the broad umbrella of disposable retirement pay, not a disability-related election. Plaintiff maintained that, once he became eligible for and selected CRSC for his injuries sustained in service to his country, the disposable retirement pay subject to the QDRO was no longer subject to division. Relying on *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), plaintiff further contended that federal law precluded the court from ordering him to give any of his CRSC to defendant, which, admittedly, left defendant with nothing.

Finding it to be the fair thing to do, given the clear intent in the divorce judgment and the QDRO that defendant receive half of plaintiff's pension, the trial court ordered plaintiff to act as trustee for the benefit of defendant with respect to half of plaintiff's benefits and then deliver those funds to defendant. The ruling essentially ordered plaintiff to turn over half of his CRSC to defendant.

On plaintiff's motion for reconsideration, the trial court, in denying the motion, determined that it had not committed a palpable error. The court further ruled that *Mansell* was inapplicable because in that case the disability benefits were already being received when the divorce judgment was entered and the instant action entailed a *postjudgment* election of disability benefits and waiver of retirement pay.

III. ANALYSIS

A. STANDARD OF REVIEW

We review de novo questions of law, *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998), including issues of statutory construction, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006), and we find that interpretation of the divorce judgment and the QDRO is also a question of law, thereby necessitating review de novo.

B. UNITED STATES CODE

There are a number of pertinent federal statutes that we shall initially review before engaging in a discussion of the issues presented.

Members of the Navy who serve for a specified period, generally at least 20 years, are entitled to retire

and to receive retirement pay. 10 USC 6321 *et seq*. Military veterans in general are entitled to compensation for service-connected disabilities under 38 USC 1101 *et seq*., which we have referred to in this opinion as "VA disability benefits." Further, CRSC is available to an "eligible combat-related disabled uniformed services retiree who elects [such] benefits . . . ." 10 USC 1413a(a). CRSC is "not retired pay." 10 USC 1413a(g). To be eligible for CRSC, a person must be a member of the uniformed services who is entitled to retired pay and who has a combat-related disability. 10 USC 1413a(c). A combat-related disability is defined as follows:

> In this section, the term "combat-related disability" means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that—
>
> (1) is attributable to an injury for which the member was awarded the Purple Heart; or
>
> (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)—
>
> (A) as a direct result of armed conflict;
>
> (B) while engaged in hazardous service;
>
> (C) in the performance of duty under conditions simulating war; or
>
> (D) through an instrumentality of war. [10 USC 1413a(e).]

Plaintiff qualified for the three different forms of benefits already discussed—disposable retirement pay, VA disability benefits, and CRSC.

Pursuant to 10 USC 1414(a)(1), and effective January 1, 2004, "a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to

veterans' disability compensation for a qualifying service-connected disability . . . is entitled to be paid both for that month . . . ." This concurrent receipt of military retirement pay and VA disability benefits is commonly referred to as CRDP, which stands for "concurrent retirement and disability pay." See *Jackson v Jackson*, 319 SW3d 76, 77 (Tex App, 2010). Because plaintiff was eligible for retirement pay and VA disability benefits, CRDP was an available option for plaintiff. A person who is qualified for CRDP and who is also qualified for CRSC, such as plaintiff, may elect to receive CRDP or CRSC, "but not both." 10 USC 1414(d)(1); see also 10 USC 1413a(f) (indicating that CRSC and CRDP must be coordinated under 10 USC 1414[d]). During an annual open-enrollment period, a person has the "right to make an election to change" from CRDP to CRSC or "the reverse, as the case may be." 10 USC 1414(d)(2). Plaintiff elected CRSC, which effectively discontinued his retirement pay that had been subject to the QDRO, halting payments to defendant.

The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408, generally governs the distribution of a spouse's military retirement pay to a former spouse pursuant to a court order, including state court final decrees of divorce issued in accordance with the state's laws and providing for the division of property expressed as a percentage of disposable retirement pay. 10 USC 1408(a)(1)(A) and (2). Section 1408(c)(1) provides, in pertinent part:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. [10 USC 1408(c)(1).]

Accordingly, disposable retired or retirement pay[2] can be treated by a court as joint property and thus subject to division in a state court divorce decree. As used in the USFSPA, the term "disposable retired pay" is defined, in relevant part, as "the total monthly retired pay to which a member is entitled less amounts which . . . are deducted from the retired pay of such member . . . as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38[.]" 10 USC 1408(a)(4)(B). We note that, while VA disability benefits are provided for in title 38, the right to CRSC is found in title 10, not title 5 or title 38. As we will explain in our analysis of *Mansell*, which involved a waiver of retirement pay in favor of title 38 VA disability benefits,[3] the fact that CRSC is a title 10 benefit is of some significance. Finally, the total amount of the disposable retirement pay of a military spouse that a court orders payable to the other spouse "may not exceed 50 percent of such disposable retire[ment] pay." 10 USC 1408(e)(1).

With these provisions in mind, we now proceed to our discussion of the issues presented on appeal.

C. DISCUSSION

We begin by first holding that, contrary to plaintiff's contention, his unilateral decision to elect CRSC was contrary to the terms and intent of the QDRO and

[2] We shall interchangeably use the terms "disposable *retirement* pay" and "disposable *retired* pay" for purposes of this opinion.

[3] As indicated earlier, 10 USC 1414(a)(1), post-*Mansell*, now permits a member or former member to receive his or her full retirement pay and VA disability benefits without reduction in the retirement pay when VA disability benefits are chosen. See *Mansell*, 490 US at 583 n 1 ("[I]f a military retiree is eligible for $1500 a month in retirement pay and $500 a month in disability benefits, he must waive $500 of retirement pay before he can receive any disability benefits.").

therefore the divorce judgment, given that the judgment incorporated by reference the QDRO. The clear language in the judgment and the QDRO required a 50 percent division of plaintiff's disposable retirement pay, and plaintiff was barred from making any "other benefit election . . . that would otherwise reduce the monthly pension allotment without the written consent of [defendant]." Plaintiff elected a benefit other than retirement pay when he elected CRSC to the exclusion of retirement pay, the election reduced and indeed eliminated defendant's monthly share of plaintiff's retirement pay, and there is no claim that defendant gave consent of any kind for plaintiff to make the CRSC election. The parties had also agreed that their mutual intent was to provide defendant with 50 percent of plaintiff's retirement pay. The decision to elect CRSC and to waive in its entirety the retirement pay was inconsistent with the declared mutual intent. The question now becomes one of remedy.

We find that the issue properly framed is whether a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment.

In *Mansell*, a United States Supreme Court case, the husband, who had been in the military, was receiving retirement pay along with, pursuant to a waiver of a portion of the retirement pay, VA disability benefits. He was receiving both benefits at the time of the divorce. Pursuant to a property settlement that was incorporated into the divorce decree, the husband agreed to pay

the wife 50 percent of his total military retirement pay, *including that portion of retirement pay that he had waived in order to receive disability benefits*. The husband then requested the trial court to modify the divorce decree by removing the provision requiring him to share his total retirement pay with his wife; he did not want to pay her a sum equal to half of the waived retirement pay. The trial court denied the request. The case made its way through the California appellate courts, with the husband arguing that the USFSPA and the statute protecting his disability benefits precluded the trial court from treating as community property that portion of his retirement pay that had been waived in favor of disability benefits. *Mansell*, 490 US at 585-587.[4]

The *Mansell* Court stated that it was being called upon to decide whether state courts, consistently with the USFSPA, "may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits." *Id.* at 583. The Court held that state courts lacked the authority to make such a division, thereby ruling in favor of the husband. *Id.* The Court concluded that Congress had specifically enacted the USFSPA to change preexisting federal law that had completely preempted the application of state law to military retirement pay. *Id.* at 587-588. The *Mansell* Court noted that the USFSPA granted state courts the authority to divide military retirement pay as property, but the section of the USFSPA defining the term "disposable retired pay" specifically and clearly excluded military retirement

[4] Although addressing a case from a community-property state, the Court noted that its decision was equally applicable to equitable-distribution states, which would include Michigan. *Mansell*, 490 US at 584 n 2.

pay that had been waived in order to receive VA disability payments, which is a benefit found in title 38. *Id.* at 588-589. The USFSPA's definitional section relied on and quoted by the Court was 10 USC 1408(a)(4)(B), which, as indicated earlier, excludes from consideration as disposable retired pay amounts waived pursuant to law "in order to receive compensation under title 5 or title 38[.]" *Mansell*, 490 US at 589 n 9. Once again, CRSC is compensation received under title 10, and plaintiff here did not waive his right to retirement pay in order to receive compensation under title 5 or title 38, but to receive title 10 compensation.

The *Mansell* Court ruled that, although the USFSPA now granted authority to state courts to divide as property a military spouse's disposable retirement pay in general, states continued to be federally preempted from dividing as property disposable retirement pay that had been waived in order to receive VA disability benefits. *Id.* at 590-592. The Court ultimately held:

> Thus, the legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees. Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice. . . . Given Congress' mixed purposes, the legislative history does not clearly support Mrs. Mansell's view that giving effect to the plain and precise language of the statute would thwart the obvious purposes of the Act.
>
> We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

> For the reasons stated above, we hold that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits. [*Id.* at 594-595.]

We glean from *Mansell* some important, but subtle, points. First, *Mansell* did not entail an attempted division or distribution of the husband's VA disability benefits; rather, it concerned payments to the wife in an amount equal to half of the husband's total retirement pay, even though a portion of that pay was no longer being received by the husband, considering that he had waived receipt of that portion in favor of VA disability benefits. The trial court here effectively divided plaintiff's CRSC and, although *Mansell* did not directly address division of disability pay, the USFSPA clearly does not allow such a division. Subsection (c)(1) of the USFSPA, 10 USC 1408(c)(1), permits a court to treat only "disposable retired pay" as "property of the member and his spouse," and CRSC is "not retired pay," 10 USC 1413a(g). Accordingly, the trial court erred by dividing plaintiff's CRSC and forcing plaintiff to pay a portion of his CRSC to defendant. However, on the subject addressed in *Mansell*, i.e., dividing waived retirement pay, the *Mansell* decision actually supports making plaintiff in the case at bar pay defendant half of the retirement pay that he would be receiving but for his election to take CRSC.[5] The *Mansell* Court concluded that waived retirement pay could not be divided

[5] We recognize that it sounds a bit odd to speak of making a party pay half of monies not actually being received; however, conceptually it is analogous to imputing income to a party in the context of a child- or spousal-support matter and then ordering that party to make a payment based on income not actually being received. See *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000) (stating that when a party voluntarily reduces his or her income, a court may impute income to that party in order to arrive at an appropriate spousal-support award).

as property in circumstances in which the pay had been waived in favor of title 38 VA disability benefits, given that the definition of "disposable retired pay" in 10 USC 1408(a)(4)(B) excludes consideration of amounts waived in order to receive title 5 or title 38 compensation. Under the reasoning and rationale of *Mansell*, there would be no prohibition here against considering for division waived retirement pay under the USFSPA because we are addressing a waiver of title 10 CRSC not mentioned in 10 USC 1408(a)(4)(B). Thus, all of plaintiff's envisioned yet waived military-retirement pay can be divided without offending the USFSPA or *Mansell*. Accordingly, there is no bar to ordering plaintiff to compensate defendant in an amount equal to 50 percent of plaintiff's envisioned retirement pay as intended under the terms of the divorce judgment after plaintiff made a unilateral and voluntary postjudgment election to waive his retirement pay in favor of disability benefits contrary to the terms of the judgment.

Moreover, even aside from the title 10–title 38 distinction, our holding is consistent with appellate-court rulings from many other states on the issue. In reviewing these cases, we shall not provide too much in the way of details regarding the underlying facts because, for the most part, they are essentially the same as those that transpired here, i.e., postjudgment waivers of retirement pay in exchange for disability benefits that leave the nonmilitary, former spouse with reduced or no funds despite a divorce decree or settlement calling for the division of the military spouse's retirement pay. We do note that most of these cases involved VA disability benefits and not CRSC, which makes the case for a division of retirement pay waived in favor of CRSC even more compelling considering that *Mansell* and the USFSPA could be viewed as being somewhat problematic with respect to retirement pay waived in favor of

title 38 VA disability benefits. Also, a number of these cases did not involve judgment language, as is present here, requiring approval from the former spouse before the military spouse could make a different election, and plaintiff here consented to the preapproval condition, yet did not honor it. Indeed, a consent judgment is in the nature of a contract. *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008).

In *Bandini v Bandini*, 935 NE2d 253, 263 (Ind App, 2010), the Indiana Court of Appeals stated in a CRSC case that *Mansell* and the USFSPA do "not preclude state courts from requiring a military spouse to compensate a former spouse when the latter's share of retirement pay is reduced by the military spouse's unilateral post-dissolution waiver of retirement pay in favor of disability benefits." The court held "that a military spouse may not, by a post-decree waiver of retirement pay in favor of disability benefits or CRSC, unilaterally and voluntarily reduce the benefits awarded the former spouse in a dissolution decree." *Id.* at 264. The Indiana Court of Appeals concluded that the trial court had properly ordered the military spouse (husband) to compensate his former wife for the reduction in her share of retirement pay that was caused by the husband's CRSC election. *Id.* Consistently with our ruling, the Indiana court warned, "Because Husband is free to compensate Wife from any of his available assets, the trial court's order on remand need not and *should not* specify his CRSC benefit as the source of this compensation." *Id.* at n 10 (emphasis added). One of the reasons the court gave for distinguishing *Mansell* was that *Mansell* was addressing a predissolution waiver of retirement pay and the Supreme Court did not "imply that a post-dissolution waiver need be treated the same way." *Id.* at 263.

In *Resare v Resare*, 908 A2d 1006 (RI, 2006), the family court, after first emphasizing that it was not ordering the division of any disability benefits, ordered the military spouse to pay a sum equal to 35 percent of the gross pension that would have been in effect had the military spouse not unilaterally modified the stipulated property division with a pension waiver. The Rhode Island Supreme Court, affirming the family court's ruling, held that the lower court had properly predicated its order on breach-of-contract principles. *Id.* at 1010.

In *Hadrych v Hadrych*, 2007 NMCA 1, ¶ 13; 140 NM 829, 833; 149 P3d 593 (NM App, 2006), the New Mexico Court of Appeals, indicating that it was adopting the majority view, held that the lower court had properly ordered the military spouse to compensate his former spouse for the reduction in retirement benefits that occurred when the military spouse converted them to disability benefits. The lower court's ruling had not identified the disability benefits as being the source for the ordered compensation, leaving it to the military spouse to determine how to pay the compensation and utilize whatever assets he chose to satisfy the obligation. *Id.* The court of appeals stated that it was critical that "the court order [did] not specifically require that disability benefits provide the source of the funds paid to the non-military spouse." *Id.* at ¶ 14; 140 NM at 833 (citation and quotation marks omitted).

In *In re Marriage of Warkocz*, 141 P3d 926, 928 (Colo App, 2006), the Colorado Court of Appeals agreed with the nonmilitary spouse "that the trial court erred in failing to award her the amount she would have received from husband's military pay had he not applied for, and received, disability benefits." The court held that, consistent with public policy and decisions in

other jurisdictions, a trial court is not precluded from equitably enforcing a separation agreement. *Id.* at 930. The court stated that neither the USFSPA nor United States Supreme Court precedent requires "courts to completely ignore the economic consequences of a military retiree's decision to waive retirement pay in order to collect disability pay." *Id.* (citation and quotation marks omitted).

In *Black v Black*, 2004 ME 21, ¶ 10; 842 A2d 1280, 1285 (Me, 2004), the Maine Supreme Judicial Court held that *Mansell* and the USFSPA do not limit the authority of state courts "to grant postjudgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property."

In *Shelton v Shelton*, 119 Nev 492, 496-498; 78 P3d 507 (2003), the Nevada Supreme Court held that a military spouse was contractually obligated under a divorce settlement agreement to continue paying his former wife $577 a month, even though the agreement indicated that the payment represented half of the military retirement pension and the military spouse had waived that pension in order to receive disability benefits.

We agree with the following sentiments expressed by the New Jersey Superior Court, Appellate Division, in *Whitfield v Whitfield*, 373 NJ Super 573, 582-583; 862 A2d 1187 (2004):

> It is important to emphasize the procedural posture of this case. The issue is one of enforcement of a prior equitable distribution award, not a present division of assets. Wife does not seek to divide her former husband's disability benefits in violation of *Mansell*. Nor does she seek a greater percentage of her husband's military pen-

> sion than she originally received at the time of his retirement pursuant to court order. Moreover, wife does not seek to alter the terms of her veteran-spouse's retirement plan or to compel the Department of Defense to make direct payments to her in excess of those permitted by federal law. The remedy she seeks, and that to which she is entitled, is an enforcement of the original order which was in effect before her former husband retired and unilaterally elected the waiver. [The trial court] appropriately accomplished that result by requiring husband to make up the shortfall in his former wife's equitable distribution award occasioned by his actions.
>
> The trial court's determination does not hinder husband's receipt of veterans' disability benefits. Nor does it impinge upon federal statutory rights husband has under the USFSPA or violate the doctrine of pre-emption. Rather, the determination is whether under our state law the trial court has the authority to interpret and enforce a judicial decree entered prior to the retiree's unilateral election of a method of payment that has tax advantages to him and adverse consequences to his former wife. We conclude that our court does have that authority. This was an appropriate remedy to avoid the inequities that would be imposed on a spouse who had no control over, but suffered the consequences of, the other's unilateral election to switch retirement benefits to tax-free disability benefits.

In *In re Marriage of Krempin*, 70 Cal App 4th 1008, 1015; 83 Cal Rptr 2d 134 (1999), the California Court of Appeal noted that out-of-state precedents had reached "nearly universal" consensus that equitable action to compensate the nonmilitary spouse is appropriate, on one theory or another, when that spouse's share of retirement pay is reduced by the military spouse's postjudgment waiver of retirement pay.

In *Danielson v Evans*, 201 Ariz 401, 407-409; 36 P3d 749 (Ariz App, 2001), the Arizona Court of Appeals upheld an order that required the military spouse to pay his former wife the difference between the value of

the retirement pay as it was envisioned at the time of the divorce and the reduced amount that she actually received after a waiver.

In *Krapf v Krapf*, 439 Mass 97, 105-108; 786 NE2d 318 (2003), the Massachusetts Supreme Judicial Court held, under theories of breach of a duty of good faith and fair dealing, that it was proper to order the military spouse to pay his former wife an amount equal to the military retirement pay she would have received under a settlement agreement had the husband not waived the pay in favor of disability benefits. The court stated that there was no violation of *Mansell* or the USFSPA when the order at issue "merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources." *Id.* at 108.

In *In re Marriage of Nielsen*, 341 Ill App 3d 863, 869-870; 792 NE2d 844 (2003), the Illinois Appellate Court ruled:

> [W]e believe that a party's vested interest in a military pension cannot be unilaterally diminished by an act of a military spouse, and we apply this principle to the present case. Here, the parties agreed that Susan would receive "25% of the gross retired or retainer pay due Mark." It is clear that the parties intended that Susan would receive a percentage of Mark's total retirement pay and not just his disposable retired or retainer pay. The parties' intent was incorporated into the judgment for dissolution. Mark retired and the judgment for dissolution was implemented. However, Mark thereafter decided to accept an increased amount of disability benefits. This resulted in a reduction of Mark's disposable retired or retainer pay. This accordingly reduced Susan's entitlement. Mark certainly had a legal right to receive disability benefits, but his doing so caused a diminution in the amount of his retirement pay that Susan had been receiving for over three years. Mark's decision frustrated the parties' intent and the trial court's judgment for dissolution. Indeed, to allow Mark to unilat-

> erally diminish Susan's interest in his military pension would constitute an impermissible modification of a division of marital property. As such, we affirm the trial court's order of November 3, 2000, in which it ruled that Susan was entitled to an amount equal to 25% of Mark's military pension as it existed on the date he retired. Because the trial court's November 3, 2000, order does not directly assign Mark's military disability pay, it does not offend the United States Supreme Court's ruling in *Mansell*.

In *Johnson v Johnson*, 37 SW3d 892, 897-898 (Tenn, 2001), the Tennessee Supreme Court held that a marital dissolution agreement that divides military retirement benefits gives the nonmilitary spouse a vested interest in his or her portion of the benefits, which cannot thereafter be unilaterally diminished by an act of the military spouse, given that such an act would constitute an impermissible modification and violation of the agreement. The court remanded the case for entry of an order providing the nonmilitary spouse with a monthly payment equal to her share of the waived retirement pay without dividing the military spouse's disability pay. *Id.* at 898.

Next, we wish to touch on two recent Texas cases addressing CRSC and waivers of retirement pay. In *Sharp v Sharp*, 314 SW3d 22 (Tex App, 2009), the Texas Court of Appeals addressed a waiver of retirement pay in exchange for CRSC, and it rejected the nonmilitary spouse's motion to enforce and clarify the divorce judgment. However, it appears that the argument posed by the nonmilitary spouse was simply that CRSC constituted military retirement pay for purposes of the judgment. And the appellate court merely held that CRSC is not retirement pay and thus the judgment did not divide CRSC that might have become payable at a later date. *Id.* at 25. The nonmilitary spouse was essentially seeking a portion of the CRSC. We agree, as

already noted, that CRSC is not retirement pay and is not subject to division; however, our analysis is couched in terms of dividing waived retirement pay and ordering replacement compensation, which matters the *Sharp* panel did not address. Indeed, *Mansell* and the litany of cases distinguishing *Mansell* are not even mentioned in *Sharp*.

In *Jackson*, 319 SW3d 76, the Texas Court of Appeals addressed a situation in which the military spouse (husband) had been appointed as trustee in a divorce judgment with respect to his ex-wife's interest in his disposable retirement pay, and he later became eligible for VA disability benefits and then CRSC, which he elected to receive. As in *Sharp*, the *Jackson* panel found that only retirement pay was subject to division, and it further ruled that the military spouse had no fiduciary obligation in regard to the CRSC. *Id.* at 81. The *Jackson* case, like the *Sharp* case, examined the issue from the perspective of dividing and awarding the CRSC funds and not the approach that we and numerous other jurisdictions have chosen. And again, we agree that CRSC is not subject to division.

While there are a few cases ruling differently, see, e.g., *In re Marriage of Pierce*, 26 Kan App 2d 236, 240; 982 P2d 995 (1999) (finding no relief available for ex-wife after former husband waived his military retirement pay in favor of disability benefits), the overwhelming weight of the caselaw from other jurisdictions supports our resolution of this appeal. By this opinion, Michigan now joins those jurisdictions providing relief to the nonmilitary spouse.

IV. CONCLUSION

We hold that a military spouse remains financially responsible to compensate his or her former spouse in

an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired. In these situations, because the ordered replacement compensation must relate to the military spouse's retirement-pay obligation and not the disability pay now being received, and because the military spouse, having made the election, will no longer actually be receiving the retirement pay, it may be necessary on occasion to review and determine whether any adjustments to the retirement pay would have been made had the military spouse continued receiving the retirement pay.

Accordingly, although we agree with the trial court that plaintiff must compensate defendant, we reverse the trial court's ruling because its order required plaintiff to pay defendant from CRSC funds and required plaintiff to pay an amount equal to half of his CRSC and not half of his envisioned retirement pay. We remand for

entry of an order requiring plaintiff to compensate defendant with monthly payments, from any source or combination of sources chosen, in an amount equal to 50 percent of the retirement pay that he would be receiving but for his election to waive the retirement pay in favor of disability benefits.

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

CEDRONI ASSOCIATES, INC v TOMBLINSON, HARBURN ASSOCIATES, ARCHITECTS & PLANNERS, INC

Docket No. 287024. Submitted May 11, 2010, at Detroit. Decided November 16, 2010, at 9:05 a.m.

Cedroni Associates, Inc., the lowest bidder for a school construction project of the Davison Community Schools (DCS), brought an action in the Genesee Circuit Court against Tomblinson, Harburn Associates, Architects & Planners, Inc. (an architectural firm the DCS hired to assist with the bid-selection process by reviewing and evaluating bid applications, investigating competing contractors and their references, expressing opinions and views on contractor competence and workmanship, and making recommendations regarding which contractor should be awarded the project), after the DCS awarded the contract for the project to the second lowest bidder following defendant's recommendations. The court, Judith A. Fullerton, J., granted summary disposition in favor of defendant on the basis that plaintiff's claim of tortious interference with a business expectancy failed to state a claim on which relief could be granted because plaintiff lacked a valid business expectancy in being awarded the contracts. Plaintiff appealed.

The Court of Appeals *held*:

1. A genuine issue of material fact existed with respect to the elements of plaintiff's cause of action. The trial court erred as a matter of law by holding that plaintiff lacked a valid business expectancy. Plaintiff, as the lowest bidder, submitted evidence sufficient to create a factual dispute with respect to whether it was a responsible contractor to the extent that the trier of fact could have concluded that there existed a reasonable probability or likelihood that plaintiff would have been awarded the project absent the alleged tortious interference. Plaintiff submitted evidence sufficient to create a factual dispute with respect to whether defendant's conduct was intentional and improper, motivated by malice and not by legitimate business reasons.

2. The submission of the lowest bid, in and of itself, is inadequate to sustain a plaintiff's suit in such a case.

3. Although the exercise of professional business judgment in making recommendations relative to governmental contracts and

projects must be afforded some level of protection and deference, litigation will not be precluded when evidence exists suggesting that the ostensible exercise of professional business judgment was in reality a disguised attempt to intentionally and improperly interfere with the contractual or expectant business relationships of others.

4. With respect to a claim of tortious interference with a business expectancy, the plaintiff must prove (1) the existence of a valid business expectancy, (2) knowledge of the expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a termination of the expectancy, and (4) resultant damage to the plaintiff.

5. The following principles apply in determining whether a valid business expectancy existed: (1) the presence of some level of discretion exercisable by a governmental body or decision-maker does not automatically preclude a recognition of a valid business expectancy, (2) if the discretion is expansive and not restricted by limiting criteria and factors to the extent that it makes it impossible to reasonably infer that the claimed expectancy would likely have come to fruition, there is no valid business expectancy, (3) an expectancy must generally be specific and reasonable, (4) it must be shown that there was a reasonable likelihood or probability that the expectant relationship would have developed as desired absent tortious interference with the expectancy, (5) a party need not prove that the expectancy equated to a certainty or guarantee, (6) innate optimism or mere hope is insufficient, and (7) the prior history of the governmental body or decision-maker and governing internal and external rules, policies, and laws constitute factors for a court to consider in determining whether a business expectancy was valid and likely achievable.

6. The provisions of the DCS's fiscal management policy and project manual that reserved the DCS's right to reject any or all bids were subject to the provision requiring an award to be made to the lowest responsible bidder. The "right to reject" provisions remained entirely enforceable in all circumstances other than the particular situation in which the bid was submitted by the lowest responsible bidder.

7. Although MCL 380.1267 provides that the DCS could reject any or all bids, it did not restrict the DCS from imposing its own criteria and limitations on itself relative to the bidding process and the acceptance and rejection of bids. Therefore, the DCS's fiscal management policy was relevant to analyzing whether plaintiff had a valid business expectancy.

8. A plaintiff alleging tortious interference with a business expectancy must demonstrate that the defendant acted both intentionally and either improperly or without justification. The plaintiff must allege the intentional doing of a wrongful act per se or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship with another. A wrongful act per se is an act that is inherently wrongful or an act that can never be justified. When a defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific affirmative acts that corroborate the unlawful purpose. To establish that a lawful act was done with malice and without justification, the plaintiff must prove with particularity affirmative actions that the defendant took that corroborate the improper motive.

9. A trier of fact, viewing the conflicting and inconsistent evidence and the inferences arising from it in a light most favorable to plaintiff, could reasonably have concluded that defendant acted with malice, in a wrongful manner per se, unethically, with an improper motive and absence of justification, or deceitfully with respect to the damaging information and recommendation conveyed to the DCS. Summary disposition was inappropriate in light of the record.

10. A genuine issue of material fact existed regarding whether the employee who conducted defendant's review of the bids before recommending that plaintiff not be awarded the project was honestly acting for the benefit of the DCS or whether she was acting solely for her own benefit and out of motivation to harm plaintiff. Therefore, summary disposition was improper.

Reversed and remanded.

K. F. KELLY, J., dissenting, stated that the trial court properly granted summary disposition in favor of defendant. Plaintiff failed to state a claim on which relief could be granted because, in recommending that the DCS reject plaintiff's bid, defendant was acting as an agent of the DCS, not an independent third party. In addition, plaintiff lacked a valid business expectancy since the DCS's decision was highly discretionary and, by statute, it had broad and unfettered discretion to reject any or all bidders. None of the bidders had any prospective advantage or business expectancy; rather, each of their interests was limited to an expectancy that the bidding process would be fair and free of fraud. Plaintiff failed to show any fraud, injustice, or violation of trust in the bidding process. Plaintiff failed to show that defendant's conduct was malicious or wrongful or that defendant's allegedly wrongful

conduct caused plaintiff to lose the award of the contract. Defendant's actions were justified as actions based on a legitimate business decision.

1. TORTS — INTERFERENCE WITH A BUSINESS EXPECTANCY — ELEMENTS.

A plaintiff seeking to litigate a claim of tortious interference with a valid business expectancy must prove (1) the existence of a valid business expectancy, (2) knowledge of the expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a termination of the expectancy, and (4) resultant damage to the plaintiff; a valid business expectancy is one in which there exists a reasonable likelihood or probability that the expectancy will come to fruition.

2. TORTS — INTERFERENCE WITH A BUSINESS EXPECTANCY.

The principles to be applied in determining whether a valid business expectancy exists for purposes of determining whether a defendant tortiously interfered with that business expectancy include (1) the presence of some level of discretion exercisable by a governmental body or decision-maker does not automatically preclude a recognition of a valid business expectancy, (2) if the discretion of the governmental body or decision-maker is expansive and not restricted by limiting criteria and factors to the extent that it makes it impossible to reasonably infer that the claimed expectancy would likely have come to fruition, there is no valid business expectancy, (3) an expectancy must generally be specific and reasonable, (4) it must be shown that there was a reasonable likelihood or probability that the expectant relationship would have developed as desired absent tortious interference with the expectancy, (5) a party need not prove that the expectancy equated to a certainty or guarantee, (6) innate optimism or mere hope is insufficient, and (7) the prior history of the governmental body or decision-maker and governing internal and external rules, policies, and laws constitute factors for a court to consider in determining whether a business expectancy was valid and likely achievable.

3. SCHOOLS — CONSTRUCTION CONTRACTS — REJECTION OR ACCEPTANCE OF BIDS.

The provision of the Revised School Code regarding competitive bidding for contracts for the construction of a new school building or addition to or repair or renovation of an existing school building that provides that the board of a school district or intermediate school district or the board of directors of a public school academy may reject any or all bids does not restrict the board from imposing its own criteria and limitations on itself relative to the bidding process and the acceptance or rejection of bids (MCL 380.1267[6]).

4. TORTS — INTERFERENCE WITH A BUSINESS EXPECTANCY — WRONGFUL ACTS PER SE — LAWFUL ACTS DONE WITH MALICE AND UNJUSTIFIED IN LAW.

A plaintiff claiming tortious interference with a business expectancy must demonstrate that the defendant acted both intentionally and either improperly or without justification; one who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a wrongful act per se 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; a wrongful act per se is an act that is inherently wrongful or that can never be justified under any circumstances; the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference when the defendant's conduct was not wrongful per se; to establish that a lawful act was done with malice and without justification, the plaintiff must prove with particularity affirmative acts taken by the defendant that corroborate the improper motive of the interference; when motivated by legitimate business reasons, a defendant's actions do not constitute improper motive or interference.

5. TORTS — INTERFERENCE WITH A BUSINESS EXPECTANCY — AGENTS — THIRD PARTY TO CONTRACT OR BUSINESS RELATIONSHIP.

A plaintiff must establish that the defendant was a third party to the contract or business relationship in order to maintain a claim of tortious interference with a business expectancy; corporate agents are not liable for tortious interference with respect to the corporation's contracts and relationships when acting for the benefit of the corporation and within the scope of their authority; an agent can be liable, however, if the agent acted not for the benefit of the corporation or entity involved in the transaction or prospective transaction, but for his or her own benefit or pursuant to a personal motive.

McAlpine & Associates, P.C. (by *Mark L. McAlpine* and *Ryan W. Jezdimir*), for plaintiff.

Sullivan, Ward, Asher & Patton, P.C. (by *Kevin J. Gleeson* and *Maria L. Meldrum*), for defendant.

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

MURPHY, C.J. Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. This case involves a claim of tortious interference with a business expectancy arising out of, allegedly, defendant's improper conduct, communications, and recommendations that resulted in a school district's decision not to award plaintiff a construction project despite plaintiff's submission of the lowest bid. We hold that genuine issues of material fact existed with respect to the elements of plaintiff's cause of action. More specifically, we reject the trial court's determination that, as a matter of law, plaintiff lacked a valid business expectancy. Plaintiff, as the lowest bidder, submitted evidence sufficient to create a factual dispute with respect to whether it was a "responsible" contractor to the extent that the trier of fact could have concluded that there existed a reasonable probability or likelihood that plaintiff would have been awarded the project absent the alleged tortious interference. Therefore, there was a genuine issue of material fact with respect to whether plaintiff had a valid business expectancy. We emphasize that the submission of the lowest bid, in and of itself, was inadequate to sustain plaintiff's suit. We reject any rule per se that would allow litigation to proceed simply on the basis of proof of the lowest bid, except, of course, if no additional criteria needed to be satisfied, which is unlikely. Absent sufficient additional evidence on relevant award criteria, there would be no valid business expectancy. We further reject the trial court's determination that, as a matter of law, plaintiff failed to show that defendant did anything improper. Plaintiff submitted evidence sufficient to create a factual dispute with respect to whether defendant's conduct was intentional and improper, motivated by malice and not legitimate business reasons. On this issue, we emphasize that the exercise of professional business judgment in making recommendations relative to governmental con-

tracts and projects must be afforded some level of protection and deference. But we will not preclude litigation when there exists evidence suggesting that the ostensible exercise of professional business judgment is in reality a disguised or veiled attempt to intentionally and improperly interfere with the contractual or expectant business relationships of others. Here, issues of fact were established and, accordingly, we reverse and remand.

I. BACKGROUND

The Davison Community Schools (DCS) opened bidding on a construction project that entailed work at two school sites. Pursuant to a contract, defendant, an architectural firm, assisted the DCS with the bid-selection process by reviewing and evaluating bid applications, investigating competing contractors and their references, expressing opinions and views on contractor competence and workmanship, and making recommendations regarding which contractor should be awarded the project. Plaintiff's bid was the lowest submitted to the DCS by any contractor. After entertaining all the submitted bids, the DCS, as recommended by defendant, elected to award the contract on the construction project to the contractor that had submitted the second lowest bid, not plaintiff.

Plaintiff filed suit against defendant, alleging a single count of, as framed by plaintiff, tortious interference with prospective economic relations.[1] Plaintiff asserted that there existed an expectancy of a valid business relationship developing between it and the DCS, that defendant was aware of the expectancy, that defendant intentionally interfered with the expectant relationship

[1] For purposes of this opinion, we shall refer to plaintiff's claim as "tortious interference with a business expectancy."

by wrongfully claiming that plaintiff was unqualified to perform the work on the project, that defendant's wrongful interference terminated the expectancy, and that plaintiff suffered damages as a result of the interference, including lost profits. In our analysis, we shall explore in detail the nature of the documentary evidence and how it relates to the issues presented.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), ruling that the evidence failed to show that plaintiff had a reasonable or valid expectation of entering into a business relationship with the DCS and that the evidence fell short of showing that defendant did anything improper.

II. ANALYSIS

A. STANDARD OF REVIEW AND GENERAL SUMMARY-DISPOSITION PRINCIPLES

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). The trial court's task in reviewing the motion entails consideration of the record evidence and all reasonable infer-

ences arising from that evidence. *Skinner*, 445 Mich at 161. "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). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court is not permitted to assess credibility, to weigh the evidence, or to determine facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

B. VALID BUSINESS EXPECTANCY

On appeal, plaintiff first argues that the trial court erred by granting the motion for summary disposition when there was evidence sufficient to create a factual issue regarding whether plaintiff, as a qualified and responsible bidder that submitted the lowest bid, had a valid business expectancy. We agree.

1. THE CASELAW

With respect to a claim of tortious interference with a business expectancy, a plaintiff must prove (1) the existence of a valid business expectancy, (2) knowledge of the expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a termination of the expectancy, and (4) resultant damage to the plaintiff. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010);

Blazer Foods, Inc v Restaurant Props, Inc, 259 Mich App 241, 254; 673 NW2d 805 (2003). A valid business expectancy is one in which there exists a reasonable likelihood or probability that the expectancy will come to fruition; mere wishful thinking is not sufficient to support a claim. *First Pub Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101 (2003); *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984).

In *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615; 329 NW2d 760 (1982), the plaintiff was a corporation that engaged in underground and heavy-duty construction, and the defendant was a firm of consulting engineers that had been retained by the Detroit Public Lighting Commission (PLC) under contract relative to a planned expansion of a utility station. Comparable to defendant's duties here, the engineering firm had contracted "to prepare construction specifications, evaluate bids made by contractors and make recommendations to the PLC as to which contractor should be awarded contracts." *Id.* at 624. The plaintiff submitted the lowest bid, but the engineering firm recommended that the PLC award the construction contract to another contractor "as it felt plaintiff was unqualified to perform the contract." *Id*. The PLC followed the defendant's recommendation, and the plaintiff was denied the contract. On another utility project, a general contractor had been awarded a construction contract by the PLC, and that contractor had designated the plaintiff as a subcontractor. The engineering firm, however, indicated that the plaintiff was an unacceptable subcontractor, and the plaintiff was then removed from the project. The plaintiff sued the defendant for tortious interference with prospective

advantageous economic relations, and the jury returned a verdict in favor of the plaintiff in the amount of $272,368. *Id.* at 624-625.

On appeal, the defendant claimed that the trial court had erred by denying its motion for a directed verdict, arguing "that it was entitled to a directed verdict as plaintiff failed to produce sufficient evidence to raise a question of fact as to a valid expectancy that the contracts would have been awarded to plaintiff absent defendant's alleged interference." *Id.* at 633. The defendant maintained that "the *discretionary* factors going into the determination of who is the lowest *qualified* bidder preclude[d] plaintiff from proving it had an expectation of being awarded the contracts." *Id.* at 634 (emphasis added). The *Joba Constr* panel stated that, to support the tortious-interference claim, the plaintiff had to prove that it was reasonably likely or probable that a specific and reasonable economic advantage or expectancy would indeed develop and occur. *Id.* at 634-635. The panel stated that the plaintiff was not required to demonstrate a guaranteed relationship, considering that anything defined as prospective in nature would necessarily be uncertain, and stated that while certainties need not be shown, there must be something more than innate optimism or mere hope. *Id.* at 635. This Court concluded that the plaintiff had submitted "sufficient evidence to create a question of fact as to whether it was the lowest qualified bidder and thus had a legitimate expectancy in obtaining the contracts . . . ." *Id.*[2]

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[2] While the *Joba Constr* opinion did indicate that the plaintiff was the lowest bidder on the first project, it did not reveal the nature of the evidence presented at trial with respect to the plaintiff being a "qualified" bidder.

In *Trepel*, 135 Mich App at 377-381, this Court tackled the issue of whether the trial court had properly granted summary disposition on a counterclaim of tortious interference with a prospective advantage, focusing attention on the lower court's determination that no valid business expectancy existed. The counterclaim was pursued by one of the defendants, a hospital, against the plaintiff, a radiologist. The hospital had applied for approval of a bond issue from the Michigan State Hospital Finance Authority (the authority), and the authority had granted tentative approval of a proposed sale of municipal bonds. The final step before consummation of the sale was obtaining approval of the sale by the Municipal Finance Commission (MFC), but the scheduled approval was substantially delayed and, as a consequence, the hospital ran out of money and had to obtain alternative financing at a much higher interest rate. The plaintiff had allegedly made good on threats to the hospital to send letters to the MFC in which he claimed that certificates of need filed by the hospital were defective. The alleged intent behind the sending of the letters by the plaintiff was to interfere with the hospital's application for approval of the bond issue, which approval was ultimately never obtained. *Id.* at 366-369.

The *Trepel* panel, examining whether the hospital had a valid business expectancy in obtaining approval of the bond issue from the government, first noted that there was an absence of Michigan caselaw "relating to interference with *discretionary* governmental action." *Id.* at 378 (emphasis added). This Court proceeded to review three federal court decisions, two of which approved of interference suits brought by parties that had submitted the most favorable bids on governmental contracts, *Lewis v Bloede*, 202 F 7 (CA 4, 1912), and *Pedersen v United States*, 191 F Supp 95 (D Guam, 1961), and one in which the court rejected a suit arising

out of a city council's decision relative to a request to close and relocate an alley that was delayed because of the need to hear from interested parties, *Carr v Brown*, 395 A2d 79 (DC App, 1978). *Trepel*, 135 Mich App at 379-380. The *Trepel* panel then ruled as follows:

> In the instant case, the discretion to be exercised by the MFC appears to be somewhat greater than that attributed to the governmental bodies in *Lewis* and *Pedersen*, *supra*, but significantly less than that in *Carr*. We perceive that *Carr* is a gloss on the general rule. It applies to situations where too many factors are in play to be able to reasonably infer that, but for defendant's allegedly wrongful action, plaintiff likely would have obtained the desired advantage. In this case, the MFC's grant of approval must be preceded by the determinations required by statute. A trier of fact might be persuaded that defendant hospital could ascertain with reasonable certainty whether the items listed in the statute were satisfied so that MFC approval was a probability. If the question were whether defendant hospital's application for a loan was denied because of [the plaintiff's] interference, defendant hospital would have made out a cause of action because a trier of fact could assess the causal effect of the [plaintiff's] actions.
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> However, where the MFC approval is only delayed, as alleged here, the problem becomes more difficult. The MFC is required to make findings of fact before granting approval. Obviously, that task takes a certain amount of time to accomplish. However, the procedure involved is not a notice and comment type hearing, as in *Carr*, designed to let interested parties express their opposition. Defendant hospital should have the opportunity to prove its allegation that approval was "scheduled" for September 11, 1979.
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> In *Lewis*, [202 F at] 20-21, and *Carr*, [395 A2d at] 84, reference is made to the prior history of the governmental entity in granting approval. Defendant hospital has sought to introduce evidence by way of affidavit of the MFC's perfect record in approving bond issues already approved by the Michigan State Hospital Finance Authority. We

> believe such evidence if otherwise admissible could persuade a trier of fact at a contested trial. [*Id.* at 380-381.]

From *Joba Constr*, *Trepel*, and *First Pub*, and cases relied on therein, we derive the following principles to apply in determining whether there exists a valid business expectancy: (1) the presence of some level of discretion exercisable by a governmental body or decision-maker does not automatically preclude a recognition of a valid business expectancy, (2) if the discretion is expansive and not restricted by limiting criteria and factors to an extent that it makes it impossible to reasonably infer that the claimed expectancy would likely have come to fruition, there is no valid business expectancy, (3) an expectancy must generally be specific and reasonable, (4) it must be shown that there was a reasonable likelihood or probability that the expectant relationship would have developed as desired absent tortious interference with the expectancy, (5) a party need not prove that the expectancy equated to a certainty or guarantee, (6) innate optimism or mere hope is insufficient, and (7) the prior history of the governmental body or decision-maker and governing internal and external rules, policies, and laws constitute factors for a court to consider in determining whether a business expectancy was valid and likely achievable. Of course, when addressing a motion for summary disposition under MCR 2.116(C)(10), these principles must be viewed in the context of determining whether a genuine issue of material fact exists on contemplation of the documentary evidence.

2. APPLICATION OF THE LAW TO THE FACTS

We begin by examining the documents governing the DCS and the bid-selection process. DCS's fiscal management policy (FMP) indicates multiple times that the

DCS Board of Education (Board) has and reserves the right to reject any or all bids. In one section of the FMP, it provides that the reservation of the right to reject bids includes "the bid of any contractor who is not reasonably determined to be 'responsible' in conjunction with this policy." The FMP, however, also provides:

> The Board . . . hereby establishes this policy to satisfy its statutory duty to competitively bid contracts for construction of a new school building, or an addition to or repair or renovation of an existing school building of the [DCS], except for repairs in emergency situations. Bids *shall* be awarded in compliance with applicable bidding obligations imposed by law to the "*lowest responsible bidder*." [Emphasis added.]

This language, including use of the word "shall," indicates that if a bidding contractor submits the lowest bid on a project and is deemed "responsible," the Board is mandated to award the project to that contractor. *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008) (" 'Shall' is mandatory."). There appears to be some tension between this provision and the FMP's language that gives the Board the authority to reject any or all bids, giving rise to the question whether the Board has the discretion to reject a bid from the "lowest responsible bidder." The term "lowest responsible bidder" is defined in the FMP as being

> [t]he Responsible Contractor that has submitted a fully complete and responsive bid that provides the lowest net dollar cost for all labor and materials required for the complete performance of the work of the Construction Project let for bid. Such bid must satisfy the requirements of all applicable local, state, and federal laws, this Policy, any administrative rules associated with this Policy developed by the Superintendent at the Board's direction, and bid documents used to solicit bids, and any other guidelines and specifications required for the Construction Project.

> Because a bidder with the net lowest dollar cost bid may not be a Responsible Contractor, the lowest dollar cost bidder may not always receive award of the bid.

This definition refers to the term "Responsible Contractor," and the FMP also defines that term as being

> [a] contractor determined by the Board to be sufficiently qualified to satisfactorily perform the Construction Project, in accordance with all applicable contractual and legal requirements. The Board's determination shall be based upon: (1) an overall review of the Responsibility Criteria listed below and the contractor's responses, or failure to respond, to same; (2) the contractor's compliance with this Policy and all applicable local, state and federal laws; (3) the input of the District's architect(s) [here defendant] and/or construction manager(s), if any; (4) review of the contractor's proposed subcontractors; and (5) other relevant factors particular to the Construction Project.

The FMP then provides a definition of "Responsibility Criteria," which sets forth a nonexclusive list of criteria that can be examined and weighed by the Board in determining whether a contractor is responsible.

In his affidavit, the superintendent of the DCS, R. Clay Perkins, averred that the DCS had the authority and right under the FMP to reject any or all bids and that the FMP specifically apprised contractors that the lowest bidder might not always be awarded a project.

The trial court was also provided with a project manual drafted by defendant that addressed the advertisement of bids and the planned construction to be undertaken at the two work sites, Hill Elementary School and Siple Elementary School. The project manual twice indicates that the DCS "reserves the right to accept or reject any or all offers." But the manual also provides that the DCS "reserves the right to reject any or all bids *where* incomplete or irregular, lacking bid

bond, data required by bidding documents, or where proposals exceed funds available." (Emphasis added.) This provision suggests that there is somewhat of a limitation on the grounds pursuant to which a bid can be rejected.

Defendant's reliance on the language in the FMP and project manual that gives the DCS the right to reject any or all bids reflects a failure to appreciate the language in the FMP that requires the DCS to award a project to the lowest responsible bidder. Indeed, defendant fails to even acknowledge the provision concerning the "lowest responsible bidder" mandate, let alone argue that it is negated by or subject to the language in the FMP and project manual on which defendant relies. Defendant's position suggests that the DCS has complete and unfettered discretion to reject a bid, but this is inconsistent with the "lowest responsible bidder" provision that mandates an award and inconsistent with the language in the project manual that indicates that the DCS has the right to reject bids, but only for certain reasons.

We hold, as a matter of law, that the multiple provisions reserving the right to reject bids are subject to the provision requiring an award to be made to the lowest responsible bidder; otherwise, the "lowest responsible bidder" provision is rendered meaningless and nugatory. In *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003), our Supreme Court stated:

> Just as "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory," courts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. [Citation omitted.]

We find no reason not to apply this same construction principle when interpreting the FMP. Further, our interpretation does not render the "right to reject" provisions surplusage or nugatory, given that they remain entirely enforceable in all circumstances other than a particular situation in which the bid being addressed was submitted by the lowest responsible bidder. Aside from the "lowest responsible bidder" provision itself, our conclusion finds some additional support in the FMP, in which, as already indicated, one of the provisions reserving the right to reject a bid also provides that the reservation encompasses "the bid of any contractor who is not reasonably determined to be 'responsible' in conjunction with this policy." This language tends to honor and can be read consistently with the "lowest responsible bidder" mandate. Further support can be found in the FMP's definition of "lowest responsible bidder," which provides, "Because a bidder with the net lowest dollar cost bid may not be a Responsible Contractor, the lowest dollar cost bidder may not always receive award of the bid." By corollary, this language suggests that if a contractor submits the lowest bid, it would be awarded the project at issue if the contractor is also properly characterized as being "responsible." Ultimately, our ruling rests on the fact that any other interpretation would render surplusage and nugatory the FMP's language that "[b]ids *shall* be awarded in compliance with applicable bidding obligations imposed by law to the '*lowest responsible bidder*.' " (Emphasis added.)

We next need to address whether plaintiff submitted evidence sufficient to create a genuine issue of material fact on the question whether it had a valid business expectancy, accepting the undisputed fact that plaintiff submitted the lowest bid and taking into consideration our construction of the FMP. Our attention must focus

on the requirement that the contractor or bidder be "responsible." The Board certainly has some discretion in making this determination. However, we are not prepared to rule that, as a matter of law, a contractor that submitted the lowest bid on a project, thereby satisfying one of the FMP award prerequisites of the "lowest responsible bidder" clause, can never establish a valid business expectancy merely because the Board had some discretion in determining whether that contractor was responsible.

The Board's discretion in awarding a project is not expansive or unrestricted by limiting criteria and factors to an extent that it makes it impossible to reasonably infer that plaintiff's claimed expectancy would likely have come to fruition. Rather, the FMP limits the discretion to an assessment of whether a contractor is "responsible," and that determination is subject to the factors and criteria delineated in the definitional section of the FMP. In determining whether a contractor is responsible, the ultimate question to be answered by the Board, according to the FMP, is whether the contractor is "sufficiently qualified to satisfactorily perform the Construction Project, in accordance with all applicable contractual and legal requirements." Certainly, a contractor submitting the lowest bid on a project, such as plaintiff, may be able to prove with testimony and other evidence that it was sufficiently qualified to complete the project in a satisfactory and legally and contractually compliant manner, to the extent that a trier of fact could conclude that there existed a reasonable likelihood or probability that the contractor would have been awarded the project absent tortious interference by a defendant. Supporting evidence that goes beyond innate optimism or mere hope could easily exist if a contractor truly has a stellar track

record in the construction field; certainty or a guarantee of an award need not be shown.

We shall now examine the documentary evidence presented in the trial court. Defendant's representative, Jackie Hoist, contacted and interviewed persons identified on plaintiff's bidder-qualification form in order to obtain opinions on the quality and timeliness of plaintiff's work on past projects. Hoist's typewritten notes of the responses and opinions supposedly communicated to her reflect some negative reviews of plaintiff's work, the harshest of which came from Hoist herself, who had worked with plaintiff on multiple projects.[3] The notes, however, also reflect some positive reviews, e.g., Richard Cedroni[4] "managed it well," "hands on job," "supervision was good," "would work with them again," "asked [plaintiff] to bid a lot of their jobs," "did a good job," "very dependable," "do what they [s]ay they will," "[s]chedule was fine," "[w]ork was very good as a whole," "[v]ery reasonable on change orders," "[w]ork quality was good," "redid work when necessary," and "[p]aperwork end was good." These responses and opinions came from many individuals and concerned several projects.[5] Additionally, the lower court record contains an affidavit by Cedroni and a letter from Cedroni to the DCS, which was also distributed at a public meeting to DCS committee members who were engaged in making a recommendation to the Board to award the project to US Construction and

[3] Hoist noted that, on one project, some of plaintiff's work was the worst that she had ever seen.

[4] Cedroni is plaintiff's president and principal representative.

[5] The documentary evidence is not clear regarding whether Hoist's notes themselves were shared with the DCS; however, defendant's brief in the trial court indicated that the notes were indeed shared and that the DCS chose another contractor on the basis of the notes and the information contained therein.

Design Services, LLC. Cedroni's affidavit and his circulated letter averred and expressed that plaintiff had performed quality work, had timely completed awarded projects, and had received excellent reviews, all with respect to numerous construction projects. The affidavit and letter were detailed and discussed specifics regarding the various projects, and they addressed and challenged the proclaimed negative opinions garnered by Hoist in her investigation conducted on behalf of defendant.[6]

In light of the documentary evidence indicating that plaintiff was sufficiently qualified to complete the project in a satisfactory manner, we conclude that a genuine issue of material fact existed concerning whether plaintiff was a responsible contractor to the extent that a trier of fact could conclude that there existed a reasonable likelihood or probability that plaintiff would have been awarded the project absent the alleged tortious interference by defendant. Stated otherwise, there was a genuine issue of material fact regarding whether plaintiff had a valid business expectancy.

As indicated in our introduction, we emphasize that the submission of the lowest bid, in and of itself, was inadequate to sustain plaintiff's suit. We reject any per se rule that would allow litigation to proceed simply on the basis of proof of the lowest bid, except, of course, when no additional criteria needed to be satisfied,

[6] Hoist's notes and Cedroni's affidavit and letter do raise concerns about hearsay. However, neither party argued in the trial court, nor argues on appeal, that any of the documentary evidence should be disregarded and not considered on the basis of hearsay. Indeed, both parties place some reliance on all three of the documents. Given that the parties have effectively agreed to allow consideration of the documents and their contents, we shall not engage in any hearsay analysis.

which is unlikely. Absent sufficient additional evidence on relevant award criteria, there would be no valid business expectancy.

We find it necessary to address some of the criticisms leveled by the dissent regarding the issue whether there could be a valid business expectancy. Initially, the dissent asserts that no cause of action exists to protect bidders on a governmental contract, citing *Talbot Paving Co v Detroit*, 109 Mich 657, 661-662; 67 NW 979 (1896). First, *Talbot Paving* addressed an action by a contractor against *a municipality*, and here plaintiff is not suing the DCS, but is proceeding on a tortious-interference claim against defendant. Next, *Talbot Paving* allowed for the possibility of a suit against a municipality if fraud were involved. *Id.* at 662. As can be gleaned from our discussion later in this opinion, there was evidence presented suggesting fraudulent conduct on the part of defendant. The dissent also cites *Leavy v City of Jackson*, 247 Mich 447, 450-451; 226 NW 214 (1929), another suit against the municipality itself, and *Leavy* recognized that a suit by a bidder could be maintained if the municipality did not act in good faith in the exercise of honest discretion or if fraud, injustice, or a violation of trust permeated the bidding process. Once again, as reflected later in our opinion, there is evidence indicating bad faith, a lack of honesty, injustice, and fraud.

The dissent contends that there could be no valid business expectancy because MCL 380.1267 gave the DCS unfettered discretion to reject a bid, since the statute provides no limiting criteria and because the FMP does not have the force of law. MCL 380.1267(6) provides, in part, that "[t]he board, intermediate school board, or board of directors may reject any or all bids, and if all bids are rejected, shall readvertise in the manner required by

this section." We first note that MCL 380.1267(6) does not restrict a board from imposing its own criteria and limitations on itself relative to the bidding process and the acceptance and rejection of bids. While the statutory language, standing alone, places no limits on discretion, the dissent's position ignores the reality that the FMP governed the bidding process. Superintendant Perkins averred that the FMP guided the bidding process and that the process involved identifying the lowest responsible bidder. The FMP itself provides that projects "requiring competitive bids shall be made in accordance with current statutes, the creation of bid specifications, *and* adherence to the District's bidding procedure[.]" (Emphasis added.) The FMP further provides that the requirements of the FMP "shall be incorporated into all bid documents used to solicit bids for construction projects[.]" We therefore conclude that the FMP is absolutely relevant to analyzing the issue whether plaintiff had a valid business expectancy.

Finally, we reject the dissent's reliance on unpublished opinions. MCR 7.215(J).

C. TORTIOUS INTERFERENCE—INTENTIONAL AND IMPROPER CONDUCT

Plaintiff next argues that the trial court erred by granting the motion for summary disposition when a genuine issue of material fact existed with respect to whether defendant's communications to the DCS that plaintiff was not qualified constituted intentional and improper conduct.

1. THE CASELAW

In regard to a claim of tortious interference with a business expectancy, a plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification. *Dalley*, 287 Mich App

at 323. "[O]ne who alleges tortious interference with a contractual or business 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." *Badiee v Brighton Area Sch*, 265 Mich App 343, 367; 695 NW2d 521 (2005), quoting *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984) (quotation marks omitted). A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. *Badiee*, 265 Mich App at 367; *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). When a defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference. *Badiee*, 265 Mich App at 367. To establish that a lawful act was done with malice and without justification, a plaintiff must prove, with particularity, affirmative acts taken by the defendant that corroborate the improper motive of the interference. *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003); see also *Dalley*, 287 Mich App at 324. "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Id.* (quotation marks and citation omitted).

A false accusation may provide a basis to pursue a claim of tortious interference. *First Pub*, 246 Mich App at 199. In *Trepel*, 135 Mich App at 377, this Court noted that the defendant's counterclaim of tortious interference "clearly allege[d] unethical conduct—sending letters knowing them to contain false allegations."

2. APPLICATION OF THE LAW TO THE FACTS

The FMP provides that the determination whether a contractor is a responsible contractor shall be based, in part, on "the input of the [DCS's] architect," which in this case was defendant. The contract between the DCS and defendant provides that defendant "shall assist the [DCS] in obtaining competitive bids and shall assist the [DCS] in awarding and preparing contracts for construction." Superintendent Perkins averred that plaintiff had submitted the lowest bid, but, "[b]ased on the review by the Board Committee and the recommendations of [defendant], [the DCS] decided to award the Project to US Construction[.]" There is no dispute that, consistently with its obligation to provide assistance in the bid-selection process, defendant made a recommendation and conveyed information to the DCS regarding plaintiff and its bid. Hoist sent a letter on behalf of defendant to the DCS in which she stated:

> We have reviewed the apparent low bidder[']s proposal, references, past experience and qualifications. At the close of the review, we recommend that you move to the second low bidder, US Construction . . . . They have provided construction services for other projects designed by [us] & for [the DCS], and have performed the work adequately.

It can reasonably be inferred from this letter that Hoist, and thus defendant, found that plaintiff had a poor work history and consequently would not adequately perform the work on the project at issue. And Perkins's averment indicating that the award decision was based, in part, on defendant's recommendation provides evidence of a causal relationship between defendant's conduct and the decision to award the project to US Construction instead of plaintiff. Further support of a causal relationship is an e-mail to Perkins from the DCS's director of finance and operations,

Daniel Romzek, in which he stated that Hoist "still stands by her recommendation not to proceed with the low bidder, and I told her that we will rely on her reference checks and recommendation for our recommendation to the board." For these reasons, we respectfully disagree with the dissent's position that plaintiff failed to establish causation.

There was conflicting evidence presented regarding plaintiff's workmanship on various projects. In Hoist's notes, she indicated that the contact person on a construction project involving toilet buildings at the Island Lake State Park stated that plaintiff had failed to meet the project's schedule, failed to follow the plans and specifications, failed to provide supervision, and failed to follow up on matters. The contact person also stated that plaintiff's work was of poor quality and that he believed that "the state put [Cedroni] on their 'may not bid' list." Cedroni asserted in his affidavit that the contact person on the Island Lake project was employed by defendant, which acted as the architect on the project. Cedroni further averred that plaintiff "timely and properly completed all work on the project considering the design errors of [defendant]." Cedroni additionally attested that "[t]he work was fully completed and was of good quality, as proven by [plaintiff's] receipt of full payment for the project[, and plaintiff] had on-site supervision during the entire course of the project."

In Hoist's notes, she indicated that she spoke with a person from Architectural Systems Group regarding a prime subcontract and that the individual stated that plaintiff was "[n]ot good to deal with." In Cedroni's affidavit, he averred that plaintiff "is currently working with Architectural Systems Group as part of a $170,000 contract[.]"

In Hoist's notes, she indicated that Ken Kander, a contact person on a construction project involving the Holly Academy, stated that he would not say anything negative about plaintiff, nor would he say anything positive. Another contact person on the Holly Academy project supposedly told Hoist that he would never hire plaintiff for the DCS construction project. In Cedroni's affidavit, he attested as follows regarding the Holly Academy project, for which defendant provided architectural services:

> Ken Kander will attest that Cedroni completed quality work on the project, had appropriate levels of supervision, and addressed any concerns of the owner. The problems on this construction project were due to [defendant]. [Plaintiff] suggested an alternative ballast to the one [defendant] had specified. [Defendant] rejected [plaintiff's] proposal. [Defendant's] specified ballasts were problematic and [plaintiff's] subcontractor has made repeated visits to the construction project to address the problems. In fact, Holly Academy has since retained a new architect rather than work any further with [defendant].[7]

In his letter presented to the DCS committee involved in the bidding process, Cedroni stated that he had spoken to the owner of the Holly Academy numerous times "and he was very happy with our quality and performance on the project and would not hesitate to utilize our services again."

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[7] Returning to our hearsay concern, aside from again noting that neither party raises hearsay issues, we would note that Cedroni's claims with respect to what others told him about plaintiff's workmanship would not be hearsay in the context of this issue because their statements would not be offered to prove the truth of the matter asserted. MRE 801(c). For purposes of this issue, statements that, for example, plaintiff did quality work on a project would not be used to prove that plaintiff indeed did quality work, but simply to show that the declarant made a statement contrary to one attributed to him or her in Hoist's notes, calling into question Hoist's truthfulness and showing improper conduct. See *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998).

Hoist's notes also reflect her own thoughts regarding plaintiff's workmanship on projects that plaintiff and defendant worked on together. According to Hoist, plaintiff's work at Holly Academy lacked supervision and showed poor workmanship. She also indicated that the quality of plaintiff's work on the project was reflective of their bid "and about what I expected from Cedroni, but in addition to the low quality, his follow-up on construction issues, especially with regard to their lighting problem, is unacceptable to me." In an e-mail from Hoist to Kander regarding the Holly Academy project, Hoist complained of plaintiff's failure to deal with a problem with lights, and she then stated, "So, here's where the rubber may hit the road for Cedroni, [h]e was low bidder on some work we are doing for [the DCS]." Regarding a construction project involving a maintenance building in Rochester Hills, Hoist described some of plaintiff's work as the worst that she had ever seen. With respect to that project, Cedroni averred that the problems were caused by defendant.

In his letter presented to the DCS committee, Cedroni made the following observations regarding his company:

> I have personally contacted all parties on this document [Hoist's notes] and all admitted to talking to Jackie. They all reported giving good reviews and glowing reports of our performance, except for one architect. After speaking with this architect and explaining to him that his comment could be viewed as damaging, he stated he didn't think his review was particularly bad and he would have no problem working with us in the future.
>
> * * *
>
> . . . I have found no definitive reason as to why my company should not be recommended for this project. I am offering to complete this job at nearly $50,000 less than the

> next lowest bidder . . . . We have never been removed from a project and never received a poor review from any architect/owner we've worked with. Even after our last project with [defendant], I was told they had no issue with our performance and we could use them as a reference for future work.

Viewing the conflicting and inconsistent evidence and the inferences arising from it in a light most favorable to plaintiff, a trier of fact could reasonably conclude that defendant acted with malice, in a wrongful manner per se, unethically, with an improper motive and absence of justification, or deceitfully with respect to the damaging information and recommendation conveyed to the DCS. If plaintiff's evidence were found to be credible by the trier of fact, it could reasonably conclude that defendant acted intentionally and improperly in an effort to interfere with plaintiff's business expectancy, i.e., being awarded the construction project by the DCS. It is quite evident in reviewing the documentary evidence that a great deal of friction and animosity had developed between plaintiff and defendant over past projects by the time the bid-selection process took place here, and a trier of fact could determine that defendant's recommendation was motivated by malice and not legitimate business reasons. Summary disposition was simply inappropriate in light of the record.

As indicated in our introduction, we emphasize that the exercise of professional business judgment in making recommendations relative to governmental contracts and projects must be afforded some level of protection and deference. But we will not preclude litigation when there exists evidence suggesting that the ostensible exercise of professional business judgment is in reality a disguised or veiled attempt to intentionally and improperly interfere with the contrac-

tual or expectant business relationships of others. There is evidence here indicating that defendant, through Hoist, was being untruthful and inaccurate in its portrayal of plaintiff. The trier of fact must sort through all the conflicting evidence and assess the credibility of the parties' claims and their witnesses.

Finally, the dissent posits that there was no evidence that Hoist provided false information to the DCS or had an improper motive and that the information supplied by Hoist simply constituted a negative opinion. The dissent asserts that the evidence merely reflected professional disagreements. We respectfully conclude that the dissent fails to view the evidence in a light most favorable to plaintiff and fails to consider reasonable inferences arising from the evidence. A reasonable inference arising from Cedroni's affidavit is that Hoist was lying, and Cedroni's letter indicates that glowing reviews were given to Hoist, which, if true, would directly establish that she was lying. Taking into consideration Cedroni's affidavit and letter, along with the other documentary evidence, and viewing it in a light most favorable to plaintiff, this case entails more than professional disagreements and negative opinions.

D. DEFENDANT'S RELATIONSHIP WITH THE DCS

The dissent argues that defendant is entitled to summary disposition on the basis that defendant was not a third party to the prospective contract or relationship between plaintiff and the DCS; rather, defendant was an agent of the DCS and thus a tortious-interference cause of action cannot be maintained. We initially note that defendant itself does not make this argument, nor did the trial court address this issue.

A plaintiff must establish that the defendant was a third party to the contract or business relationship in

order to maintain a tortious-interference claim, and therefore corporate agents are not liable for tortious interference with respect to corporation contracts and relationships when acting for the benefit of the corporation and within the scope of their authority. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004); *Reed v Mich Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). For purposes of examining and applying this particular principle of law, we first question whether it is proper to classify defendant as a "corporate agent" rather than a "third party" relative to the relationship between plaintiff and the DCS. The caselaw addressing the principle has almost always been in the context of a situation in which the defendant was an actual employee or officer of the corporation or entity involved in the relationship or prospective relationship. *Reed*, 201 Mich App at 13 (executive director and chief officer of the defendant Girl Scout council); *Bradley v Philip Morris, Inc*, 194 Mich App 44, 46; 486 NW2d 48 (1992), vacated in part on other grounds 440 Mich 870 (1992) (employees of tobacco company); *Feaheny v Caldwell*, 175 Mich App 291, 294-295; 437 NW2d 358 (1989) (top executives of Ford Motor Company); *Dzierwa v Mich Oil Co*, 152 Mich App 281, 283; 393 NW2d 610 (1986) (president and director of oil company); *Stack v Marcum*, 147 Mich App 756, 758; 382 NW2d 743 (1985) (employee supervisor at phone company); *Tash v Houston*, 74 Mich App 566, 568; 254 NW2d 579 (1977) (president of union). There is no indication that Hoist or any of defendant's personnel were employees or officers of the DCS. While *Lawsuit Fin* did not involve a defendant who was an employee or officer, the alleged interference occurred within the sanctity of the attorney-client relationship. *Lawsuit Fin*, 261 Mich App at 583.

Nevertheless, assuming for the sake of argument that defendant was an agent of the DCS and not a third party relative to the relationship between plaintiff and the DCS, that would not automatically insulate defendant from liability. Instead, even an agent can be held liable for tortious interference if the agent acts not for the benefit of the corporation or entity involved in the transaction or prospective transaction, but for his or her own benefit or pursuant to a personal motive. *Reed*, 201 Mich App at 13; *Bradley*, 194 Mich App at 50-51 (examining whether actions were based on personal motivation or for personal benefit); *Feaheny*, 175 Mich App at 294-295 (examining whether the defendants acted out of a personal motive to harm the plaintiff or to acquire a pecuniary advantage); *Stack*, 147 Mich App at 759-760 (examining whether the conduct at issue was to further the defendant's own ends); *Tash*, 74 Mich App at 571-574 (stating that the defendant agent must not act for a strictly personal motive and must proceed with an honest belief that actions will benefit the company).

Reviewing the evidence in a light most favorable to plaintiff, and taking into consideration reasonable inferences arising from the evidence, a genuine issue of material fact existed regarding whether Hoist was honestly acting for the benefit of the DCS or whether she was acting solely for her own benefit and out of motivation to harm plaintiff. As already indicated, a trier of fact, on the basis of the evidence, could reasonably conclude that defendant acted with malice, in a wrongful manner per se, unethically, with an improper motive and absence of justification, or deceitfully in regard to the damaging information and recommendation conveyed to the DCS. There was evidence of an acrimonious relationship between Hoist and Cedroni, and it could reasonably be inferred from the e-mail Hoist sent to Kander, when considered in conjunction with the

other evidence, that Hoist was out to sabotage plaintiff's efforts in the bid process. If the information conveyed to the DCS was fabricated, and given the history between Hoist and Cedroni, one could conclude that Hoist was driven by a personal motive to get back at Cedroni and not by a good-faith attempt to benefit the DCS. The winning contractor was to work with defendant in completing the project, and Hoist's recommendation benefited her in that she would not be forced to work on the project with Cedroni, of whom she had a very negative opinion. Again, issues of fact abound and summary disposition was improper. We further note that very little discovery had taken place before the summary disposition motion was granted, and further discovery could greatly sharpen the issues presented. Finally, this Court's decision in *Joba Constr* would effectively have to be ignored on the issue now raised by the dissent, given that the defendant engineering firm in that case was also arguably an agent for the city.

III. CONCLUSION

In light of the documentary evidence indicating that plaintiff was sufficiently qualified to complete the project in a satisfactory manner, we conclude that a genuine issue of material fact existed concerning whether plaintiff was a responsible contractor to the extent that the trier of fact could conclude that there existed a reasonable likelihood or probability that plaintiff would have been awarded the project absent the alleged tortious interference by defendant. Thus, there was a genuine issue of material fact regarding whether plaintiff had a valid business expectancy.

Furthermore, viewing the conflicting and inconsistent evidence and the inferences arising from it in a light most favorable to plaintiff, a trier of fact could

reasonably conclude that defendant acted intentionally and improperly in an effort to interfere with plaintiff's business expectancy.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

STEPHENS, J., concurred.

K. F. KELLY, J. (*dissenting*). I respectfully dissent. The trial court correctly determined that plaintiff lacked a valid business expectancy in a potential governmental contract. In my view, plaintiff merely had a legitimate expectancy that the bidding process would be openly and fairly conducted and, thus, it had to establish fraud, injustice, or violation of trust in order to avoid summary disposition. Moreover, even assuming that the majority's framework of analysis is correct, plaintiff nonetheless failed to show that defendant did anything improper or that its conduct was anything other than the exercise of professional business judgment. Accordingly, I would affirm the trial court's order granting summary disposition in favor of defendant.

I. STATEMENT OF FACTS

This action arises out of the bidder selection process for a construction project undertaken by the Davison School District that involved renovations and new construction at the Hill and Siple elementary schools (the project). In June 2003, the school district contracted with defendant to provide professional architectural and engineering services for the project. In addition to providing these services, defendant agreed to assist the school district in the administration and implementa-

tion of the project, to provide evaluations and recommendations during all phases of the project, and to help the school district obtain competitive bids. With regard to the competitive-bidding process, it was defendant's role to assist the school district with "bid validation or proposal evaluation and determination of the successful bid or proposal, if any." In this capacity, defendant was responsible for advertising the project and distributing bidding documents to prospective bidders and, if requested by the school district, for assisting in interviewing, selecting, and negotiating with prospective contractors. Defendant designated Jackie Hoist to act as its designated representative to assist the district with the project.

With respect to the competitive-bidding process, the school district's fiscal management policy (FMP) provides that bids shall be awarded consistently with applicable law. The applicable provision of law, MCL 380.1267, provides, in relevant part:

> (1) Before commencing construction of a new school building, or addition to or repair or renovation of an existing school building, except repair in emergency situations, the board of a school district . . . shall obtain competitive bids on all the material and labor required for the complete construction of a proposed new building or addition to or repair or renovation of an existing school building.
>
> (2) The board . . . shall advertise for the bids required under subsection (1) by placing an advertisement for bids at least once in a newspaper of general circulation in the area where the building or addition is to be constructed or where the repair or renovation of an existing building is to take place and by posting an advertisement for bids for at least 2 weeks on the department of management and budget website on a page on the website maintained for this purpose or on a website maintained by a school

> organization and designated by the department of management and budget for this purpose. . . .
>
> * * *
>
> (6) At a public meeting identified in the advertisement for bids described in subsection (3), the board . . . or its designee shall open and read aloud each bid that the board . . . received at or before the time and date for bid submission specified in the advertisement for bids. *The board . . . may reject any or all bids*, and if all bids are rejected, shall readvertise in the manner required by this section. [Emphasis added.]

The FMP further provides that "[b]ids shall be awarded . . . to the 'lowest responsible bidder.' " The FMP indicates that the lowest responsible bidder, i.e., the responsible contractor that submits the lowest bid, is not necessarily the lowest overall bidder because that bidder might not be a responsible contractor. In determining who is a responsible contractor, the FMP directs the district's school board to rely on a variety of factors, including responsibility criteria and the recommendation of the architect. Responsibility criteria take into account a wide variety of information relating to a particular contractor, such as projects completed during the last three years, experience with projects similar to those being bid on, and references from third persons who have hired the contractor, and, importantly, the FMP defines a responsible contractor as a contractor "determined by the Board to be sufficiently qualified to satisfactorily perform the [c]onstruction project . . . ." Further, under the FMP, the board specifically reserves "the right to reject any or all bids, including the bid of any contractor who is not reasonably determined to be 'responsible' in conjunction with this policy."

In July 2007, defendant prepared a project manual for the project. The manual established a method by which the school district would procure bids on the project consistent with applicable law, see MCL 380.1267. It provided a bid advertisement, which required bidders to submit a bidder-qualification form with their proposals and indicated that "offer[s] will be required to be submitted under a condition of irrevocability for a period of thirty (30) days after submission"[1] and that the "[o]wner reserves the right to accept or reject any or all offers." Bid instructions provided to applicants contained similar provisions.

In October 2007, plaintiff submitted a bid on the project. In its application, plaintiff identified five public-sector educational clients that it had completed projects for and a contact person for each of them, including (1) Irene Hughes Building, contact John Tagle, (2) Holly Academy, contact Les Hartzman, (3) Detroit Public Schools, contact Tim Rothermel, (4) Denby High School, contact Rob Marintette, and (5) Southwestern High School, contact Tom Miller. Plaintiff also identified three current or prior similar projects to those at issue here: (1) Holly Academy, contact Les Hartzman, (2) Madison Heights Library, contact Elizabeth Muzyk,[2] and (3) Warren Consolidated Schools, contact David Gassen. Plaintiff included the necessary contact information for each of these previous clients. Notably, Hoist had personal knowledge of plaintiff's work product because defendant had worked with plaintiff on the Holly Academy project.

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[1] Apparently, the purpose of the 30-day irrevocability period was to give the district time to determine whether bidders were responsible contractors.

[2] Elizabeth's surname was spelled "Muzyk" in plaintiff's documents and "Musyk" in defendant's documents.

On October 17, 2007, the school board opened all the contractors' bids. Of the six bids submitted, plaintiff's bid was the lowest. Defendant then checked plaintiff's references, and Hoist conducted interviews. Hoist spoke to several of plaintiff's identified contacts, including Tagle, Hartzman, Rothermel, Muzyk, and Gassen. She also spoke with Ken Kander, another person affiliated with the Holly Academy project; Jim Tomblinson and Bryan Hall, who had apparently worked with plaintiff on other projects; and two persons identified as Ron K and Aaron W. According to plaintiff, Kander and Hall were outside sources, while Tomblinson, Ron, and Aaron were affiliated with defendant. These people had differing opinions regarding plaintiff's work, both positive and negative. Apparently, Hoist made notes of these conversations, which provided:

> **Contact #1** — David Gassen — Partners in Architecture
>
> 2005 or 2006 thinks $600,000 Warren Consolidated Schools Service Center Connecting Links.
>
> Work was a tight schedule, people were in the building, He managed it well, hands on job, supervision was good, would work with them again. His firm has asked them to bid a lot of their jobs.
>
> **Contact #2** — Jim Tomblinson
>
> 2003 or 2004
>
> State Island Lake State Park Toilet Buildings
>
> Cedroni didn't meet the project schedule
>
> Did not follow plans and specs
>
> Lack of supervision
>
> No follow-up
>
> Poor quality
>
> He thinks the state put him on their "may not bid" list

Contact #3 — Bryan Hall regarding a prime subcontract — casework

Architectural Systems Group

Says Not good to deal with

Contact #4 — Tim Rothermel — ABC Paving

Detroit Public Schools Jayne Field Fieldhouse. $80,000 exterior and interior work, concrete, finishes, and cmu.

Worked for them but not recently, did a good job, very dependable, do what they way [sic] they will. Schedule was fine, they ended up getting into winter conditions but it was not Cedroni's fault.

Contact #5 — Elizabeth Musyk — Eares and Associates

$700,000 — City of Madison Heights Library, January 2007, grand opening was in July. Work was very good as a whole. Problems with the electrical sub who did not finish on time. Schedule lag. DTE got them behind as too. Did as much as possible to keep (on schedule). Very reasonable on change orders.

Contact #6 — John Tagle

Irene Hughes Building Alterations, Flint — State of Michigan job $100,000

Work quality was good, redid work when necessary. Did not follow documents closely. Fairly good. Paperwork end was good. Schedule — didn't meet deadlines but not all his fault. The fire marshal and the state agencies were involved. There were some things/issues created that didn't have to be created. He did things his own way, then they had to scramble and re-design

Contact #7 — Les Hartzman

Holly Academy, 2006 $260,000

Laughed, said he didn't have a problem with the guy. Would not hire him for this job.

Contact #8 — Ken Kander

2006 Holly Academy $260,000.

Declined to comment

I won't say anything negative but I won't say anything positive either.

> **Myself**
>
> Worked with him on several projects. Rochester [H]ills Maintenance addition, Rochester Hills Paths and Vault Toilets, and Holly Academy.
>
> Some of the work at the Maintenance addition was the worst I'd seen — I told him that. Holly as [sic] lacking supervision and workmanship was poor. The quality level received is reflective of their bid and about what I expected from Cedroni, but in addition to the low quality, his follow-up on construction issues, especially with regard to their lighting problem, is unacceptable to me.
>
> **Ron K.** reminded me that the Paths and vaults project was so late that the owner almost lost their grant money and had to finish up the work themselves just to close out the contract.
>
> **Aaron W.** reminded me that when we did pre-award interview at Holly — I warned him that past shortcomings will not be tolerated.

Ultimately, Hoist did not recommend plaintiff to the school district, and plaintiff was made aware that it had not been recommended. In response, Richard Cedroni, plaintiff's president, wrote a letter to "All Interested Parties" regarding the matter. In the letter, he stated:

> Jackie Hoist was forthcoming enough to let me know she intended to not recommend our company as general contractors for this project. I admire her frankness, but I obviously do not agree with her evaluation. . . . I have personally contacted all [our references] and all admitted to talking with Jackie. They all reported giving good reviews and glowing reports of our performance, except for one architect. After speaking with this architect and explaining to him that his comment could be viewed as damaging, he stated he didn't think his review was particularly bad and he would have no problem working with us in the future.

> Quite truthfully, I was shocked to hear her intentions, as we have recently worked together to complete a classroom renovation at Holly Academy. The project was successfully completed on time, with the only difficulty coming from the state office of fire and safety. . . . I have spoken with [the] owner numerous times and he was very happy with our quality and performance on the project and would not hesitate to utilize our services again.
>
> Based upon my research, I have found no definitive reason as to why my company should not be recommended for this project. I am offering to complete this job at nearly $50,000 less than the next lowest bidder . . . . We have never been removed from a project and never received a poor review from any architect/owner we've worked with. Even after our last project with [defendant], I was told they had no issue with our performance and we could use them as a reference for future work.

On October 30, 2007, a district committee held a meeting regarding the bids. Cedroni appeared at the meeting, distributed copies of his letter, and addressed the committee. Plaintiff did not allege that the statements of the respective references were *not* made, or that Hoist had transcribed them inaccurately; rather, plaintiff merely disagreed with the content of the opinions expressed. Ultimately, the committee approved defendant's recommendation to award the contract to the second lowest bidder, "contingent upon review of" Cedroni's letter, and forwarded its recommendation to the school board. After further review, and based on the recommendations of the committee and defendant, the board awarded the contract to the second lowest bidder, US Construction and Design Services, LLC. At the time, US Construction had an active contract with the school district and was performing in a satisfactory manner.

On May 20, 2008, plaintiff filed suit against defendant for tortious interference with business relations. Defendant moved for summary disposition pursuant to

MCR 2.116(C)(8) and (10). After arguments, the court determined that plaintiff did not have a valid business expectancy because all the documentation indicated that the lowest overall bidder was not guaranteed to receive the contract and the board never implied that it would accept plaintiff's bid. The court also determined that there was no evidence indicating that defendant's conduct was improper. It therefore granted defendant's motion pursuant to MCR 2.116 (C)(10).

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under MCR 2.116 (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Badiee v Brighton Area Sch*, 265 Mich App 343, 351; 695 NW2d 521 (2005). "The motion may be granted only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Cummins v Robinson Twp*, 283

Mich App 677, 689-690; 770 NW2d 421 (2009) (quotation marks and citation omitted).

III. ANALYSIS

Plaintiff first argues that the trial court erred by granting summary disposition in favor of defendant on plaintiff's claim of tortious interference with a prospective economic advantage. I disagree. In my view, plaintiff failed to state a claim and otherwise failed to produce evidence of an intentional interference that caused a breach of the alleged business expectancy. In essence, plaintiff's claim is nothing more than dissatisfaction with the school district's ultimate choice of a contractor.

As noted by the majority, the requisite elements for tortious interference with advantageous business relationships or prospective economic relations are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) an intentional interference causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy has been disrupted. At issue here are the first and third elements.

The first element requires proof of "the existence of a valid business relationship or the expectation of such a relationship between the plaintiff and some third party . . . ." *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 254; 673 NW2d 805 (2003). A valid business expectancy is one that is reasonably likely or probable, not merely hoped for. *First Pub Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101 (2003). The third element requires a plaintiff to prove "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." *Badiee*, 265 Mich App at 367 (quotation marks and citation omitted). "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (quotation marks and citation omitted).

A. PLAINTIFF FAILED TO ESTABLISH THAT DEFENDANT IS AN INDEPENDENT THIRD PARTY

Although the trial court dismissed plaintiff's claim on the basis of MCR 2.116(C)(10), I would also conclude that an additional basis for dismissal exists under MCR 2.116(C)(8). "To maintain a cause of action for tortious interference, the plaintiff must establish that the defendant was a 'third party' to the contract rather than an agent of one of the parties acting within the scope of its authority as an agent." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004), citing *Reed v Mich Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). The reason for this rule is common sense: An agent who is not acting solely on his or her own behalf, but is acting within the scope of an agency relationship, cannot be said to interfere with a business expectancy or contract because the agent's actions, as an arm of the principal, are imputed to the principal. Whether an agency relationship exists and the extent of its scope are questions of fact. See *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 434-435; 683 NW2d 171 (2004) rev'd on other grounds 472 Mich 192 (2005).

Defendant was not a third party to the prospective contract; rather defendant was acting as the school

board's agent. The contractual agreement between the school board and defendant directed defendant, at the school board's request, to assist the school board in the competitive-bidding process. Thus, defendant stood in a fiduciary relationship with the school board, and it was incumbent on defendant to act in good faith and in the school board's best interest when it assisted the school board in the selection of contractors for the project. Nothing in the record shows that defendant was acting solely for its own benefit, or otherwise outside its agency relationship with the school district, when it recommended that US Construction, instead of plaintiff, be awarded the project. And although there is some indication that Hoist had negative opinions of plaintiff's work, there is no indication that defendant's motives were strictly personal or that defendant would directly benefit from not recommending plaintiff. Accordingly, when defendant chose not to recommend plaintiff for the project, it did so as an agent of the school board rather than as an independent third party. As such, plaintiff's claim of tortious interference cannot lie against defendant. While this argument was never raised by defendant or addressed by the trial court, it alone provides a sufficient basis for dismissal and is an additional reason for affirming the trial court's decision.

B. PLAINTIFF HAD NO VALID BUSINESS EXPECTANCY

Next, even assuming that defendant could be liable for tortious interference, I would conclude, contrary to the majority's position, that plaintiff lacked any business expectancy, valid or otherwise. Plaintiff merely stood in the position of a "disappointed bidder" on a construction contract. Michigan law makes clear that disappointed bidders for governmental contracts have

no action at law to recover lost profits, let alone any protected interest in being awarded a governmental contract. See *Talbot Paving Co v Detroit*, 109 Mich 657, 661-662; 67 NW 979 (1896). As our Supreme Court has stated: " 'The exercise of discretion to accept or reject bids [involving public contracts] will only be controlled by the courts when necessary to prevent *fraud, injustice or the violation of a trust*.' " *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), quoting 3 McQuillin, Municipal Corporations (2d ed), § 1340, p 919 (emphasis added). Accordingly, there is no cause of action for damages in connection with alleged improprieties in the highly discretionary process for awarding public contracts absent fraud, injustice, or violation of trust.[3] This principle is consistent with public policy—competitive bidding is designed for the benefit of taxpayers, not bidders, *Lasky v Bad Axe*, 352 Mich 272, 276; 89 NW2d 520 (1958)—and with the relevant statute, which provides the school district with absolute and unfettered discretion in determining whether to award a contractor a project, MCL 380.1267.[4] As such, because a bidder has no valid business expectation, or interest in a prospective economic advantage, when it submits a bid to a governmental entity that has full discretion in the award process, like the school board in the instant case, it cannot sue a nonagent third party for tortious interference with that alleged expectancy.

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[3] *EBI Detroit, Inc v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2009 (Docket No. 277953). Although this case is not binding, MCR 7.215(C)(1), this Court may view it as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2004).

[4] Section 1267 of the Revised School Code, MCL 380.1 *et seq*., establishes procedures that school districts must abide by when constructing a new school building. MCL 380.1267(6) requires bids to be read aloud at a public meeting and provides that "[t]he board, intermediate school board, or board of directors may reject any or all bids . . . ."

Indeed, when the ultimate decision to enter into a business relationship is, by statute, a highly discretionary decision, a plaintiff cannot establish that its "business expectancy" was a reasonable likelihood or possibility and not merely wishful thinking. *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377-381; 354 NW2d 341 (1984). This is not to say that a lawsuit for tortious interference with discretionary governmental action can never succeed as the majority notes; however, the category of cases in which such a suit may lie is very narrow and must involve fraud, injustice, or violation of trust. Stated differently, while a plaintiff has no business expectancy in a bidding process that vests absolute discretion in the governmental authority, a plaintiff does have a legitimate expectancy that the bid it submits will be evaluated fairly and openly and will be subject to the same or similar scrutiny as other bids, so that the plaintiff's bid stands on an even playing field with all other bids.

Because the instant matter involves a claim of tortious interference with a business expectancy allegedly stemming from the school board's competitive-bidding process, the question becomes, What degree of discretion was allowed to the school district and was it such a high degree that no business expectancy could flow from the bidding process? By statute, the competitive-bidding process here was highly discretionary in nature. The statute provides no limiting criteria, and thus it can be said the discretion granted to the school board in awarding a contract for construction is unfettered and the broadest discretionary authority possible. See MCL 380.1267. Further, the fact that plaintiff was not awarded the contract even after it had a full and fair opportunity to be heard at a public forum supports my conclusion that the award of the contract to US Construction was a highly discretionary governmental ac-

tivity in which "too many factors [were] in play to be able to reasonably infer that . . . plaintiff likely would have obtained the desired advantage." *Trepel*, 135 Mich App at 380. Accordingly, I would conclude, given the absolute discretion vested in the school district in regard to the bidding process, that plaintiff had no valid business expectancy; rather, it merely had an expectancy that its bid would be evaluated fairly and openly, absent any fraud, injustice, or violation of trust.

Implicit in this conclusion is my rejection of the majority's contrary position that the school district's discretion was limited. The bidding instructions clearly informed all bidders that the lowest bidder, or in fact any bidder, was not guaranteed to receive a contract. All the accompanying documentation related to the bidding process reiterated the board's full discretion to reject any and all bids. For example, the district's advertisement for bids provided, "Owner reserves the right to accept or reject any and all offers"; the instructions provided to bidders indicated that the board reserved the right to reject or accept any bids in its "best interest"; and, the FMP also contained language reserving the board's discretion to "reject any or all bids." I acknowledge, as the majority points out, that the FMP also mandates that the board select the "lowest responsible bidder." However, the majority's reliance on this language to conclude that the school district's discretion was limited, thereby creating a valid business expectancy in an exercise of discretionary governmental authority using principles of contract interpretation, is puzzling. The FMP did not have the force of law, and its distribution to all competing bidders did not create an enforceable contract or even an expectancy in a business relationship. Rather, in my view, the FMP is akin

to an employer's policy manual and merely informs contractors how the school board intends to proceed in the selection process.

Turning to the instant matter, because plaintiff had no valid business expectancy, plaintiff had to show that defendant interfered with its expectation that its bid would be treated fairly in the bidding process, which required plaintiff to show fraud, injustice, or violation of a trust. There is no evidence in the record substantiating fraud, let alone any allegations that defendant engaged in any fraudulent or unjust activity. Indeed, plaintiff even *admits* that in Cedroni's letter to the school district, he was simply attempting to substitute his own judgment for that of the school district. While plaintiff may believe its president's judgment to be superior to that of the school board, the statute endows the school board, not plaintiff, with the discretion to award contracts in the school board's best interest.

Further, I find the majority's reliance on *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615; 329 NW2d 760 (1982), unpersuasive as support for its position that plaintiff had a valid business expectancy by virtue of its low bid. In that case, the defendant was the engineer for a project undertaken by the city of Detroit and, like defendant in this case, was to "evaluate bids made by contractors and make recommendations to the [city] as to which contractor should be awarded contracts." *Id*. at 624. Initially, the defendant recommended that the contract not be awarded to the plaintiff, the lowest bidder, because "it felt plaintiff was unqualified to perform the contract," and the contract was awarded to another bidder. *Id*. Subsequently, another contract was awarded to a different general contractor that "had designated plaintiff as its proposed excavation and piling subcontractor." *Id*. at 624-625. At

the defendant's direction, the plaintiff was removed as the subcontractor. *Id.* at 625. This Court held that the trial court had properly denied the defendant's motion for a directed verdict, concluding that the "plaintiff presented sufficient evidence to create a question of fact as to whether it was the lowest qualified bidder and thus had a legitimate expectancy in obtaining the contracts" at issue. *Id.* at 635.

While a superficial reading of *Joba Constr* suggests that it is applicable to this matter, I would conclude that its value as a guide to this Court is nonexistent. The *Joba Constr* Court never explained the nature of the evidence presented that gave rise to a legitimate business expectancy, and the Court never described what discretion, if any, the city of Detroit had to remove a subcontractor from the project. Thus, it is unclear whether the Court meant to suggest that simply being the lowest bidder in the bidding process is sufficient to establish a legitimate business expectancy or whether because the plaintiff had contracted with the general contractor and was already performing the role of a subcontractor it had some legitimate expectancy in the continuation of the same. Further, given the foregoing, the facts of *Joba Constr* are clearly distinguishable from the present matter. Here, plaintiff was never awarded a contract for the project through a general contractor and then subsequently removed from the project like the plaintiff in *Joba Constr*. Rather, the present matter is limited to the highly discretionary bidding process before a contract is awarded that school districts use when undertaking a school-construction project. Thus, the exact issue that was before the *Joba Constr* Court is not now before this Court. In any case, the decision in *Joba Constr* is not binding on this Court. Although a published opinion generally has precedential effect under the rule of stare decisis, MCR 7.215(C)(2), a rule of

law established in a published opinion issued before November 1, 1990, need not be followed, MCR 7.215(J)(1).

More persuasive and on point is the case of *Mago Constr Co v Anderson, Eckstein & Westrick, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 183479).[5] In *Mago*, the plaintiff was the lowest bidder for a municipal contract. The defendant engineering consultant apparently recommended that the plaintiff's bid be accepted, but rescinded that recommendation when it was discovered that the plaintiff's bond was deficient, even though it turned out that every bidder's bond was nonconforming. *Id*. at 1-2. This Court affirmed the trial court's grant of summary disposition in favor of the defendant, ruling, in part, that the evidence did not establish that the plaintiff had a legitimate expectation of receiving the contract. *Id.* at 2. It explained:

> Where the ultimate decision to enter into a business relationship is a highly discretionary decision reposed within the structure of a governmental entity, it becomes more difficult for a plaintiff to prove that it had an expectancy of doing business with the governmental body. Here, the fact that [the second lowest bidder] was awarded the contract at a city council meeting after all interested parties were given a chance to be heard supports the view that the award of the contract was a highly discretionary governmental activity in which "too many factors [were] in play to be able to reasonably infer that . . . plaintiff would have obtained the desired advantage." Moreover, the bidding instructions clearly informed plaintiff that the lowest bidder was not guaranteed to receive the water main improvement contract. Lastly, the fact that plaintiff submitted a nonconforming bid should have negated any

[5] Again, while I recognize this case is not binding precedent, MCR 7.215(C)(1), I do view it as persuasive. See *Dyball*, 260 Mich App at 705 n 1.

> expectation that it might have had regarding the possibility of receiving the contract. [*Id.* at 3 (citations omitted).]

Apart from the bond issue, *Mago* is identical to this case. Plaintiff knew from the outset that the lowest bidder was not guaranteed to be awarded the contract, that the selection of the winning bidder depended on the evaluation of numerous criteria, and that the decision was made at a public meeting at which interested parties, including plaintiff, were permitted to speak.

An additional case I find persuasive is *EBI-Detroit, Inc v Detroit*, 279 Fed Appx 340 (CA 6, 2008), in which the plaintiff was the low bidder on a project commissioned by the Detroit Water and Sewer Department (DWSD) and its bid was rejected. *Id.* at 343. The plaintiff filed suit in the Wayne Circuit Court, and the defendants removed it to federal court. Regarding the plaintiff's state-law claim for tortious interference against two of the DWSD's directors, the appellate court held that the plaintiff did not have a valid business expectancy. *Id.* at 352-353. It explained:

> [H]owever one describes EBI's relationship with DWSD, it is not the kind of relationship that can support a tortious interference claim. Michigan courts have already rejected the idea that a disappointed bidder has a valid business expectancy in a potential government contract. *Timmons v. Bone*, [unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 228942)] 2002 WL 745089, at *2 (Mich.Ct.App. April 23, 2002). We agree, and note that holding otherwise would give any low responsive bidder an immediate business expectancy in the government contract at issue. EBI had a "unilateral hope" of winning the contract, nothing more, so its tortious interference claim cannot proceed. [*Id.*]

In summary, given that the school board expressly reserved the right to reject any bid under MCL 380.1267, I conclude that while plaintiff's status as the

lowest bidder created the mere *possibility* that it would be in contention to be awarded the contract, it did not create a reasonably likely or probable expectation that it would, in fact, be awarded the contract. Because plaintiff had no business expectancy in the highly discretionary bidding process and it only had an expectancy that its bid would be treated fairly, it was required to come forward with some evidence of fraud, injustice, or violation of trust. It failed to do so, and therefore the trial court properly granted defendant summary disposition under MCR 2.116(C)(10).

C. PLAINTIFF DID NOT ESTABLISH INTENTIONAL INTERFERENCE

Even assuming that the majority's framework of analysis is correct, i.e., that plaintiff had some valid business expectancy, I would nonetheless conclude that plaintiff's claim fails on the third element necessary to establish a claim of tortious interference. The claim requires proof that the defendant intentionally interfered with the existence of a valid business relationship or expectancy and that the interference induced or caused a breach or termination of the relationship or expectancy. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996); *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). In addition to being intentional, the interference must be improper, i.e., illegal, unethical, or fraudulent. *Trepel*, 135 Mich App at 374. To prove that the defendant acted improperly, the plaintiff must show the intentional doing of an act that is wrongful per se or the intentional doing of a lawful act with malice and unjustified in law. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003). "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 plaintiff relies on the intentional doing of a lawful act done with malice and unjustified in law, the plaintiff "must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Laboratories*, 217 Mich App at 699. The defendant does not act improperly when its actions are motivated by legitimate business reasons. *Id*. Plaintiff does not and did not meet this burden; it has shown neither interference nor causation.

1. INTENTIONAL INTERFERENCE

Plaintiff contends that a question of fact existed regarding whether defendant provided the school board false information. I disagree. Plaintiff fails to identify any evidence in the record substantiating this claim. Plaintiff's argument seems to rely on Hoist's notes from the reference checks, which related to projects plaintiff worked on. However, there is no evidence in the record indicating that Hoist's notes contained false reports. Noticeably absent from the record is any affidavit or proof that Hoist's notes were made up, slanted, or created out of whole cloth. In fact, plaintiff has never asserted that the comments recorded in Hoist's notes were not actually made. Indeed, Cedroni's letter to the school district made no such allegations, but simply asserted that he disagreed with the references. Plaintiff chose not to submit any affidavits from these references asserting that they had provided glowing references of plaintiff's work or that they never made the statements recorded in Hoist's notes. A party cannot create a question of fact to avoid summary disposition by mere allegations or promises that a claim will be supported

by evidence at trial. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 377; 775 NW2d 618 (2009). Plaintiff's reliance, as well as the majority's reliance, on Cedroni's letter to create a question of material fact is simply erroneous because the letter contains inadmissible hearsay within hearsay. *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010) (noting the well-established rule that when reviewing a motion to dismiss based on MCR 2.116(C)(10), only evidence that is admissible is considered).

Further, it is obvious from the record that plaintiff and defendant have had disagreements in the past while working together on previous projects and that their relationship was contentious at times. Considering that the parties worked together on complex, large, and costly construction projects, it is not difficult to imagine professional disagreements occurring. Plaintiff's attempt to blame defendant for the professional disagreements, however, does not create a legitimate question of fact, absent some other substantiating evidence, that defendant acted on improper motives. As noted, a plaintiff must identify specific affirmative acts that corroborate the alleged improper motive. *BPS Clinical Laboratories*, 217 Mich App at 699. A review of the record, in a light most favorable to plaintiff, reveals that this evidence is lacking. At best, the most that can be inferred is that Hoist had a negative opinion of plaintiff's work on the basis of prior experience. Reporting that information to the school board, however, was not malicious or wrongful conduct; rather, defendant was merely acting within its capacity to make recommendations to the school district, as was required under its contract with the school district. There simply is no question that defendant's actions were justified as

actions based on a legitimate business decision. Accordingly, plaintiff has failed to establish any question of material fact that defendant acted improperly.

2. CAUSATION

Even if defendant had acted improperly, however, plaintiff has failed to show that this allegedly improper conduct actually interfered with plaintiff's supposed business expectancy. Defendant's recommendation was but one factor that the school district was to consider in determining which contractor to award the contract. After receiving defendant's recommendation and Cedroni's letter, a district committee considered the recommendation and the letter. The committee then made a recommendation to the school board, which, in turn, consistenly with the FMP, considered a number of responsibility criteria, defendant's recommendation, and Cedroni's letter. As noted, the responsibility criteria take into account a wide variety of information relating to a particular contractor, such as projects completed during the last three years, experience with projects similar to those being bid on, and references from third persons that have hired the contractor. Discretion was vested in the board to select the contractor that it viewed to be qualified to perform the job. The school board ultimately selected the second lowest bidder, US Construction, which at that time had an active contract with the school district and was performing well. In other words, defendant's recommendation was only one factor taken into account when the board made its determination. Defendant has presented no evidence showing that the board relied solely on information submitted by defendant or that, absent the recommendation, plaintiff would have been awarded the contract. Accordingly, plaintiff has also failed to

establish causation. See *Barnard Mfg*, 285 Mich App at 377 ("[A] party 'may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided [in MCR 2.116], *set forth specific facts* showing that there is a genuine issue for trial.' ") (citation omitted).

IV. CONCLUSION

In my view, the trial court properly granted summary disposition for defendant. Plaintiff never established that defendant was an independent third party. Rather, in recommending that the school board reject plaintiff's bid, defendant was acting as an agent of the school board. Thus, plaintiff failed to state a claim on which relief could be granted. *Reed*, 201 Mich App at 13. Even if this were not the case, I would conclude that plaintiff lacked any valid business expectancy. The school board's decision was highly discretionary and, by statute, it had broad and unfettered discretion to reject any or all bidders. Thus, none of the bidders in the bidding process had any prospective advantage or business expectancy; rather, each of their interests was limited to an expectancy that the bidding process would be fair and free of fraud. To sustain a claim of tortious interference on this basis, a party must show fraud, injustice, or violation of trust in the bidding process. Plaintiff made no such showing here. Even if the majority's framework of analysis were correct, plaintiff failed to show that defendant's conduct was malicious or wrong or that defendant's allegedly wrongful conduct caused plaintiff to lose the award of the contract. Plaintiff is merely a disappointed bidder in the competitive-bidding process that believes its judgment should be substituted for that of the governmental agency. The majority's opinion sanctions this position. In effect, it will allow all

disgruntled bidders for governmental contracts to state a claim of intentional interference with a business expectancy against the government's agent based on the agent's negative professional opinion of the claimant. Unfortunately, the majority has failed to see this lawsuit for what it really is: plaintiff's attempt to punish or obtain damages from defendant for expressing its opinion that plaintiff performed poorly on previous projects.

I would affirm.

DUTTON PARTNERS, LLC v CMS ENERGY CORPORATION

Docket No. 292094. Submitted September 13, 2010, at Detroit. Decided September 21, 2010. Approved for publication November 16, 2010, at 9:10 a.m.

Dutton Partners, LLC, brought an action for negligence and trespass in the Oakland Circuit Court against CMS Energy Corporation, alleging that defendant was liable for damage resulting from a natural gas pipeline rupture that occurred in an easement on plaintiff's property. Defendant moved for summary disposition, asserting that plaintiff had sued the wrong party; that its subsidiary, Consumers Energy Company, not defendant, owned and maintained the pipeline; and that amending the complaint would be futile because the period of limitations had expired with respect to Consumers. The court, Fred M. Mester, J., denied the motion, concluding that defendant's liability arose not only from ownership of the pipeline but also from its maintenance, and denied plaintiff's motion to amend because Consumers did not have notice of the complaint within the limitations period. Defendant renewed its motion after discovery, arguing that there was no question of material fact that it did not own and was not responsible for maintaining the pipeline. Plaintiff responded that defendant was the alter ego of Consumers and identified evidence that, among other things, defendant and Consumers had the same corporate address, shared the same board of directors and corporate executives, and had made joint financial filings. The court, Lisa O. Gorcyca, J., denied the motion, concluding that factual questions remained about whether defendant and Consumers were alter egos. Defendant appealed.

The Court of Appeals *held*:

The trial court erred by denying summary disposition because there was no evidence of fraud, misuse, or wrongdoing required to justify ignoring the separate corporate entities. Absent some abuse of the corporate form, parent and subsidiary corporations are treated as separate entities. In order to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff must allege the existence of a parent-subsidiary relationship and facts that justify piercing the corporate veil. Such facts

must show evidence of fraud, wrongdoing, or misuse of the corporate form. It is not enough that one corporation is the mere instrumentality of the other. Although there was evidence that showed that defendant and Consumers were alter egos, there was no evidence of fraud, wrongdoing, or misuse and thus no justification to ignore their separate corporate identities.

Reversed and remanded for dismissal with prejudice.

CORPORATIONS — SUBSIDIARIES — PIERCING THE CORPORATE VEIL.

Absent some abuse of the corporate form, parent and subsidiary corporations are treated as separate entities; to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff must allege the existence of a parent-subsidiary relationship and facts that justify piercing the corporate veil; the plaintiff must show all the following: (1) that the corporate entity is a mere instrumentality of another entity or individual, (2) that the corporate entity was used to commit fraud or a wrong, and (3) that, as a result, the plaintiff suffered an unjust injury or loss.

Padilla Kostopoulos, PLLC (by *K. Dino Kostopoulos*, *Gerald V. Padilla*, and *Daniel V. Padilla*), for plaintiff.

Sullivan, Ward, Asher & Patton, P.C. (by *Scott D. Feringa* and *Ronald S. Lederman*), for defendant.

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

PER CURIAM. CMS Energy Corporation, defendant, appeals by leave granted the trial court's opinion and order denying its motion for summary disposition.[1] We reverse and remand.

I. BASIC FACTS AND PROCEDURE

Plaintiff, Dutton Partners, LLC, owns a 177-acre development, known as "Stonegate Ravines," located in Orion Township, Michigan. An easement across the property contains an underground pipeline, which is

[1] *Dutton Partners, LLC v CMS Energy Corp*, unpublished order of the Court of Appeals, entered August 24, 2009 (Docket No. 292094).

used for the transportation and distribution of natural gas. On May 1, 2005, part of the pipeline ruptured and allegedly exploded, or at least caused natural gas to be released into the atmosphere. At the time, plaintiff was still working on the development of Stonegate Ravines and, as a result of the pipe's rupture, had to temporarily cease its construction on the project.

On April 30, 2008, plaintiff filed a two-count complaint alleging that defendant was negligent and that its conduct, which allegedly caused the pipe to explode, had created a nuisance and trespass on plaintiff's property. Plaintiff's complaint was filed one day before the period of limitations expired. See MCL 600.5805(10) (setting the limitations period for ordinary negligence actions at three years). In its answer to the complaint, defendant asserted that plaintiff had sued the wrong party.

A. DEFENDANT'S CORPORATE STRUCTURE

Defendant is a corporation organized under Michigan's laws and is a utility holding company. Defendant does not have any daily operations and has no employees; instead, it derives income from the holdings of its subsidiaries in the form of dividends received on securities. Its subsidiaries are involved in various sectors of the power and energy industries. A majority of defendant's income derives from only one of its subsidiaries, Consumers Energy Company.

Consumers owns, operates, and maintains the pipeline involved in the underlying incident. However, defendant and Consumers are separate Michigan corporations, allegedly each with its own officers and board of directors. And although defendant owns 100 percent of Consumers, defendant does not own or operate any of Consumers' gas pipelines or related infrastructure.

Consumers controls its own day-to-day operations, while defendant only concerns itself with regard to major policy issues affecting Consumers. Further, the two companies allegedly keep separate books and records, their financial results are reported separately, and each entity's board of directors has its own meetings and separate minutes are kept.

Other attributes of the two corporations, however, are not so distinct. Consumers and defendant share the same physical address; Consumers' universal resource locator (URL), or its website domain, is registered to defendant; the two share the same in-house counsel; all of Consumers' and defendant's filings with the Securities and Exchange Commission (SEC) are filed jointly; the two entities share the same code of conduct, ethics manual, and set of governing principles; and defendant includes all of Consumers' assets, including its pipelines, on its balance sheets and depreciates those assets for its accounting purposes.

B. MOTION FOR SUMMARY DISPOSITION

On September 24, 2008, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had sued the incorrect party. In its brief in support, defendant argued that it is a utility holding company separate from Consumers. Defendant relied on the affidavits of Catherine Reynolds, who testified that defendant's corporate structure is separate from Consumers' structure, and David Montague, who explained Consumers' role pre- and postinvestigation of the ruptured pipeline.

Plaintiff countered that its suit against defendant was appropriate because defendant allegedly is the alter ego of Consumers. Plaintiff supported its position that Consumers and defendant are the same entity by relying on

publicly available information showing, among other things, that the two share the same corporate address and had made joint filings to the SEC. Further, contrary to Reynolds's affidavit, plaintiff asserted that Consumers and defendant shared the same board of directors and corporate executives, relying on information from defendant's 2007 annual report and defendant's website. Plaintiff asserted that summary disposition should be denied because a question of material fact remained regarding whether defendant is the alter ego of Consumers. It also contended that that it should be allowed further discovery because defendant's liability was not limited to "ownership" of the pipeline, but included maintenance, repair, and inspection of the pipeline.

Before the trial court could rule on defendant's motion for summary disposition, plaintiff moved to amend the pleadings to add Consumers as a party. Defendant countered that leave to amend should be denied because the period of limitations had expired on plaintiff's claims.

The trial court, Judge Fred M. Mester presiding, denied defendant's motion for summary disposition and also denied plaintiff's motion to amend the complaint. In denying plaintiff's motion to amend, the court found that Consumers did not have notice of the lawsuit within the limitations period and, thus, granting the motion to amend would be futile. With regard to defendant's motion for summary disposition, the court explained: "[T]his Court finds that because the allegation of the Complaint [sic] are not limited to liability based on ownership of the line but also as to the maintenance, repair and inspection of the pipeline, defendant may be liable to the Plaintiff in other capacities than as the owner." The trial court made no explicit ruling regarding plaintiff's alter-ego theory.

C. RENEWED MOTION FOR SUMMARY DISPOSITION

After further discovery, defendant renewed its motion for summary disposition. In its renewed motion, defendant argued that there was no question of fact that defendant does not own and is not responsible for maintenance of the pipeline at issue. In its view, the only question left to pursue was whether defendant had any of those responsibilities; it interpreted Judge Mester's order as precluding plaintiff's alter-ego theory of liability. Defendant relied on a second affidavit prepared by Montague, which indicated that defendant has no responsibilities for maintenance and repair of the pipeline.

Plaintiff responded, arguing that Judge Mester's ruling had not precluded its alter-ego theory. It reaffirmed its original position that defendant was an appropriate party because it is the alter ego of Consumers. Plaintiff did not provide any evidence that defendant was responsible for the pipeline's maintenance, repair, or inspection.

In the interim, a new trial judge, Judge Lisa Gorcyca, was assigned to the case. After oral argument, the trial court issued a written opinion and order denying defendant's renewed motion for summary disposition, concluding that defendant misinterpreted Judge Mester's ruling. The court stated:

> [T]he undisputed evidence presents material factual questions regarding whether the two entities are alter egos of one another: (1) The CMS Energy 2007 Annual Report identifies "gas pipelines" of Consumers Energy as an asset of CMS Energy; (2) Both companies have the same physical address and phone number; (3) In the Internet Universal Resource Locator, www.consumersenergy.com has been registered to "CMS Energy," not to Consumers Energy; (4) Both entities share the same in-house counsel; (5) Consum-

> ers Energy's letterhead describes Consumers Energy as "A CMS Energy Company;" (6) CMS enjoys the accounting benefit of depreciating the gas pipelines which are supposedly owned by its subsidiary.
>
> In sum, this Court finds that Judge Mester's previous ruling were [sic] appropriate. Defendant has not presented any basis to set aside that ruling.

Defendant now appeals this order in this Court.

II. STANDARD OF REVIEW

We review de novo the trial court's decision on defendant's renewed motion for summary disposition.[2] *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 712; 777 NW2d 205 (2009). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Woodman v Kera, LLC*, 280 Mich App 125, 134; 760 NW2d 641 (2008). We must review all the evidence in a light most favorable to the nonmoving party. *Houdek v Centerville Twp*, 276 Mich App 568, 572-573; 741 NW2d 587 (2007). Summary disposition is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Woodman*, 280 Mich App at 134. A genuine issue of material fact exists if the record leaves open an issue upon which reasonable minds could differ. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008).

III. ANALYSIS

Defendant argues that the trial court, Judge Gorcyca presiding, erred by finding that factual questions remained with respect to plaintiff's alter-ego theory of

[2] We note that a successor judge has the authority to enter whatever orders his or her predecessor could have entered. MCR 2.613(B).

liability. We agree with defendant. At the outset, we note that the propriety of the trial court's ruling was questionable in the first instance. Plaintiff never pleaded facts supporting its alter-ego theory in its complaint and never moved to amend to add such facts; thus, plaintiff's complaint likely could have been dismissed for failure to state a claim.[3] However, because the trial court treated the alter-ego theory of liability as if it had been properly pleaded and raised, and ultimately denied defendant's renewed motion on the basis of plaintiff's alter-ego theory, we will treat the matter as if it had been properly presented and preserved.

Plaintiff's suit seeks to pierce the corporate veil and hold defendant liable for the acts of its subsidiary, Consumers.[4] "[I]n order to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff would have to allege: (1) the existence of a parent-subsidiary relationship, and (2) facts that justify

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[3] Despite this deficiency, defendant never moved to dismiss on this basis under MCR 2.116(C)(8); rather, both of its motions were based solely on MCR 2.116(C)(10). Defendant does argue on appeal, however, that plaintiff failed to plead specific facts seeking to have the trial court disregard defendant's corporate form and suggests that plaintiff's alter-ego argument was therefore waived and should have been dismissed for failure to state a claim. Defendant could have raised this basis for dismissal in its renewed motion for summary disposition, but failed to do so. Rather, it continued to defend itself against plaintiff's alter-ego theory, in effect forfeiting its own waiver argument. Thus, we consider defendant's argument under MCR 2.116(C)(8) to be unpreserved, and we will not dispose of this appeal on (C)(8) grounds.

[4] Plaintiff's case differs from the traditional lawsuit in which a party seeks to pierce the corporate veil because plaintiff is not attempting to hold liable defendant's individual corporate executives or shareholders. See *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004) ("The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations.") (citation and quotation marks omitted).

piercing the corporate veil." *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 548; 537 NW2d 221 (1995).

It is undisputed in this case that Consumers is defendant's subsidiary. Thus, the pertinent question is whether plaintiff has alleged sufficient facts to justify piercing the corporate veil. It is well settled under Michigan law that "absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities." *Id*. at 547. However, the courts may ignore this presumption and the corporate veil may be pierced if, under the circumstances, respecting an otherwise separate corporate existence will "subvert justice or cause a result that would be contrary to some other clearly overriding public policy." *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). For the corporate veil to be pierced, the plaintiff must aver facts that show (1) that the corporate entity is a mere instrumentality of another entity or individual, (2) that the corporate entity was used to commit fraud or a wrong, and (3) that, as a result, the plaintiff suffered an unjust injury or loss. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 715; 762 NW2d 529 (2008).

> At least in the context of tort liability, relevant factors in showing that a subsidiary is a "mere instrumentality" of its parent might be that the parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the parent's exclusive distributing arm, or the parent's revenues are entirely derived from sales by the subsidiary. [*Seasword*, 449 Mich at 548 n 10.]

The trial court denied defendant's renewed motion for summary disposition, finding that material questions of fact existed regarding "whether the two entities are alter egos of one another," including:

> (1) The CMS Energy 2007 Annual Report identifies "gas pipelines" of Consumers Energy as an asset of CMS Energy; (2) Both companies have the same physical address and phone number; (3) In the Internet Universal Resource Locator, www.consumersenergy.com has been registered to "CMS Energy," not to Consumers Energy; (4) Both entities share the same in-house counsel; (5) Consumers Energy's letterhead describes Consumers Energy as "A CMS Energy Company;" (6) CMS enjoys the accounting benefit of depreciating the gas pipelines which are supposedly owned by its subsidiary.

We do not disagree with the trial court's ruling in this regard. Legitimate questions exist regarding whether Consumers is a mere instrumentality of defendant, given the conflicting evidence presented below. However, the trial court erred by denying summary disposition because plaintiff failed to demonstrate any evidence of fraud, wrongdoing, or misuse of the corporate form. And after our review of the record, we cannot find any factual evidence showing that defendant merely used Consumers to commit fraudulent or otherwise wrongful acts. Nothing in the record demonstrates that Consumers was so controlled or manipulated by defendant in relation to Consumers' maintenance, ownership, and repair of the pipeline that defendant was somehow abusing its corporate shield for its own purposes. Thus, given the absence of any evidence of fraud or misuse, summary disposition for defendant should have been granted.

Significantly, plaintiff does not identify in its brief on appeal any evidence of fraud, wrongdoing, or misuse. Rather, it simply argues that Michigan law does not require such a showing in order for a parent corporation to be held liable for the acts of its subsidiary. We disagree. Plaintiff has cited no binding authority for its

proposition that it is sufficient to show merely that CMS and Consumers are alter egos.

Further, defendant's reliance on *CMS Energy Corp v Attorney General*, 190 Mich App 220; 475 NW2d 451 (1991), for the same proposition is unavailing. In *CMS Energy Corp*, this Court affirmed a decision of the Michigan Public Service Commission (PSC) that disregarded the separate corporate identities of Consumers and CMS Energy in a ruling that subjected certain Consumers' proceeds received from its own assets to the PSC's regulations. *Id*. at 231-233. Consumers had transferred the proceeds at issue to its nonregulated subsidiaries for purposes of insulating those funds from regulation, and those subsidiaries were subsequently transferred to CMS Energy's control. *Id*. at 223-226. Although the panel cited the proposition that fraud need not be shown to consider the entities as one, it did not rely on that proposition alone for its conclusion that the PSC appropriately "pierce[d] the corporate veil of the nonregulated corporate entities." *Id*. at 232. The Court explicitly cited some misuse of the corporate form that did occur under the circumstances; specifically, the subsidiaries held by Consumers were transferred to CMS Energy for the sole purpose of "avoid[ing] regulation of the proceeds to be generated by those assets." *Id*. Thus, *CMS Energy Corp* does not support plaintiff's position, but refutes it.[5]

Because a showing of fraud, wrongdoing, or misuse is required under Michigan law in order to prevail on an alter-ego theory of liability and because plaintiff proffered no such evidence, the trial court erred by denying defendant's renewed motion for summary disposition.

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[5] We were unable to locate any binding Michigan case that has held that the corporate veil may be disregarded absent a showing of fraud, wrongdoing, or some misuse of the corporate form.

Plaintiff has not presented sufficient facts in support of its alter-ego theory of liability, and the case cannot go forward on this basis. The matter also cannot proceed against defendant in its individual capacity. Plaintiff concedes in its brief on appeal that "ownership as well as responsibility for repair, maintenance, and inspections of [the pipeline] rests with Consumers . . . and not [defendant]." Thus, there is no genuine question of material fact that defendant was not negligent and did not otherwise trespass on plaintiff's property. On remand, the trial court shall enter an order in defendant's favor dismissing the case with prejudice.

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

In re LEETE ESTATE

Docket No. 293979. Submitted November 5, 2010, at Grand Rapids. Decided November 16, 2010, at 9:15 a.m.

Appellant Frederick D. Leete IV filed a petition in the Emmet County Probate Court for the probate of the estate of his father, Frederick D. Leete III, and was appointed personal representative. Appellee Cynthia K. Sherman, as personal representative of the estate of Barbara K. Leete who was the wife of Frederick Leete III, sought a determination of the rights of Barbara's estate in the Leete estate. Barbara's death certificate showed that she had died at an unknown time on February 28, 2008, and her husband died at 9:10 p.m. on March 3, 2008. Both were residents of Indiana, but they owned property in Michigan. Appellee argued that Barbara's estate was entitled under MCL 700.2702(3) to a one-half interest in property the deceased couple had owned jointly as tenants by the entirety because Frederick did not survive Barbara by more than 120 hours. The court, Frederick R. Mulhauser, J., granted an adjournment to allow appellant time to substantiate his claim that Barbara had died more than 120 hours before her husband and subsequently entered an order on May 19, 2009, stating that if appellant failed to do so within 90 days, appellee's petition seeking half of any jointly owned property would be granted. The parties also signed the order, each noting that it was "approved as to form." After 90 days, appellant had produced no evidence regarding the time of Barbara's death, but instead relied on arguments that the property should be distributed consistently with Frederick's will, which stated that Barbara would inherit the property only if she survived him by 30 days. In the alternative, appellant argued that MCL 700.2702(3) was inapplicable because it became effective four years after the execution of the quitclaim deed by which the property was conveyed to Barbara and Frederick as tenants by the entirety. The court granted summary disposition in appellee's favor on August 20, 2009, finding no clear and convincing evidence that Frederick had survived Barbara by more than 120 hours and that Barbara's estate was entitled to half of any jointly owned property.

The Court of Appeals *held*:

1. Under MCR 2.602(B)(2), an order must be entered if its form is approved by all the parties and if, in the court's determination, it is in conformity with the court's decision. The May 19 order was valid because the parties agreed to its form and the court stated at the hearing that it would follow appellee's proposed course of action if both parties agreed to the form of the order. The August 20 order granting summary disposition was valid because it was entered pursuant to the procedure established in the probate court's earlier order, which the parties had approved, and it was in conformity with the court's decision that appellee's motion would be granted if appellant failed to produce evidence that Frederick had survived Barbara by more than 120 hours.

2. Under MCL 700.1303(1), probate courts have concurrent legal and equitable jurisdiction to determine property rights and interests and to ascertain if individuals have survived. Under MCL 700.1301(b), the Estates and Protected Individuals Code (EPIC) applies to a nonresident's property located in this state. Appellant identified Frederick's domicile as Michigan, but even if he had been an Indiana resident, EPIC applied to the property located in Michigan.

3. MCL 700.8101(2)(a), (d), and (e) provide that EPIC applies to a governing instrument executed before EPIC came into effect as long as the statute does not affect an accrued right and as long as the governing instrument does not contain a clear indication of contrary intent. There were no governing instruments in this case that indicated an explicit intent that some other law or rule should be applied. Appellant did not have an accrued right in the property at the time of Frederick's and Barbara's deaths because his interest was still subject to change.

4. Under MCL 700.2701 and 700.2702(3), a coowner must survive a deceased coowner by more than 120 hours to be entitled to property that passes due to a right of survivorship, unless a governing instrument expressly provides otherwise. If two coowners with rights of survivorship die within 120 hours of one another, the property is divided in equal shares between each coowner's estate. Survivorship must be proved by clear and convincing evidence. There were no governing instruments indicating a contrary intent, and there was no evidence showing that Frederick survived Barbara by more than 120 hours. Therefore, the probate court correctly ordered the property divided between the two estates.

Affirmed.

1. COURTS — ORDERS — VALIDITY.

A court must sign and enter an order if all parties approve the form of the order and, in the court's determination, the order is in conformity with the court's decision (MCR 2.602[B]).

2. ESTATES IN PROPERTY — ESTATES AND PROTECTED INDIVIDUALS CODE — NONRESIDENTS.

The Estates and Protected Individuals Code applies to a nonresident's property located in this state (MCL 700.1301[b]).

3. ESTATES IN PROPERTY — ESTATES AND PROTECTED INDIVIDUALS CODE — ACCRUED RIGHT.

The Estates and Protected Individuals Code applies to a governing instrument executed before the code came into effect as long as the code does not affect an accrued right and as long as the governing instrument, including a will or a deed, does not contain a clear indication of contrary intent (MCL 700.8101[2][a], [d], and [e]).

4. ESTATES IN PROPERTY — ESTATES AND PROTECTED INDIVIDUALS CODE — SIMULTANEOUS-DEATH PROVISION.

The Estates and Protected Individuals Code requires that a coowner survive a deceased coowner by more than 120 hours to be entitled to property that passes due to a right of survivorship, unless a governing instrument, including a will or a deed, expressly provides otherwise; if two coowners with rights of survivorship die within 120 hours of one another, the property is divided in equal shares between each coowner's estate; survivorship must be proved by clear and convincing evidence (MCL 700.2702[3]).

Chalgian & Tripp Law Offices, PLLC (by *Douglas G. Chalgian*), for Frederick D. Leete IV.

Running, Wise & Ford, P.L.C. (by *Kent E. Gerberding* and *Thomas A. Grier*), for Cynthia K. Sherman.

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

PER CURIAM. In this probate case, we must decide whether the probate court properly entered an order pursuant to MCR 2.602(B)(2) and correctly interpreted

and applied the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, and its simultaneous-death provision, MCL 700.2702. Appellant, Frederick D. Leete IV, would have us conclude that the summary disposition order in favor of appellee, Cynthia K. Sherman, is void and that EPIC is inapplicable. We disagree and we affirm the probate court's order.

I. BASIC FACTS

In 2008, Frederick DeLand Leete III and Barbara R. Leete, 80 and 75 years old respectively, had been married for 34 years and lived in Brownsburg, Indiana. They had no children from their marriage, but each had children from previous marriages. The Leetes owned, as tenants by the entirety, a cottage located in Mackinaw City in Emmet County, Michigan, which is the property that is the subject of this dispute. Apparently, Frederick had inherited this property, which had been in the Leete family for about 100 years. Nonetheless, Frederick and Barbara executed a quitclaim deed, dated October 29, 1996, which indicated that Frederick and Barbara would own, as tenants by the entirety,

> [a]ll those portion of lots 59 and 60 of Block A in the Village of Mackinaw City, according to the recorded plat thereof, as lie North of the 15 ft. alley or service roadway bisecting said lots,
>
> ALSO
>
> Lot 61 of Block A in the Village of Mackinaw City, according to the recorded plat thereof, including all of said lot lying on both sides of the existing service road;
>
> TOGETHER WITH ALL TANGIBLE PERSONAL PROPERTY IN OR ON SAID PREMISES[.]

On February 28, 2008, at an unknown time, Frederick allegedly left his vehicle running in the garage after

returning from the store. That same day, Barbara's daughter went to Barbara and Frederick's home and discovered Barbara dead and Frederick unconscious.[1] At the time, the car's engine was still warm, but it was no longer running because it had run out of gas. Frederick was taken to the hospital, but he expired on March 3, 2008, at 9:10 p.m. Barbara's death certificate lists her date of death as February 28, 2008, time "unknown." The cause of their deaths was carbon monoxide poisoning. Barbara died intestate, but Frederick had a will, dated September 20, 1974.

On May 23, 2008, appellant, who was Frederick's son, filed a petition for probate and appointment as the personal representative of Frederick's estate. Accordingly, Frederick's will was submitted to probate, and appellant was appointed personal representative to administer Frederick's estate. With regard to the disputed property, Frederick's will provided:

> I give and bequeath to my wife, Barbara R. Leete, if she shall survive me for a period of more than thirty (30) days, all real estate and improvements thereon of which I may die the owner or parr [sic] owner, specifically including the real estate and improvements located on Lot 62, Block "A", Mackinaw City, Emmett County, Michigan. In the event my said wife shall not survive me for a period of more than thirty (30) days, then I give and bequeath such real estate to my aforenamed children who survive me for a period of more than thirty (30) days, per stirpes and not per capita.

Appellant filed an inventory of Frederick's estate, listing among Frederick's assets the property located in Mackinaw City.

On November 24, 2008, appellee, who was Barbara's daughter and the personal representative of Barbara's

[1] The exact time Barbara and Frederick were discovered is unclear. The police report indicates that the event was reported about 1:40 p.m.

estate, filed an appearance in the case, giving notice to Frederick's estate that Barbara's estate sought a one-half interest in all jointly owned property because Frederick had not survived Barbara by more than 120 hours.[2] The legal basis for appellee's claim is MCL 700.2702(3) of EPIC, which provides:

> Except as provided in subsection (4), *if it is not established by clear and convincing evidence that 1 of 2 co-owners with right of survivorship survived the other co-owner by 120 hours, 1/2 of the co-owned property passes as if 1 had survived by 120 hours and 1/2 as if the other had survived by 120 hours*. If there are more than 2 co-owners and it is not established by clear and convincing evidence that at least 1 of them survived the others by 120 hours, the property passes in the proportion that 1 bears to the whole number of co-owners. For the purposes of this subsection, "co-owners with right of survivorship" includes joint tenants, *tenants by the entireties*, and other co-owners of property or accounts held under circumstances that entitles 1 or more to the whole of the property or account on the death of the other or others. [Emphasis added.]

Accordingly, on February 23, 2009, appellee filed a petition for a determination of the rights of Barbara's estate and requested appellant to amend the inventory of Frederick's estate in conformance with the statute.

In response, appellant asserted that MCL 700.2702(3) was inapplicable and asked that the Mackinaw City property be distributed according to Frederick's will, as if Frederick had survived Barbara. Appellant alleged that Barbara died on February 27, 2008, and that Frederick, thus, died more than 120 hours

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[2] The year 2008 was a leap year and, thus, the dates between Barbara's and Frederick's deaths included February 28 and 29, and March 1, 2, and 3. The longest length of time possible between Barbara's and Frederick's deaths would be 117 hours and 10 minutes. This calculation assumes that Barbara died at the earliest time possible on February 28, i.e., immediately after the day began at midnight.

after Barbara's death. Appellant did not provide any evidence in support of this allegation. Appellant also argued that even if MCL 700.2702(3) was applicable, an exception in MCL 700.2702(4) applied and required that the property be divided according to the "governing instrument," Frederick's will. Appellant requested the court to adjourn the proceedings for appellant to substantiate his claim that Barbara died more than 120 hours before Frederick's death.

The probate court granted appellant's request for an adjournment. However, instead of producing evidence related to the time of Barbara's death, appellant moved for summary disposition under MCR 2.116(C)(8) and (10). Appellant asserted that the property should be distributed consistently with Frederick's will and that even if the will were not the "governing instrument," MCL 700.2702(3) was inapplicable because it became effective four years after the deed was executed. In appellant's view, once Barbara died the property passed, in whole, to Frederick and his will precluded the property's division.

Appellee countered that Barbara's estate was entitled to summary disposition based on MCR 2.116(I)(2) and (C)(10). Appellee argued that EPIC explicitly applies to the factual circumstances at issue and that the deed, not Frederick's will, was the governing instrument at issue. Appellee further asserted that because Frederick and Barbara died within 120 hours of each other, one-half the interest of the Mackinaw City property vested in Barbara's estate under MCL 700.2702(3). In response, appellant argued that his interpretation of EPIC was correct. However, appellant asked for additional time to pursue factual evidence with regard to the time of Barbara's death.

At the motion hearing, the probate court initially denied both parties' motions for summary disposition. However, appellee's attorney presented to the court an order that the court indicated it would "follow" and sign if both parties agreed to "the form of that order." The order provided, in relevant part:

> IT IS HEREBY ORDERED that unless Frederick D. Leete IV, Personal Representative of the Estate of Frederick Deland Leete III, Deceased, within [90] days from the date hereof, submits evidence that Frederick Deland Leete, III, survived Barbara R. Leete by 120 hours, the relief requested by the Petition and Motion For Summary Disposition filed by Cynthia K. Sherman, Personal Representative of the Estate of Barbara R. Leete, Deceased, shall be GRANTED, and the attached proposed Order shall be entered.
>
> In the event such evidence of survival is submitted, Petitioner shall have [90] days to respond to such evidence, and the Court, if necessary, may schedule an evidentiary hearing to resolve the dispute.

Both attorneys for the parties signed the order "approved as to form," and the probate court entered the order on May 19, 2009.

Ninety days later, on August 20, 2009, the court entered an order granting summary disposition in appellee's favor. It found "no clear and convincing evidence" that Frederick had survived Barbara by 120 hours and that Barbara's estate was entitled to half of any coowned property pursuant to MCL 700.2702(3). It ordered appellant to amend his inventory accordingly. This appeal followed.

II. ENTRY OF THE ORDER

Appellant first argues that the probate court's August 20 order is void because it did not meet the

requirements of MCR 2.602(B). We disagree. Appellant never raised this issue below, the probate court did not consider or decide this issue, and the matter is unpreserved for appeal. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Thus, this Court is not required to consider appellant's argument. See *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 720-721; 706 NW2d 426 (2005). We also note that a party may not successfully obtain appellate relief on the basis of a position contrary to that which the party advanced in the lower court. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Arguably, we should thus dismiss appellant's argument at the outset because appellant affirmatively agreed to the entry of the May 19 order, which, by its operation, resulted in the entry of the August 20 order that he now claims is void. Nonetheless, we will review appellant's argument because this Court may review an unpreserved issue if it presents a question of law and all the facts necessary for its resolution are before the Court. *Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 740; 605 NW2d 18 (1999).

A trial court's interpretation and application of a court rule is a question of law that this Court reviews de novo. See *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). Court rules are subject to the same rules of construction as statutes. *Vyletel-Rivard v Rivard*, 286 Mich App 13, 21; 777 NW2d 722 (2009). Our goal in interpreting the meaning of a court rule is to give effect to the intent of the drafters. *Id*. We first examine the language used. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006). The drafters are assumed to have intended the effect of the language plainly expressed, and we must give every word its plain and ordinary

meaning. *Brausch v Brausch*, 283 Mich App 339, 348; 770 NW2d 77 (2009). If the language is plain and unambiguous, then we must apply the language as written. *Vyletel-Rivard*, 286 Mich App at 22. In such instances, judicial construction is neither necessary nor permitted. *Kloian*, 273 Mich App at 458.

At issue in the present matter is MCR 2.602, which governs the "entry of judgments and orders." MCR 2.602(B), titled "Procedure of Entry of Judgments and Orders," provides:

> An order or judgment *shall be entered by one of the following methods*:
>
> (1) The court may sign the judgment or order at the time it grants the relief provided by the judgment or order.
>
> (2) The court shall sign the judgment or order *when its form is approved by all the parties and if*, in the court's determination, *it comports with the court's decision*.
>
> (3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed judgment or order and proof of its service on the other parties.
>
> * * *
>
> (4) A party may prepare a proposed judgment or order and notice it for settlement before the court. [Emphasis added.]

Thus, under MCR 2.602(B), for an order to be valid, it must be entered in one of four ways: it may be signed at the time relief is granted; it may be signed when its "form" is approved by all the parties and if, in the

court's determination, it comports with the court's decision; it may be entered pursuant to the "seven-day rule"; or, it may be prepared and noticed for settlement before the court.

The only relevant subrule of MCR 2.602(B) for purposes of this appeal is MCR 2.602(B)(2). The language of that provision is plain and unambiguous. An order must be signed and entered if two requirements are met: (1) the order's "form" is approved by all the parties and (2) in the court's determination, the order is in conformity with the court's decision. The term "form" is not defined by the court rule and, in such instances, this Court may rely on dictionary definitions to give terms their plain and ordinary meanings. See *Kloian*, 273 Mich App at 458-459. Black's Law Dictionary (9th ed) defines "form" as "[t]he outer shape or structure of something, as distinguished from its substance or matter," or as an "[e]stablished . . . procedure." Thus, for the first condition of MCR 2.602(B)(2) to be met, the parties must agree regarding the order's structure or, if relevant, any procedure that it may establish for the disposition of the matter before the court.

Although the probate court initially denied both parties' motions for summary disposition at the motion hearing on May 19, 2009, indicating that the case needed "to be developed a little more," it retracted this initial disposition and adopted the parties' suggested course of proceeding with the matter. Specifically, appellee's counsel informed the court that he had presented appellant's counsel with a proposed form and order, indicating that if, within 90 days of the motion hearing, appellant did not present clear and convincing evidence that Frederick had died more than 120 hours after Barbara, appellee's motion for summary disposition would be granted. The probate court then stated

that it would follow this suggestion and would sign the proposed order if "both [parties] agree to the form of th[e] order . . . ." Subsequently, the court signed an order consistent with appellee's suggestion, which both parties' counsels also signed, each writing above his or her signature, "approved as to form."

Given these facts, the probate court entered the May 19 order consistently with MCR 2.602(B)(2). The first requirement of MCR 2.602(B)(2) was met: both parties agreed to the form of the order, which in this case involved the entry of a subsequent order granting summary disposition for appellee if certain conditions were not met. Counsels' signatures on the order, juxtaposed with the phrase "approved as to form" above each signature, are evidence that the order's form was approved by all parties. Moreover, the second requirement of MCR 2.602(B)(2) was also met, given the court's unequivocal statement at the motion hearing that it would follow appellee's suggested course of action so long as "both [parties] agree to the form of th[e] order . . . ." The parties did so agree, and the court signed the order. In addition, because a court speaks through its written orders, the court's signature on the May 19 order implies that the substance of the order was in conformity with its decision to follow appellee's suggested course of action. Accordingly, the May 19 order was properly entered under MCR 2.602(B)(2).

Further, because the May 19 order was validly entered and the August 20 order was entered pursuant to the procedure established in the May 19 order, we also conclude that the August 20 order was validly entered under the same subrule. As already explained, the August 20 order was entered by operation of the procedure set forth in the May 19 order. It would be illogical for us to conclude that the August 20 order was not

validly entered pursuant to MCR 2.602(B)(2), given that the parties agreed to the form of the May 19 order, which specifically contemplated entry of the August 20 order and was signed by the court consistently with its decision. In other words, under the circumstances of this case, the parties' initial agreement about form in the first order was imputed to all subsequent orders entered consistently with that original agreement. Thus, because the parties agreed with respect to form and the order was consistent with the court's decision, the August 20 order was validly entered pursuant to MCR 2.602(B)(2).

Lastly, for us to declare that the August 20 order was invalidly entered would allow litigants to haphazardly agree to the entry of orders that envision the entry of additional orders and later escape the effect of those subsequently entered orders on appeal by declaring the later orders void. The outcome would be a waste of judicial resources and would unnecessarily increase the cost of litigation to the parties' detriment. Moreover, we note, contrary to appellant's argument, that nothing in the plain language of MCR 2.602(B)(2) explicitly prohibits the type of conditional order that was entered in this matter. Nor do we agree with appellant's argument that the order was not in conformity with the probate court's decision. Accordingly, we conclude that both the May 19 and August 20 orders were validly entered pursuant to MCR 2.602(B)(2).

III. SUMMARY DISPOSITION

Appellant next contends that the probate court erred by granting appellee summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Royal Prop Group*, 267 Mich App at 713. Because the probate court's August 20 order necessarily

relied on facts outside the pleadings, we will treat the court's grant of summary disposition as based on MCR 2.116(C)(10). A motion is properly granted under this subrule if no genuine issue of material facts exists and the moving party is entitled to judgment as a matter of law. *Royal Prop Group*, 267 Mich App at 713. In reviewing a lower court's decision, we must view all the submitted admissible evidence in a light most favorable to the nonmoving party. *In re Smith Estate*, 252 Mich App 120, 123; 651 NW2d 153 (2002). "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).

At the outset, we note that appellant's argument on appeal is responsive not to the existence of a factual question, but to an interpretation of the applicable law. Specifically, appellant posits that we should reverse the probate court's August 20 order because it made no findings about the applicability and effect of Indiana law, whether EPIC applied, whether a contrary intent precluded the application of MCL 700.2702(3), and whether an exception to the 120-hour rule applied, see MCL 700.2702(4). Appellant also asserts that the probate court applied the incorrect standard of proof.

We disagree that reversal is required on the basis of the probate court's alleged failure to make any conclusions with regard to the applicable law. This position is without support in the record. Rather, the probate court—by adopting appellee's suggested course of action at the May 19 motion hearing, which appellant agreed to in form only, and by entering the August 20 order in conformity therewith—concluded that appellee's interpretation of the relevant statutes was correct

and narrowed the dispositive issue to whether Frederick passed away more than 120 hours after Barbara under MCL 700.2702(3). Thus, our review is limited to whether the probate court's interpretation of EPIC was correct, which is a question of law we review de novo. *In re Clarence W Temple & Florence A Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The same rules of construction apply as those discussed earlier in reference to court rules.

A. DOES MICHIGAN PROBATE LAW APPLY?

In 1998, the Michigan Legislature enacted EPIC, 1998 PA 386, which became effective April 1, 2000. The new law, which repealed and replaced the Revised Probate Code, 1978 PA 642, MCL 700.1 *et seq*., was intended to modernize probate practice by simplifying and clarifying the law concerning decedents' affairs and by creating a more efficient probate system. MCL 700.1201; MCL 700.1303(3). Consistently with this purpose, the Legislature expanded the probate court's powers and included "provisions designed to reduce court involvement in trusts and estates." *In re Nestorovski Estate*, 283 Mich App 177, 190; 769 NW2d 720 (2009). Accordingly, EPIC confers on Michigan probate courts the exclusive legal and equitable jurisdiction of matters that "relate[] to the settlement of a deceased individual's estate, whether [the decedent died] testate or intestate, [if the decedent] was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered . . . .' " MCL 700.1302; *Nestorovski*, 283 Mich App at 189. In addition, MCL 700.1303(1) provides probate courts with further jurisdictional authority, which includes, in part, concurrent legal and equitable jurisdiction to determine a property

right or interest, authorize the partition of property, authorize or compel specific performance of a contract in a joint or mutual will, and ascertain if individuals have survived. EPIC also explicitly states that it applies to "[a] nonresident's property that is located in this state . . . ." MCL 700.1301(b).

Appellant contends that the probate court's failure to consider the effect and application of Indiana laws of survivorship requires reversal and remand. We disagree. Implicit in the probate court's decision was the conclusion that Indiana law was inapplicable to the administration of Frederick's estate and that Michigan law was the correct choice of law. We see no error in this ruling. Although Frederick had a residence, and died, in Indiana, appellant filed an affidavit of domicile with the probate court that listed Frederick's domicile as 804 Lakeside Drive, Mackinaw City, Michigan. Thus, application of EPIC to the administration of Frederick's estate was appropriate. See MCL 700.1301(a).

Even if we were to assume that Frederick was an Indiana resident, we would reach the same conclusion. Michigan probate courts have jurisdiction over property located in this state, including property that is owned by a nonresident decedent, MCL 700.1302, and EPIC explicitly applies to a nonresident's property located in Michigan, MCL 700.1301(b). Moreover, neither Frederick's will nor any other documentary evidence evinces an intent that Indiana law should apply to the administration of his estate. And while Indiana undoubtedly has some interest in the administration of the estates of its deceased residents, Michigan's interest in the present matter is greater, given the fact that the property at issue is located in Michigan and in value comprises the bulk of the assets of Frederick's estate. See *Frydrych v Wentland*, 252 Mich App 360, 363-364;

652 NW2d 483 (2002) (explaining choice-of-law analysis). Thus, application of EPIC, as opposed to Indiana law, was appropriate.

B. DOES EPIC OR FORMER LAW APPLY?

Appellant next argues that EPIC is inapplicable because the deed and Frederick's will predate EPIC's effective date and because its application would affect an "accrued right." We disagree. EPIC specifically "applies to a governing instrument executed by a decedent dying after [April 1, 2000, as long as it does not] impair an accrued right . . . ." MCL 700.8101(2)(a) and (d). Further, "[a] rule of construction . . . provided in this act applies to a governing instrument executed before [April 1, 2000] unless there is a clear indication of a contrary intent." MCL 700.8101(2)(e). Thus, EPIC applies to a governing instrument executed before EPIC came into effect, as long as it does not affect an accrued right and as long as the governing instrument does not contain a contrary intent. See *Temple Marital Trust*, 278 Mich App at 127-128. Under EPIC, "governing instrument" is defined as including both a will and a deed. MCL 700.1104(k).

The governing instrument here, be it Frederick's will or the deed, was created before EPIC became effective, but neither instrument contains an explicit intent that EPIC should not apply. There is no mention in either instrument that some other law or rule should be enforced. And although both instruments were created before EPIC's effective date of April 1, 2000, no accrued right therein would be impaired by applying EPIC. This Court has recognized that an accrued right is similar to one that has vested. *Smith Estate*, 252 Mich App at 127-128. However, in the context of EPIC, "an 'accrued right' . . . mean[s] something other than a right under a

will upon the testator's death . . . [and] is a legal right to the exclusion of any other right or claim to it." *Id*. at 128-129. In other words, even though a devise under a will vests upon the death of the testator, it is not an accrued right under EPIC because "it is not so fixed that it cannot be changed." *Id*. at 128. This understanding of the term "accrued right" is consistent with MCL 700.8101(2)(d), which states, in part, "If a right is acquired . . . upon the expiration of a prescribed period of time that commences to run by the provision of a statute before [April 1, 2000], the provision remains in force with respect to that right." Appellant obtained no fixed or accrued right by way of Frederick's will before April 1, 2000. See MCL 700.8101(2)(d). Nor did he acquire such a right at the time of Frederick's and Barbara's deaths because his interest in the Mackinaw City property was still subject to change. Accordingly, EPIC governs the present matter, and the probate court did not err by concluding the same.

C. DOES EPIC'S 120-HOUR RULE APPLY?

At the outset, we note that the 120-hour rule, or simultaneous-death provision, is not new to Michigan probate law. Its origin is related to the problematic administration of the common-law rule that an heir or devisee had to survive the testator by only an instant in order to receive a donative transfer under the testator's will. 1 Restatement Property, 3d, Wills and Other Donative Transfers, § 1.2, pp 32-33. Administration of this common-law concept became problematic in the early twentieth century when vehicular accidents resulting in simultaneous deaths became more common. *Id*. at 33. Thus, in the context of simultaneous deaths, some new rule was necessary to ensure that each decedent's property passed to his or her heirs and avoid

the expense of double probate administration. *Id*. Michigan first adopted a survival requirement in 1941, see Uniform Simultaneous Death Act, 1941 PA 73, former MCL 720.101 through 720.108; and a survival-period requirement of 120 hours in 1978, see Revised Probate Code, 1978 PA 642, specifically former MCL 700.107 and 700.132. The latter requirement is meant to ensure that a decedent's property passes to a beneficiary who can personally benefit, as opposed to a beneficiary who became deceased a short time later, meaning that the property would ultimately pass to that beneficiary's heirs. 1 Restatement, § 1.2, p 34.

In Michigan, the 120-hour survival requirement did not always apply to nonprobate transfers, such as joint estates with rights of survivorship. *In re VanConett Estate*, 262 Mich App 660, 667-668; 687 NW2d 167 (2004) (explaining that jointly held property with rights of survivorship typically passes automatically to the surviving tenant upon one tenant's death and is not subject to devise under a will). While the 120-hour rule was only applicable to wills under the Revised Probate Code, see former MCL 700.132, EPIC expanded the 120-hour rule to cover all events, governing instruments, and coownerships. Jacobs, *EPIC 386 PA 1998—Rules of construction and interpretation for transfers upon death*, 79 Mich B J 345 (2000); compare former MCL 700.107, former MCL 700.132, and MCL 700.2702.

Appellant asserts that EPIC's 120-hour rule is inapplicable because (1) a "contrary intention" exists, embodied in Frederick's will, see MCL 700.2701, and (2) an exception to the 120-hour rule applies, see MCL 700.2702(4).

1. MCL 700.2701

The provisions appellant relies on, MCL 700.2701 and MCL 700.2702, are in EPIC's article II (regarding

intestacy, wills, and donative transfers) part 7 (regarding rules of construction applicable to governing instruments). MCL 700.2701 provides:

> *In the absence of a finding of a contrary intention, the rules of construction in this part control the construction of a governing instrument*. The rules of construction in this part apply to a governing instrument unless the application of a particular section is limited by its terms to a specific type of provision or governing instrument. [Emphasis added.]

MCL 700.1104(k) defines "governing instrument" as used in EPIC to mean

> *a deed; will*; trust; insurance or annuity policy; account with POD [pay on death] designation; security registered in beneficiary form (TOD [transfer on death]); pension, profit-sharing, retirement, or similar benefit plan; instrument creating or exercising a power of appointment or a power of attorney; or dispositive, appointive, or nominative instrument of any similar type. [Emphasis added.]

Clearly, EPIC defines "governing instrument" broadly. The term includes both a will and a deed. MCL 700.2701 is plain and unambiguous. It indicates that the rules of construction articulated in part 7 of EPIC, as they pertain to governing instruments, will not apply if the relevant governing instrument contains a contrary intent. Thus, there must be some explicit recognition in that instrument that EPIC will not apply. This intent may be manifested, for example, by a specific directive that EPIC does not apply or that other rules apply, such as those articulated in the former Revised Probate Code or in another state's probate code. In this case, neither the deed nor the will, nor any other instrument, declares such a contrary intent. Both instruments are silent on the matter. Thus, MCL 700.2701 does not function to preclude application of

part 7 of EPIC, which includes the simultaneous-death provision articulated in MCL 700.2702.

2. MCL 700.2702

The section immediately following MCL 700.2701 is EPIC's simultaneous-death provision. MCL 700.2702(3), provides, in relevant part:

> Except as provided in subsection (4), *if it is not established by clear and convincing evidence that 1 of 2 co-owners with right of survivorship survived the other co-owner by 120 hours, 1/2 of the co-owned property passes as if 1 had survived by 120 hours and 1/2 as if the other had survived by 120 hours*. If there are more than 2 co-owners and it is not established by clear and convincing evidence that at least 1 of them survived the others by 120 hours, the property passes in the proportion that 1 bears to the whole number of co-owners. For the purposes of this subsection, "co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles 1 or more to the whole of the property or account on the death of the other or others. [Emphasis added.]

There is no dispute between the parties regarding the meaning of this language and, indeed, we are of the view that this language is clear. If two coowners with rights of survivorship die within 120 hours of one another, then the property does not pass in whole to the last surviving coowner but is divided in equal shares between each coowner's estate. Conversely, if clear and convincing evidence shows that one coowner survived the other by 120 hours or more, then the estate of the longer surviving coowner receives the whole property consistently with his or her right of survivorship.[3]

[3] The "clear and convincing" evidence standard in the context of the simultaneous-death provision was newly included under EPIC. Compare

MCL 700.2702(4) provides a list of exceptions to the general rule established in MCL 700.2702(3). It states:

> Survival by 120 hours is not required under any of the following circumstances:
>
> (a) The governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case. Language dealing explicitly with simultaneous deaths includes language in a governing instrument that creates a presumption that applies if the evidence is not sufficient to determine the order of deaths.
>
> (b) The governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event by a specified period. Survival of the event or the specified period, however, must be established by clear and convincing evidence.
>
> (c) The imposition of a 120-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under section 2(1)(a), (2)(a), or (3)(a) of the uniform statutory rule against perpetuities, 1988 PA 418, MCL 554.72, or to become invalid under section 2(1)(b), (2)(b), or (3)(b) of the uniform statutory rule against perpetuities, 1988 PA 418, MCL 554.72.
>
> (d) The application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition. Survival, however, must be established by clear and convincing evidence.

Thus, under these limited, articulated circumstances, the 120-hour rule is inapplicable.

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former MCL 700.107 and former MCL 700.132 with MCL 700.2702. This evidentiary burden serves to resolve doubtful questions in favor of nonsurvival and better serves the decedent's intent that his or her property pass to heirs and only to persons who can personally benefit from it. 1 Restatement, § 1.2, p 35.

Because there is no evidence in the present case demonstrating that Frederick survived Barbara by more than 120 hours—and appellant identifies no such evidence on appeal, in the record or otherwise, and makes no argument relating to the substance of this issue—the 120-hour rule applies and one-half of the Mackinaw City property vested in Barbara's estate, unless appellant can substantiate that one of the exceptions in MCL 700.2702(4) is applicable. The only exception that appellant argues is applicable is MCL 700.2702(4)(d). However, we disagree. While this case does involve multiple governing instruments—Frederick's 1974 will and the 1996 deed—we are not of the view that application of the 120-hour rule would result in an "unintended failure . . . of a disposition." Certainly, Frederick indicated in his 1974 will that Barbara must survive him by more than 30 days in order to receive a full ownership interest in the Mackinaw City property. At the time, Frederick was presumably the sole owner of the property. However, Frederick and Barbara executed a quitclaim deed in 1996 that conveyed the Mackinaw City property to Barbara and Frederick as tenants by the entirety. Clearly, as is evident from the execution of the deed, Frederick's intent with respect to the disposition of the Mackinaw City property changed in 1996. "A conveyance by a testator of . . . his property after making his will revokes the will." *In re Smith*, 191 Mich 694, 701; 158 NW 148 (1916); cf. MCL 700.2507. Thus, a portion of Frederick's will was effectively revoked with respect to this particular property because the conveyance was inconsistent with the will's provision regarding the disposition of the Mackinaw City property at Frederick's death. And, accordingly, it cannot be said that the application of the 120-hour rule under the present

circumstances would result in an unintended failure of disposition. Rather, adherence to the 1974 will would have that effect.

Accordingly, appellant has failed to show that any of the exceptions to the 120-hour rule are applicable. The trial court did not err by applying the 120-hour rule to the present circumstances. And because clear and convincing evidence does not show that Frederick survived Barbara by 120 hours or more, the Mackinaw City property is properly divided between their respective estates consistently with MCL 700.2702(3).

D. DID THE PROBATE COURT APPLY THE WRONG STANDARD OF PROOF?

Finally, we also reject appellant's last argument that the probate court applied the incorrect standard of proof. Appellant takes issues with the court's written statement in its August 20 order, which stated, "There is no clear and convincing evidence that Frederick Deland Leete, III, survived Barbara R. Leete by 120 hours . . . ." However, appellants's allegation takes the probate court's statement out of context. The clear and convincing evidentiary burden is mandated by MCL 700.2702(1), which provides, in part: "[A]n individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours is considered to have predeceased the event." This provision establishes a party's burden of proof with regard to the 120-hour rule. Thus, when the probate court's order is read as a whole, it means that appellant failed to bring forth any clear and convincing evidence, as required by the statute, that would create a question of fact, when viewed in a light most favorable to appellant, that Frederick survived Barbara by 120 hours. There is no indication

in the probate court's August 20 order that it applied the incorrect standard of proof. The trial court properly granted summary disposition in appellee's favor.

Affirmed.

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 25, AFL-CIO v HAMTRAMCK HOUSING COMMISSION

Docket No. 293505. Submitted November 3, 2010, at Detroit. Decided November 18, 2010, at 9:00 a.m.

American Federation of State, County & Municipal Employees, Council 25, AFL-CIO, and its affiliated Local 666 brought an action in the Wayne Circuit Court against the Hamtramck Housing Commission, seeking, under the arbitration provision of the parties' collective-bargaining agreement, arbitration of a dispute. The court, Jeanne Stempien, J., denied plaintiff's motion for summary disposition and dismissed the case, holding that plaintiff had waived the right to arbitrate the grievance because the delay in filing for arbitration was not reasonable. Plaintiff appealed.

The Court of Appeals *held*:

The collective-bargaining agreement clearly required arbitration of unresolved grievances that had been processed through the grievance procedure. Nothing in the agreement explicitly excludes determination of the issue of timeliness by the arbitrator. In light of the presumption in favor of arbitrability, and the fact that nothing in the language of the agreement provides positive assurance that the arbitration clause does not cover the question of timeliness, it must be concluded that the arbitrator, not the trial court, must decide the issue. Allowing the arbitrator to determine the question of timeliness is consistent with the purpose of arbitration. Absent specific contractual language to the contrary, whether the demand for arbitration is made before or after expiration of the contract is not determinative of the arbitrability of the grievance. The trial court, on remand, must enter an order compelling arbitration.

Reversed and remanded.

1. LABOR RELATIONS — ARBITRATION — DUTY TO ARBITRATE.

The duty to arbitrate grievances arises from the contractual agreement between an employer and its employees; where an employer and a union have contractually agreed to arbitration, in the

absence of explicit contractual direction to the contrary, all doubts regarding the proper forum should be resolved in favor of arbitration.

2. ARBITRATION — SCOPE OF ARBITRATION — PRESUMPTION OF ARBITRABILITY.

Any ambiguity concerning whether a specific issue falls within the scope of an arbitration clause, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution; there is a presumption of arbitrability unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; doubts should be resolved in favor of coverage.

3. ARBITRATION — ARBITRABILITY OF GRIEVANCES — TIMING OF DEMAND FOR ARBITRATION.

Whether a demand for arbitration is made before or after the expiration of the contract containing an arbitration clause is not determinative of the arbitrability of a grievance under the contract absent specific contractual language to the contrary.

Cassandra D. Harmon-Higgins and *Miller Cohen, P.L.C.* (by *Bruce A. Miller* and *Ada A. Verloren*), for plaintiff.

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

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM. Plaintiff appeals as of right a circuit court order denying plaintiff's motion for summary disposition and dismissing its complaint for arbitration on the basis that plaintiff "waived the right to arbitrate the subject grievance because the delay in filing for arbitration was not reasonable . . . ." We reverse and remand for the entry of an order compelling arbitration because the issue whether the grievance was not arbitrable because of laches was an issue for the arbitrator to decide, not the trial court.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich

109, 118; 597 NW2d 817 (1999). Although plaintiff was the party who moved for summary disposition, the trial court granted judgment in favor of defendant pursuant to MCR 2.116(I)(2) ("If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."). Whether a court or an arbitrator should decide whether laches and waiver preclude arbitration of a grievance is a question of law also subject to review de novo. See *Gregory J Schwartz & Co, Inc v Fagan*, 255 Mich App 229, 231; 660 NW2d 103 (2003).

Procedural questions such as timeliness are generally left to the arbitrator. *Brown v Holton Pub Sch*, 397 Mich 71, 73; 243 NW2d 255 (1976). "The duty to arbitrate grievances arises from [the] contractual agreement between an employer and its employees." *Ottawa Co v Jaklinski*, 423 Mich 1, 22; 377 NW2d 668 (1985) (opinion by WILLIAMS, C.J.). Where an employer and a union have contractually agreed to arbitration, in the absence of explicit contractual direction to the contrary, all doubts regarding the proper forum should be resolved in favor of arbitration:

> [A]ny ambiguity concerning whether a specific issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution. See *AT&T Technologies,* [*Inc v Communications Workers of America*, 475 US 643, 650 ;106 S Ct 1415; 89 L Ed 2d 648 (1986)]. In other words, there is a presumption of arbitrability " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' " *Id.*, quoting *United Steelworkers of America v Warrior & Gulf Navigation Co (On Remand)*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960).

> [*Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234-235; 590 NW2d 580 (1998).][1]

The arbitration provision in the parties' collective-bargaining agreement (CBA) provides:

> Any unresolved grievances which relate to the interpretation, application, or enforcement of any specific article or section of this contract, or any supplementary agreement or letters and memorandums of understanding appended to this contract, which have been fully processed through the last step of the grievance procedure, shall be submitted to arbitration in strict accordance with the following:
>
> * * *
>
> In any matter submitted to an arbitrator pursuant to this Agreement, the arbitrator shall strictly limit his/her decision to the interpretation, application or enforcement of this agreement and he/she shall be without power and authority to make any decision contrary to, or inconsistent with, or modifying or varying in any way, the terms of this Agreement.

The language of the provision clearly requires arbitration of unresolved grievances that have been processed through the grievance procedure. Moreover, there is nothing in the provision that explicitly excludes the issue of timeliness from the arbitrator. In light of the presumption in favor of arbitrability, and the fact that nothing in the language provides "positive assurance" that the arbitration clause does not cover the question of timeliness, we are bound to conclude that it is the arbitrator, not the trial court, that must decide the issue. *Amtower*, 232 Mich App at 235 (quotation marks and citations omitted).

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[1] Although *Amtower* itself is not a labor case, it draws its applicable legal principles from cases that are labor cases. Accordingly, we conclude that it is appropriate to cite *Amtower* in this context.

Furthermore, we conclude that allowing the arbitrator to determine the question of timeliness is consistent with the purpose of arbitration. Allowing procedural challenges to be heard by a court rather than by the arbitrator runs contrary to the presumption of arbitrability and would leave every arbitration subject to piecemeal litigation, a result contrary to a central purpose of arbitration. See *John Wiley & Sons, Inc v Livingston*, 376 US 543, 558; 84 S Ct 909; 11 L Ed 2d 898 (1964), holding that reserving procedural issues for the courts would create "the difficult task of separating related issues" as well as "eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs)," all of which are "contrary to the aims of national labor policy."

Because we conclude that the determinations regarding timeliness and the application of the defense of laches must be made by the arbitrator, we need not decide whether the trial court erred in its analysis of the issue.

Finally, we disagree with defendant's contention that it was not required to arbitrate the grievance because the CBA expired before plaintiff demanded arbitration. Although defendant cites *Ottawa Co*, 423 Mich 1, that case does not support defendant's position. In that case, the Court held that

> the right to grievance arbitration survives the expiration of the collective bargaining agreement when the dispute concerns the kinds of rights which could accrue or vest during the term of the contract. . . . [S]uch a rule recognizes and sustains both fundamental principles of law and the right of employees and employers to develop the common law of labor relations in their collective bargaining agreements. [*Id*. at 22 (opinion by WILLIAMS, C.J.).][2]

[2] See also *Ottawa Co*, 423 Mich at 24 n 9 (opinion by WILLIAMS, C.J.), and its approval of the holding in *Northern California Dist Council of Hod Carriers v Pennsylvania Pipeline, Inc*, 103 Cal App 3d 163; 162 Cal Rptr 851 (1980),

Therefore, absent specific contractual language to the contrary, whether the demand for arbitration is made before or after expiration of the contract is not determinative of the arbitrability of the grievance.[3]

Reversed and remanded to the trial court for an entry of an order compelling arbitration. We do not retain jurisdiction. Plaintiff may tax costs pursuant to MCR 7.219.

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cert den 449 US 874 (1980), that the right to arbitrate "vests" on the date the alleged grievance arises, and is thus enforceable even if it is not demanded until after the contract expires.

[3] Contrary to defendant's assertion at oral argument, *AFSCME, Council 25 v Wayne Co*, 290 Mich App 348; ___ NW2d ___ (2010), is inapplicable to the present case. In *AFSCME*, the language of the contract explicitly provided that arbitration would apply only to " '*differences . . . aris*[*ing*] between the Employer and the Union *during the term of this agreement . . . .*' " *Id*. at 351 (emphasis added). Given that the dispute in *AFSCME* did not arise until more than a month after the relevant agreement had expired, we concluded that the dispute did not fall within the scope of the arbitration defined by the contract. By contrast, in this case, there is no basis to exclude the substantive dispute from arbitration and the only issue concerns the timing of the demand for arbitration—something that was not at issue in *AFSCME*. *AFSCME* did not deal with an attempt to divide a dispute into arbitrable and nonarbitrable portions. Instead, it was controlled by explicit contract language taking the entire dispute out of mandatory arbitration and it provides no guidance on the issue before us here.

OLIVER v SMITH

Docket No. 292585. Submitted October 12, 2010, at Grand Rapids. Decided November 23, 2010, at 9:00 a.m.

Gary Oliver filed a complaint in the Wayne Circuit Court against police officer Cory Smith and others, asserting claims of assault and battery, negligence, and civil rights violations arising out of Smith's alleged use of excessive force when arresting Oliver. Smith moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that he was entitled to governmental immunity under MCL 691.1407(2) and (7) because his conduct in handcuffing Oliver during the arrest had not amounted to gross negligence. The court, John A. Murphy, J., denied the motion without prejudice, concluding that while Oliver had not produced documentary evidence establishing a genuine issue of material fact regarding whether Smith's conduct caused Oliver to suffer an injury, summary disposition was premature because discovery had not been completed and Oliver still had time to produce documentary evidence of an injury. Smith appealed. The Court of Appeals affirmed, holding that handcuffing a person too tightly may constitute gross negligence for purposes of governmental immunity if physical injury resulted. The Court of Appeals also held that Smith had failed to meet his initial burden of providing evidence in support of his motion for summary disposition, however the Court of Appeals also indicated that Smith might be entitled to summary disposition at the conclusion of discovery. 269 Mich App 560 (2006). Following the continuation of discovery in the trial court, Smith filed another motion for summary disposition, which the trial court denied. The trial court concluded that evidence that Smith had laughed when Oliver complained that the handcuffs were on too tightly suggested that Smith may not have been acting in good faith, and thus there was a question of material fact for the jury. The trial court also held that the handcuffing had been a ministerial, as opposed to a discretionary, act. Smith appealed.

The Court of Appeals *held*:

1. Smith is a lower-level governmental employee not entitled to the absolute immunity provided by MCL 691.1407(5).

2. Smith was acting within the scope of his authority and was discharging a governmental function while arresting Oliver and taking him into custody.

3. There was no evidence establishing that it was Smith's acts alone that were the one most immediate, efficient, and direct cause preceding Oliver's injury. Because it cannot be said that Smith's acts constituted the proximate cause of Oliver's injuries, Smith met his burden of proof in establishing his entitlement to governmental immunity under MCL 691.1407(2). The trial court erred by not granting Smith's motion for summary disposition of Oliver's gross negligence claim under MCR 2.116(C)(7).

4. The question with regard to the assault and battery claim is whether Smith acted in good faith when he selected how tightly to handcuff Oliver, not whether Smith had a good-faith basis for handcuffing Oliver. Under the facts indicating that the police officers were faced with an unruly individual who was verbally belligerent, actively disturbing a police inquiry, and creating a dangerous situation for the officers, and who was intent on physically resisting the arrest, it is likely that Oliver caused his own injuries by his repeated efforts to physically thwart the officers' attempts to restrain him. Considering the vast array of emotions that Smith's laughter could signify and viewing the evidence in the light most favorable to Oliver, Oliver's reliance on the laughter alone, without more, did not create a justiciable question of fact with regard to whether Smith had acted in good faith when he placed the cuffs on Oliver.

5. Although handcuffing a person under normal circumstances incident to an arrest without resistance may be a ministerial act, Oliver's conduct in this case together with the concern for the officers' safety transformed the act of handcuffing Oliver into a discretionary act. Smith's actions were discretionary actions to which governmental immunity applied.

Reversed.

1. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — TORTS — NEGLIGENT TORTS — WORDS AND PHRASES — PROXIMATE CAUSE.

A trial court, when a defendant raises the affirmative defense of individual governmental immunity to a negligent-tort claim, must determine if the defendant caused an injury or damage while acting in the course of employment or service or on behalf of the defendant's governmental employer and whether (1) the defendant was acting or reasonably believed that he or she was acting within the scope of his or her authority, (2) the governmental agency was engaged in the exercise or discharge of a governmental

function, and (3) the defendant's conduct amounted to gross negligence that was the proximate cause of the injury or damage; "proximate cause," in this context, is the one most immediate, efficient, and direct cause preceding the injury or damage (MCL 691.1407[2]).

2. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — TORTS — INTENTIONAL TORTS.

A trial court, when a defendant raises the affirmative defense of individual governmental immunity to an intentional-tort claim, must determine whether the defendant established that he or she is entitled to individual governmental immunity by showing (1) the acts were undertaken during the course of employment and the defendant was acting, or reasonably believed that he or she was acting, within the scope of his or her authority, (2) the acts were undertaken in good faith, or were not undertaken with malice, and (3) the acts were discretionary, as opposed to ministerial.

3. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — WORDS AND PHRASES — GROSS NEGLIGENCE.

"Gross negligence" by a governmental employee, for purposes of governmental immunity, involves conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results; the issue is a factual question for the jury if reasonable jurors could honestly reach different conclusions regarding whether the subject conduct constituted gross negligence; the issue may be determined by the court in response to a motion for summary disposition if reasonable minds could not differ regarding whether the subject conduct constituted gross negligence.

4. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — TORTS — INTENTIONAL TORTS.

A governmental employee enjoys a qualified right to immunity with regard to alleged intentional torts if (1) the employee's challenged acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he or she was acting, within the scope of his or her authority, (2) the acts were undertaken in good faith, or were not undertaken with malice, and (3) the acts were discretionary, rather than ministerial, in nature; the "good faith" element is subjective in nature.

Law Offices of Scott E. Combs (by *Scott E. Combs*) for Gary Oliver.

Cummings, McClorey, Davis & Acho, P.L.C. (by *Joseph Nimako* and *Jeffrey R. Clark*), for Cory Smith.

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM. In this tort action alleging excessive use of force by a police officer, defendant Cory Smith appeals as of right the trial court's order denying his motion for summary disposition based on governmental immunity. This is the second time that this case is before this Court. This Court previously affirmed the trial court's order denying a previous motion for summary disposition made by defendant.[1] *Oliver v Smith*, 269 Mich App 560; 715 NW2d 314 (2006). Because the trial court erred by denying defendant's motion for summary disposition, we reverse.

The facts underlying this appeal were summarized in our previous opinion:

> The events giving rise to this appeal occurred on November 9, 2001. On that date, defendant, an officer with the Dearborn Heights Police Department, arrested plaintiff for interfering with a police officer after plaintiff was disruptive and uncooperative while defendant and another officer attempted to administer field sobriety tests to the driver of a vehicle in which plaintiff was a passenger. As a result of the arrest, plaintiff filed a complaint against the city, the police department, and two police officers, including defendant. The complaint contained claims of assault and battery, negligence, and civil rights violations. In the complaint, plaintiff alleged that defendant used excessive force when he arrested him because he intentionally handcuffed plaintiff's wrists too tightly with the intent to inflict harm. The complaint further alleged that defendant's use of excessive force caused plaintiff to suffer physical and mental injuries. [*Id.* at 561-562.]

[1] References to "defendant" in the singular are to Smith alone.

Defendant Smith advanced his previous motion for summary disposition under MCR 2.116(C)(7) and (10), arguing that he was entitled to governmental immunity under the governmental immunity act, MCL 691.1401 *et seq*., because his conduct did not amount to gross negligence under MCL 691.1407(2)(c) and (7)(a). The trial court denied the motion. In so ruling, the court noted that plaintiff failed to produce documentary evidence to establish a genuine issue of material fact regarding whether defendant's conduct caused plaintiff to suffer an injury. However, the court, in essence, concluded that summary disposition was premature because discovery was not complete and plaintiff still had time to produce documentary evidence of injury.[2]

Defendant appealed as of right the denial of his previous motion for summary disposition. On appeal, this Court affirmed the trial court's ruling. In reaching this result, this Court held that handcuffing an individual too tightly may constitute gross negligence for purposes of governmental immunity if physical injury results, and we also held that defendant failed to meet his initial burden of providing evidence in support of his motion for summary disposition. *Oliver*, 269 Mich App at 566-568. However, this Court indicated that defendant might be entitled to summary disposition at the conclusion of discovery:

> Because the trial court denied defendant's motion for summary disposition without prejudice, both parties will have sufficient opportunity to compile additional evidence, and, if he so desires, defendant can bring another motion for summary disposition at the end of the discovery period. [*Id.* at 568.]

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[2] The trial court granted summary disposition in favor of all defendants except Smith on plaintiff's state-law claims. The federal issues raised in the case were removed to a federal court. Thus, only the state-law claims against defendant are in dispute here.

At the end of the discovery period, defendant filed another motion for summary disposition, which the trial court denied. Defendant has again appealed as of right in this Court.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.' " *Young v Sellers*, 254 Mich App 447, 449-450; 657 NW2d 555 (2002), quoting *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition is appropriate under 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."

The Supreme Court in *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008), set forth the following steps that a court must follow when a defendant raises the affirmative defense of individual governmental immunity:

> (1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).

(2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.

(3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* [*v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984)] test by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial.

Following the steps provided in *Odom*, we first observe that defendant is indisputably a lower-level governmental employee not entitled to the absolute immunity provided by MCL 691.1407(5). It is also plain that plaintiff pleaded both negligent and intentional torts. We will address both alleged torts in turn.

As was clarified in *Odom*, in order to determine whether defendant is entitled to summary disposition under MCR 2.116(C)(7), the proper inquiry is whether

defendant has met his burden of proof in establishing that he is entitled to governmental immunity as a matter of law. *Odom*, 482 Mich at 479. Governmental immunity from negligence claims applies to officers of a governmental agency when they are acting, or reasonably believe they are acting, within the scope of their employment, they are exercising or discharging a governmental function, and their conduct does not amount to gross negligence that is the proximate cause of the injury or damage. *Id*. at 479-480; MCL 691.1407(2). Here, there is no doubt that defendant was acting within the scope of his authority and was discharging a governmental function during the time he was arresting plaintiff and taking him into police custody. Thus, the only remaining question with regard to the gross-negligence claim is whether defendant's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

For the purpose of governmental immunity, "gross negligence" by an employee involves "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). It has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by a motion for summary disposition. *Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998). When this case was first before this Court, we held "that a police officer's conduct of handcuffing an individual too tightly does not constitute gross

negligence unless physical injury results," and the case then continued in the trial court with the completion of discovery. *Oliver*, 269 Mich App at 566.

In the trial court, plaintiff presented evidence that he suffered from continuing pain and decreased strength and range of motion, as well as wrist abrasions apparent immediately after his arrest. We held in our previous opinion in this case: "Evidence that handcuffing caused some pain but not injury is insufficient to establish excessive force in applying the handcuffs; if injury is minimal or nonexistent, then the force creating it must also be minimal and, therefore, not excessive." *Id.* at 566. The evidence presented by plaintiff was generally subjective and difficult to verify. However, if plaintiff's complaints are believed, then he has suffered more than "some pain" and minimal injury and has suffered an injury that affects his ability to work and perform daily activities. Because the question turns on plaintiff's credibility, it would be proper to submit to a jury if the alleged gross negligence was the proximate cause of the injury or damage.

Proximate cause in the context of MCL 691.1407(2) refers to the cause that is "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Taking the evidence in the light most favorable to plaintiff, there was simply no evidence establishing that it was defendant's acts alone that were "the one most immediate, efficient, and direct cause preceding [plaintiff's] injury." *Id*. The record evidence shows that plaintiff got out of the vehicle and began yelling at the officers to let the driver go after the police stopped the vehicle. Plaintiff was belligerent and failed to comply with the officers' orders to remain in the vehicle, making it unsafe for them to continue the field sobriety

tests of the driver. The police attempted to arrest plaintiff for hindering that process but plaintiff refused to place his hands behind his back so that he could be handcuffed. Defendant managed to place one cuff on plaintiff's right wrist, but plaintiff then began to pull away. Accordingly, a second officer had to help defendant pull plaintiff's left arm behind his back in order to handcuff plaintiff. As a result, plaintiff was also arrested for resisting arrest. Plaintiff does not seem to dispute the majority of the police evidentiary account of what occurred during the arrest but adds that defendant threw him to the ground in order to handcuff him.

Under these circumstances, it cannot be said that defendant's acts alone were "the one most immediate, efficient, and direct cause preceding [plaintiff's] injury." *Robinson*, 462 Mich at 459. The wrist and hand injury is not clearly attributable to defendant alone and instead may just as fairly be attributed to plaintiff. The facts as developed clearly indicate that plaintiff was actively resisting arrest and the record indicates that plaintiff's injuries were just as likely caused by his own efforts to thwart the officers' attempts to restrain him. Plaintiff could have caused his own injuries when he: (1) refused to place his hands behind his back to allow the officers to handcuff him and the officers had no other option but to pull plaintiff's left arm, wrist, and hand behind his back, (2) continued to resist when he pulled away from the officers after defendant was able to affix the first cuff, or (3) forced the officers to restrain him on the ground after he continued to refuse to submit to the officers' orders. Because, even when reviewing the facts in the light most favorable to plaintiff, it cannot be said that defendant's acts constituted the proximate cause of plaintiff's injuries, defendant has met his burden of proof in establishing entitlement to governmental immunity under MCL 691.1407(2). The trial court there-

fore erred by not granting defendant's motion for summary disposition of plaintiff's "gross negligence" claim under MCR 2.116(C)(7).

In *Odom*, 482 Mich at 480, our Supreme Court stated that the proper method for determining whether governmental immunity applies to intentional torts (such as assault and battery) is to apply the test set forth in *Ross*. The *Odom* Court stated that employees enjoy a qualified right to immunity if (1) the employee's challenged acts were undertaken during the course of employment and the employee was acting, or reasonably believed he or she was acting, within the scope of his or her authority, (2) the acts were undertaken in good faith, or were not undertaken with malice, and (3) the acts were discretionary, rather than ministerial, in nature. *Odom*, 482 Mich at 480 citing *Ross*, 420 Mich at 633.

With regard to the assault and battery claim, defendant was clearly acting during the course of his employment and within the scope of his authority. The parties' primary disagreement is whether defendant was acting in good faith when he handcuffed plaintiff. "The good-faith element of the *Ross* test is subjective in nature. It protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent." *Odom*, 482 Mich at 481-482. Here, the trial court concluded that plaintiff's evidence that defendant laughed when he complained that the handcuffs were on too tightly suggested that defendant may not have been acting in good faith, and thus, there was a question of material fact for a jury.

Defendant's argument in response focuses on whether he honestly believed there was a need to handcuff plaintiff, but that is not the issue in question.

Under *Ross*, what is in question is whether defendant acted in good faith when he selected how tightly to handcuff plaintiff, not whether defendant had a good-faith basis for handcuffing plaintiff. Plaintiff relies solely on defendant's laughter when plaintiff informed him that the handcuffs were too tight to suggest that defendant's decision in that regard may not have been made in good faith. But defendant's laughter after plaintiff's complaint could just as fairly indicate his disbelief of plaintiff, thinking that if he loosened the handcuffs, plaintiff might again endeavor to resist, thereby creating another dangerous situation that defendant was not willing to risk. The laughter could also indicate that defendant was flabbergasted with plaintiff after plaintiff's obstreperous behavior, and had nothing to do with his previous act of cuffing plaintiff. When looking at the situation as a whole, the officers were faced with an unruly individual who was verbally belligerent, actively disturbing a police inquiry, and creating a dangerous situation for the officers involved. Plaintiff was intent on physically resisting arrest and as a result, plaintiff's injuries were just as likely caused by his own repeated efforts to physically thwart the officers' attempts to restrain him and regain control of the situation. Under these facts, considering the vast array of emotions defendant's laughter could signify, even when viewing the evidence in the light most favorable to plaintiff, plaintiff's reliance on the laughter alone, without more, did not create a justiciable question of fact with regard to whether defendant acted in good faith when he placed the cuffs on plaintiff.

Defendant also contends that the trial court erred when it concluded that handcuffing was a ministerial, as opposed to a discretionary, act. " 'Discretionary-decisional' acts are those which involve significant decision-making that entails personal deliberation, de-

cision, and judgment. 'Ministerial-operational' acts involve the execution or implementation of a decision and entail only minor decision-making." *Ross*, 420 Mich at 592. In reaching its conclusion, the trial court relied on *Watson v Quarles*, 146 Mich App 759; 381 NW2d 811 (1985). Citing *Ross*, *Watson* held that an officer's decision concerning what type of action to take, e.g., to make an arrest, issue a warning, or wait for assistance, is a discretionary act entitled to immunity. However, the execution of that decision is merely a ministerial act. *Id*. at 764-765. This Court has also observed that, "[i]t was generally conceded in *Ross* that a police officer's use of excessive force in effectuating an arrest is a ministerial act and not entitled to the cloak of immunity." *Butler v Detroit*, 149 Mich App 708, 718; 386 NW2d 645 (1986). Here, defendant was faced with an aggressive individual who was intent on physically and forcefully resisting the officers' efforts to restrain him. While handcuffing an individual under normal circumstances incident to an arrest without resistance may be a ministerial act, plaintiff's conduct in this case, given his belligerent attitude, physical resistance to being arrested, and defiant refusal to put his arms behind his back to be handcuffed, together with the concern for the officers' safety transformed the act of handcuffing plaintiff into a discretionary act. Under these circumstances, defendant's actions, in deciding how to respond to plaintiff, safely defuse the situation, and effectuate a lawful arrest of plaintiff as he resisted, were clearly discretionary. Accordingly, it is a decision to which governmental immunity applies.

Reversed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

MYLAND v MYLAND

Docket No. 292868. Submitted November 4, 2010, at Grand Rapids. Decided November 23, 2010, at 9:05 a.m.

Kimberly Myland obtained a divorce from Thomas Myland in the Kalamazoo Circuit Court, Family Division. To calculate plaintiff's spousal-support award, the court, Curtis J. Bell, J., imputed a $7,000 annual income to plaintiff, who was physically impaired, then multiplied the difference between defendant's income and plaintiff's imputed income by 0.25, a factor it chose because the parties had been married for 25 years. The court denied plaintiff's need-based request for attorney fees. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court's use of a formula to determine the spousal-support award in place of considering the relevant required factors was an error of law. A trial court has discretion to award spousal support under MCL 552.23, but it must balance the incomes and needs of the parties in a way that will not impoverish either party and is just and reasonable under the circumstances. Among the factors a court must consider in determining a spousal-support award are (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. A court should make specific factual findings regarding the factors that are relevant to the particular case. The trial court's formula in this case did not adequately account for many factors that were highly relevant to this proceeding.

2. The trial judge clearly erred by concluding that plaintiff was able to work and by imputing to her an income of $7,000 after having considered the judge's own medical ailments rather than

the plaintiff's situation, which included a diagnosis of progressive multiple sclerosis, cognitive disabilities, and limited work experience.

3. The trial court erred by failing to consider plaintiff's needs, specifically her health-care costs, and by determining that plaintiff should not be awarded any additional support to cover those costs, which resulted in a spousal-support award that would not cover her living expenses. In determining that plaintiff could pay for her health insurance from her spousal support, the trial court ignored the disparate economic positions of the parties. Plaintiff suffered from a severe, progressive physical impairment and had no meaningful work experience, no specialized training, and no real potential to earn any income, whereas defendant was healthy, earned about $62,500 a year in a field in which he had years of experience, and had a retirement account and health care coverage for which he paid $41 a month.

4. The trial court did not err by failing to enforce a stipulation between the parties that, according to plaintiff, required defendant to sell a vehicle he owned and use the proceeds to pay marital debt. The record indicated that the parties merely agreed that the car was defendant's separate property and that, if he sold it, plaintiff would receive an accounting of the sale and the proceeds would be applied to the marital debt. Because there was no indication of a mutual mistake, fraud, duress, or severe stress and plaintiff's interpretation of the stipulation had no support in the record, the trial court properly enforced the stipulation according to its plain terms.

5. The trial court's refusal to award plaintiff's need-based request attorney fees on the ground that neither party had engaged in egregious conduct or wasteful litigation constituted an error of law. Under MCR 3.206(C)(2)(a), a party who requests attorney fees and expenses must establish that the party is unable to bear the expense of the action and that the other party is able to pay. In a divorce action, this rule requires an award of attorney fees only as necessary to enable a party to prosecute or defend the suit without invading the same spousal assets on which the party is relying for support. On remand, the trial court must apply the correct legal analysis, giving special consideration to the specific financial situations of the parties and the equities involved, and must also consider whether plaintiff would be entitled to appellate attorney fees pursuant to MCR 3.206(C)(1) under the same analysis.

Reversed and remanded for further proceedings.

1. DIVORCE — SPOUSAL SUPPORT — SPOUSAL-SUPPORT FACTORS.

The statutory provision governing awards of spousal support in divorce actions prohibits the use of rigid and arbitrary formulas that fail to account for the parties' unique circumstances and relative positions; a trial court must consider the relevant spousal-support factors to balance the incomes and needs of the parties in a way that will not impoverish either party and is just and reasonable under the circumstances; among the factors a court must consider in determining a spousal-support award are (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity (MCL 552.23).

2. DIVORCE — ATTORNEY FEES — NEED-BASED ATTORNEY FEES.

A court may not refuse a need-based request for attorney fees on the ground that neither party had engaged in egregious conduct or wasteful litigation; a party who requests attorney fees and expenses must establish that the party is unable to bear the expense of the action and that the other party is able to pay; in a divorce action, this rule requires an award of attorney fees only as necessary to enable a party to prosecute or defend a suit without invading the same spousal assets on which the party is relying for support (MCR 3.206[C][2][a]).

Miller Johnson (by *Julie A. Sullivan* and *Eric J. Griswold*) for Kimberly Myland.

Stancati & Associates, P.C. (by *Ross F. Stancati*), for Thomas Myland.

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

K. F. KELLY, J. This appeal from a divorce judgment requires us to determine whether the trial court's

application and use of an arbitrary formula to calculate an award of spousal support was fair and equitable under the circumstances of this case. We hold that MCL 552.23 prohibits the use of rigid and arbitrary formulas that fail to account for the parties' unique circumstances and relative positions and reaffirm the mandate that a trial court awarding spousal support must consider the relevant factors. Further, we must also determine whether a trial court may disregard MCR 3.206(C)(2)(a) when considering a request for attorney fees based on need and merely rely on whether a party engaged in either egregious conduct or wasteful litigation. Under these circumstances, we conclude that the trial court failed to apply the proper needs-based analysis. Accordingly, we reverse and remand.

I. SPOUSAL SUPPORT

Plaintiff first argues that the trial court erred by failing to adequately consider the parties' ages, health, and abilities to work; their respective abilities to pay alimony; their needs; and their prior standard of living. Plaintiff also asserts that the trial court clearly erred by imputing $7,000 in income to her and by failing to consider the costs of the health insurance she purchased pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 USC 1161 *et seq*. We agree. We review a trial court's findings of fact related to an award of spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. at 654-655. "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of

the facts." *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008). We must affirm the trial court's dispositional ruling unless we are firmly convinced that it was inequitable. *Id*.

A trial court has discretion to award spousal support under MCL 552.23. *Korth v Korth*, 256 Mich App 286, 288; 662 NW2d 111 (2003). The primary purpose of spousal support is to "balance the incomes and needs of the parties in a way that will not impoverish either party" on the basis of what is "just and reasonable under the circumstances of the case." *Moore*, 242 Mich App at 654. Among the factors to be considered are

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003) (citations omitted).]

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." *Korth*, 256 Mich App at 289.

In this case, the trial court determined that defendant's income was $62,500 a year and imputed $7,000 in income to plaintiff. It then awarded plaintiff spousal support of $13,875 a year ($1,156 a month) after considering only the length of the parties' marriage. To reach this number, the trial court applied a mechanistic

formula,[1] stating that it had "a formula that it has utilized in the past" and it was "using that as a guideline . . . ." Accordingly, the court multiplied the difference between defendant's income and plaintiff's imputed income ($62,500 - $7,000 = $55,000) by 0.25. The trial court stated that it chose 0.25 on the basis of the number of years the parties were married—25.

This limited, arbitrary, and formulaic approach is without any support in the law. It totally fails to consider the unique circumstances of the parties' respective positions and fails to reach an outcome that balances the parties' needs and incomes. In short, we cannot sanction the use of such a blunt tool in any spousal support determination, and the trial court's use of this formula here was an error of law. Given the trial court's use and application of its formula, it is not surprising that it failed to consider the factors relevant to an award of spousal support, aside from the length of the parties' marriage and their relative incomes. Indeed, this formula does not adequately account for many factors that were highly relevant to this proceeding, including the parties' ages, health, abilities to work, needs, previous standard of living, and whether one of them would be supporting a dependent. The trial court considered none of these required factors in the instant proceeding.

Moreover, the trial court clearly erred by imputing to plaintiff an income of $7,000. As noted, the trial court made no explicit finding regarding plaintiff's health or her ability to work, nor did it make any finding that plaintiff had voluntarily reduced her income. The trial judge simply cited excerpts of the deposition of plain-

[1] The trial court offered no legal authority in support of this particular formula, and we have found no legal authority that supports such a formula.

tiff's doctor and considered the judge's own personal medical ailments before concluding that plaintiff could work and could earn $7,000 a year. This finding was clearly erroneous. First, parties to a divorce action "are entitled to individual consideration based on the law and facts applicable to their case, not on anecdotal experiences of the trial court." Cf. *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009) (applying this principle to a custody action). Thus, the trial judge's comments that despite his own ailments, he planned to work until he was "not able to do anything" and "when you don't have any options and you gotta work, you gotta work," were an entirely irrelevant and inappropriate basis on which to conclude that plaintiff herself had the ability to work. Second, after a review of the deposition of plaintiff's doctor and plaintiff's testimony, it is clear that plaintiff does not have the ability to work or to earn $7,000 a year because of her progressive multiple sclerosis (MS). Plaintiff testified that she could not work and that she suffered numbness in her extremities, blurred vision, clumsiness, confusion, lack of bladder control, chronic fatigue, drowsiness, vertigo, and depression. Plaintiff's doctor, Phillip Green, also testified that plaintiff suffered from weakness, clumsiness, decreased cognition, and confusion and that her condition would worsen over time. According to Dr. Green, plaintiff's intelligence quotient was in the 23d percentile, and her cognitive ability to process information and act on the information was in the 8th percentile. Dr. Green testified that plaintiff was not capable of full-time employment and indicated that part-time employment was "possible . . . but not probable," especially because of the progressive nature of her MS. Further, plaintiff's only work experience is childcare and waitressing—two physically demanding jobs that plaintiff could not reasonably be expected to

perform—and she lacks any valuable job skills that would qualify her for skilled employment. In light of this evidence, and a lack of any evidence that plaintiff voluntarily reduced her income, we have a definite and firm conviction that the trial court made a mistake by concluding that plaintiff had the ability to work and earn an income and by imputing to her a $7,000 income.

We also note, as plaintiff points out, that the trial court erred by failing to consider plaintiff's needs, specifically her health-care costs, and by determining that plaintiff should not be awarded any additional support to cover those costs. Presently, plaintiff pays $383 a month for COBRA benefits. The trial court determined that plaintiff could pay for COBRA from her spousal support and did not award any additional amount to cover her health-care costs. However, in making this determination, the trial court ignored the disparate economic positions of the parties. As noted, plaintiff suffers from a severe physical impairment that will become worse with time, and she has no meaningful work experience, no specialized training, and no real potential to earn any income. In comparison, defendant is healthy, he earns about $62,500 a year (approximately $5,200 a month) in a field in which he has years of experience, and he has a retirement account and health-care coverage for which he pays $41 a month. In consideration of the parties' relative positions and plaintiff's needs, it would not have been inequitable for the trial court to require defendant to maintain plaintiff's health insurance. See *Voukatidis v Voukatidis*, 195 Mich App 338, 339; 489 NW2d 512 (1992). The trial court, however, failed to even address the parties' relative positions. The trial court also overlooked the fact that its spousal support award would not even

cover plaintiff's living expenses.[2] Although the trial court likely expected plaintiff to make up the difference through her separate individual earnings, we have already concluded that the trial court clearly erred by determining that plaintiff had the ability to work and earn an income. Accordingly, on remand, the trial court must specifically consider plaintiff's needs, and specifically her health-related needs, in light of the fact that she has no earning potential and no ability to work.

In summary, an application of the general principles of equity, within the confines of the applicable statute and relevant caselaw, supports a conclusion that plaintiff is entitled to a greater amount of spousal support than the trial court awarded. Plaintiff has no earning ability, has severe health problems, and has significant costs associated with her health care, while defendant is relatively young, in good health, employed, earns a decent salary, and has relatively low living expenses. The trial court's award of spousal support, in light of plaintiff's health condition and earning ability, was deficient and clearly inequitable. On remand, the trial court must consider the relevant factors as they pertain to the parties and make specific findings of fact that justify its ultimate award of spousal support. In doing so, it must keep in mind that its goal is to reach a result that is just and reasonable under the circumstances and that "balance[s] the incomes and needs of the parties in a way that will not impoverish either party." *Moore*, 242 Mich App at 654. Finally, given the statutory mandate of MCL 552.23, we must emphasize that there is no room for the application of any rigid and arbitrary

[2] Under the division of property, plaintiff was responsible for half of the marital debt and the marital home's mortgage until the home is sold—approximately $1000 a month. Housing and COBRA alone, totaling $1,383 per month, would cost more than the $1,156 in monthly support that the trial court awarded.

formulas when determining the appropriate amount of spousal support and the trial court on remand must proceed accordingly.

II. STIPULATION

Next, plaintiff argues that the trial court erred by failing to enforce a stipulation between the parties that required defendant to sell his 1969 Pontiac Firebird and use the proceeds to pay marital debt. We disagree. "A settlement agreement, such as a stipulation and property settlement in a divorce, is construed as a contract." *MacInnes v MacInnes*, 260 Mich App 280, 283; 677 NW2d 889 (2004). The same legal principles that govern the construction and interpretation of contracts govern the parties' purported settlement agreement in a divorce case. *Id*. The existence and interpretation of a contract involves a question of law that this Court reviews de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

Under MCR 2.507(G),

> [a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Further,

> [i]t is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged. [*Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990).]

In this case, the record does not support a conclusion that the parties entered into a binding stipulation that required defendant to sell the Firebird to pay the marital debt. Rather, the parties merely agreed that the Firebird would be considered defendant's separate property and that, should defendant decide to sell it, plaintiff would be entitled to receive an accounting of the sale and the proceeds would be applied to the marital debt. Thus, whether to sell the Firebird remained in defendant's sole discretion, and, to plaintiff's detriment, he decided not to sell it. Accordingly, contrary to plaintiff's position, the trial court did not err by adhering to the parties' stipulation and excluding the Firebird from the distribution of the assets.

Further, we note that although plaintiff advances an alternative interpretation of the stipulation, she does not even argue that she entered into the stipulation because of a mutual mistake. Therefore, absent an indication of fraud, duress, or severe stress, the stipulation must be enforced according to its plain terms. Plaintiff does not assert that any of these foregoing circumstances existed, and her interpretation of the stipulation has no support in the record. Her argument on appeal is simply an attempt to avoid the effect of the stipulation and to regain that which she forfeited by agreeing to it: an adjudication of whether the Firebird constituted defendant's separate property and, if so, whether it could be invaded under MCL 552.23. No relief is warranted on this basis.

III. ATTORNEY FEES

Plaintiff also asserts that the trial court abused its discretion by denying her need-based request for attorney fees. We agree. We review for an abuse of discretion a trial court's decision whether to award attorney fees.

Reed v Reed, 265 Mich App 131, 164; 693 NW2d 825 (2005). We review findings of fact for clear error and questions of law de novo. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007).

The applicable court rule, MCR 3.206(C)(2)(a), states:

> A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay . . . .

This Court has interpreted this rule to require an award of attorney fees in a divorce action "only as necessary to enable a party to prosecute or defend a suit." *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). With respect to a party's ability to prosecute or defend a divorce action, a party "may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Further, a party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees. *Stallworth*, 275 Mich App at 288-289.

In this case, the trial court stated that it only awards attorney fees if a party engaged in egregious conduct or wasteful litigation and indicated that plaintiff could use her spousal support to pay her attorney, stating:

> With regard to attorney fees, this Court has never granted attorney fees unless the Court felt that there was an egregious—egregious conduct by [sic] the part of one of the litigants or wastefulness with regard to their actions. I always believe that everyone should, you know, with whatever allocation of assets pay their attorney fees. And so, I'm denying the invitation to assess attorney fees.

This basis for denying plaintiff attorney fees constituted an error of law. See *Maake*, 200 Mich App at 189; *Gates*, 256 Mich App at 438. It was incumbent upon the trial court to consider whether attorney fees were necessary for plaintiff to defend her suit, including whether, under the circumstances, plaintiff would have to invade the same spousal support assets she is relying on to live in order to pay her attorney fees and whether, under the specific circumstances, defendant has the ability to pay or contribute to plaintiff's fees. See *Gates*, 256 Mich App at 438; MCR 3.206(C)(2)(a). Thus, on remand, the trial court must apply the correct legal analysis, giving special consideration to the specific financial situations of the parties and the equities involved. In addition, the trial court must also consider whether plaintiff is entitled to appellate attorney fees pursuant to MCR 3.206(C)(1), applying the same analysis.

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

In re NALE ESTATE

Docket No. 293802. Submitted November 10, 2010, at Detroit. Decided November 23, 2010, at 9:10 a.m.

Fayette L. Nale was convicted by a jury in the Macomb Circuit Court of the voluntary manslaughter of her husband, Michael L. Nale. Julia Cook, the successor personal representative of Michael Nale's estate, then petitioned the Macomb County Probate Court for an order requiring Fayette Nale to forfeit and revoke all benefits from the decedent's estate. The probate court, Pamela G. O'Sullivan, J., entered an order granting the petition. Fayette Nale appealed, contending that the terms "feloniously and intentionally," as used in MCL 700.2803, the statute providing for such forfeiture by an individual who feloniously and intentionally kills the decedent, refers to first- and second-degree murder, but not manslaughter.

The Court of Appeals *held*:

1. The Supreme Court has defined voluntary manslaughter as an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool. An essential element of the crime of voluntary manslaughter is the intent to kill or commit serious bodily harm. Voluntary manslaughter has been specifically designated by the courts as an "intentional killing." The common-law application of the "slayer rule," which prohibits a person who commits a murder from benefitting from the person's criminal act or a devisee from taking under the will of a testator whose death was caused by the criminal and felonious act of the devisee, extends beyond the crime of murder to manslaughter.

2. Had the Legislature intended to limit the operation of MCL 700.2803 to instances where the beneficiary murders the decedent, it could have used the term "murder." Because voluntary manslaughter is an intentional killing and the common-law slayer rule has never been limited to the crime of murder, MCL 700.2803 operates to prevent one convicted of voluntary manslaughter from benefitting from the estate of the victim.

Affirmed.

CRIMINAL LAW — FORFEITURES AND PENALTIES — VOLUNTARY MANSLAUGHTER — DECEDENTS' ESTATES — WORDS AND PHRASES — INTENTIONALLY.

The term "intentionally" in the statute providing that an individual who feloniously and intentionally kills the decedent forfeits all benefits with respect to the decedent's estate and providing that if the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share, prevents a person convicted of voluntary manslaughter from benefitting from the victim's estate (MCL 700.2803).

Simasko, Simasko & Simasko, P.C. (by *Scott E. Bright*), for Julia Cook.

Sherry A. Wells for Fayette L. Nale.

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM. Respondent appeals as of right the probate court's grant of petitioner's petition for forfeiture and revocation of benefits. Respondent argues that the probate court improperly construed MCL 700.2803, Michigan's "slayer statute," as preventing her, as one convicted of the voluntary manslaughter of the decedent, from receiving benefits from the decedent's estate. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Respondent's husband, Michael Stephen Nale (the "decedent"), was stabbed to death on September 13, 2007. Respondent was charged with second-degree murder, MCL 750.317, in his death. On February 19, 2009, a jury convicted her of voluntary manslaughter, MCL 750.321, and she was sentenced to 34 to 180 months in prison.

On August 5, 2009, petitioner, Julia Cook, successor personal representative of the decedent's estate, filed in

the Macomb County Probate Court a petition for forfeiture and revocation of benefits, arguing that respondent had forfeited all benefits from the decedent's estate under MCL 700.2803 because she had "feloniously and intentionally" killed the decedent. Respondent argued that the term "feloniously and intentionally," as used in MCL 700.2803, refers to first- and second-degree murder, but not manslaughter. At a hearing on the petition, the court disagreed and entered an order granting the petition.

II. STANDARD OF REVIEW

In general, an appeal from a probate court decision is on the record, not de novo. MCL 600.866(1); *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). Nonetheless, questions of law, such as issues of statutory construction, are reviewed de novo. *Temple*, 278 Mich App at 128. The instant case involves a question of law construing MCL 700.2803, and our review is de novo.

III. ANALYSIS

When interpreting statutes, a court's primary goal is to determine and give meaning to the Legislature's intent. *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000). Once ascertained, the Legislature's intent must prevail despite any conflicting rule of statutory construction. *Terzano v Wayne Co*, 216 Mich App 522, 526-527; 549 NW2d 606 (1996). This Court may determine legislative intent by considering the language of the statute and the general scope the statute seeks to accomplish or the evil it seeks to remedy. *Cowen v Dep't of Treasury*, 204 Mich App 428, 431-432; 516 NW2d 511 (1994). In construing the language of a statute, "the Legislature is deemed to act

with an understanding of common law in existence before the legislation was enacted." *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997).

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., provides that a devisee who "feloniously and intentionally" kills a decedent forfeits all benefits from the decedent's estate. MCL 700.2803 states, in pertinent part:

> (1) An individual who feloniously and intentionally kills the decedent forfeits all benefits under this article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share.
>
> (2) The felonious and intentional killing of the decedent does all of the following:
>
> (a) Revokes all of the following that are revocable:
>
> (*i*) Disposition or appointment of property made by the decedent to the killer in a governing instrument.
>
> (*ii*) Provision in a governing instrument conferring a general or nongeneral power of appointment on the killer.
>
> (*iii*) Nomination of the killer in a governing instrument, nominating or appointing the killer to serve in a fiduciary or representative capacity, including a personal representative, executor, trustee, or agent.
>
> (b) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common.

This provision, sometimes referred to as a "slayer rule," is derived from the common-law rules that one who commits a murder cannot benefit by his or her criminal

act and that no devisee can take under the will of a testator whose death has been caused by the criminal act of the devisee. *Garwols v Bankers Trust Co*, 251 Mich 420, 428; 232 NW 239 (1930).

Respondent was convicted of voluntary manslaughter. She argues that manslaughter does not involve an "intentional killing," and notes that she was specifically acquitted of murdering her husband. Thus, respondent asserts that MCL 700.2803 does not prevent her from receiving benefits from the estate of her late husband. The issue in this case rests, therefore, on the meaning of the term "intentionally" as used by the Legislature in MCL 700.2803 when describing the killing of a decedent.

The manslaughter statute, MCL 750.321, encompasses two types of common-law manslaughter: voluntary and involuntary. *People v Townes*, 391 Mich 578, 588-589; 218 NW2d 136 (1974). Although the punishment for manslaughter is defined by statute, the common law defines the elements of voluntary and involuntary manslaughter. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

The Michigan Supreme Court has defined voluntary manslaughter as an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool. *People v Mendoza*, 468 Mich 527, 534-535; 664 NW2d 685 (2003), citing *Maher v People*, 10 Mich 212, 219 (1862); *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993). An essential element of the crime of voluntary manslaughter is the intent to kill or commit serious bodily harm. *People v Delaughter*, 124 Mich App 356, 360; 335 NW2d 37 (1983). Murder and voluntary manslaughter are both homicides that share the element of being "intentional"

killings. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). However, the existence of provocation characterizes the offense of voluntary manslaughter, *Pouncey*, 437 Mich at 388, whereas the presence of malice characterizes murder, *Mendoza*, 468 Mich at 534-535.

In contrast, involuntary manslaughter has been defined as " 'the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.' " *People v Scott*, 29 Mich App 549, 551; 185 NW2d 576 (1971), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923). Courts have, therefore, specifically designated voluntary manslaughter an "intentional" killing.

Before the enactment of MCL 700.2803 and its predecessor, MCL 700.251, the Michigan Supreme Court twice referred favorably to a description of the common-law "slayer rule" as described in Wharton on Homicide (3d ed), § 665:

> "To permit a person who commits a murder, or any person claiming under him, to benefit by his criminal act, would be contrary to public policy. And no devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself. And in applying this rule, *no distinction can be made between a death caused by murder and one caused by manslaughter."* [*Garwols*, 251 Mich at 428 (emphasis added); see also *Budwit v Herr*, 339 Mich 265, 270-271; 63 NW2d 841 (1954), quoting with approval *Garwols* quoting Wharton.]

While those cases did not involve the application of the common-law rule in the context of manslaughter, they nonetheless reveal that the common-law application of the slayer rule extends beyond the crime of murder to manslaughter.

When the Legislature enacts statutes in derogation of the common law, it is presumed to know the existence of the common law. *Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006). Had the Legislature, knowing the state of the common law, intended to limit the operation of MCL 700.2803 to instances where the beneficiary murders the decedent, it could have used that specific term.[1] Furthermore, when a statute contravenes the common law, courts must construe the statute so that it results in the least change in the common law. *Nation*, 454 Mich at 494. Given that there is no reason to believe that the Legislature intended to limit the operation of MCL 700.2803 in this way, it is fair to conclude that it intended to encompass the crimes that the common law deems "intentional killings," including voluntary manslaughter.

Because voluntary manslaughter has been defined by Michigan courts as an intentional killing, and because the common law "slayer rule" has never been limited to the crime of murder, it follows logically that MCL 700.2803 operates to prevent one convicted of voluntary manslaughter from benefiting from the estate of the decedent. Because respondent was convicted of voluntary manslaughter, she is subject to the forfeiture rule of MCL 700.2803.

Affirmed.

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[1] Cf. *Ernsting v Ave Maria College*, 274 Mich App 506, 513; 736 NW2d 574 (2007) (stating that had the Legislature intended to limit the term "law enforcement agency" to mean only state and local law enforcement agencies, it could have expressly so stated, as it did in other sections of the Whistleblowers' Protection Act, MCL 15.361 *et seq*.).

SZPAK v INYANG

Docket No. 292625. Submitted November 10, 2010, at Detroit. Decided November 23, 2010, at 9:15 a.m.

David and Michelle Szpak, individually, and Michelle Szpak as next friend of the minor, Alexa Szpak, brought a medical malpractice action in the Oakland Circuit court against Alexa's treating physicians, Joy Inyang, M.D., Michael Falzon, M.D., and B. Najem, M.D., and their principals, Huron Valley Hospitals, Inc. (HVH), and Huron Valley Pediatrics, P.C. (HVP), alleging negligence and derivative claims. To ensure compliance with the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*., counsel for Najem and HVP filed a motion in which Inyang, Falzon, and HVH joined, seeking a qualified protective order covering ex parte interviews with any treating physicians and prohibiting them from using or disclosing any health information acquired in the covered interviews, as required by HIPAA. 45 CFR 164.512(e)(1). The court, Denise Langford Morris, J., granted the order but added conditions requested by plaintiffs requiring that plaintiffs' counsel be given notice of the interviews, permitting plaintiffs' counsel to be present at the interviews, and barring defense counsel from any ex parte interviews with David's and Michelle's treating physicians. The court subsequently dismissed the claims of David and Michelle Szpak because the period of limitations had expired before they brought their claims. Najem and HVP appealed; Inyang, Falzon, and HVH cross-appealed.

The Court of Appeals *held*:

Ex parte interviews by defense counsel are permitted under Michigan law, and nothing in HIPAA specifically precludes them. However, under MCR 2.302(C), when a party seeking discovery moves for a qualified protective order as required by HIPAA, on reasonable notice and for good cause shown, the court may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Thus, the conditions imposed on the ex parte interviews must be those that justice requires. The first part of the protective order—the portion sought by defendants—specifically prohibited defendants from using or disclosing any health information ac-

quired in the covered interviews, as required by HIPAA. The additional conditions imposed by the court—that plaintiffs' counsel must have notice and may be present at the interviews—were sought by plaintiffs only in response to the motion, and had no bearing on the disclosure of health information. Although plaintiffs argued that the treating physicians in this case could be subject to intimidation during the interviews, they did not identify any facts supporting the fear that defense counsel would intimidate treating physicians during voluntary ex parte interviews. Because there was no showing that justice required the conditions requested by plaintiffs and imposed by the court, the court abused its discretion when it imposed conditions unrelated to compliance with HIPAA or any related privacy concerns.

Reversed in part, vacated in part, and remanded for further proceedings.

HEALTH — HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT — MEDICAL MALPRACTICE — EX PARTE INTERVIEWS WITH HEALTH-CARE PROVIDERS — PROTECTIVE ORDERS.

Ex parte interviews by defense counsel are permitted under Michigan law as long as the party seeking discovery moves for a qualified protective order as required by HIPAA; on reasonable notice and for good cause shown, the court may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense (42 USC 1320d *et seq.*; 45 CFR 164.512[e][1]; MCR 2.302[C]).

Kelman Loria, PLLC (by *Charles H. Chomet*), for David, Michelle, and Alexa Szpak.

Corbet, Shaw, Essad & Tucciarone, P.L.L.C. (by *Daniel R. Corbet* and *Joshua O. Booth*) for Joy Inyang, M.D., Michael Falzon, M.D., and Huron Valley Hospitals, Inc.

Plunkett Cooney (by *Robert G. Kamenec*) and *Foster Swift Collins & Smith, P.C.* (by *Bruce A. Vande Vusse*), for B. Najem, M.D., and Huron Valley Pediatrics, P.C.

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM. Defendants[1] appeal by leave granted[2] the trial court's order granting in part and denying in part defendants' motion for a qualified protective order in this medical malpractice action. Defendants argue that the trial court abused its discretion when it imposed certain conditions on the protective order. We agree, and therefore reverse in part and vacate in part the qualified protective order.

Defendants argue that where a qualified protective order is entered to ensure compliance with the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*., it was an abuse of discretion also to require that plaintiffs receive notice of, and an opportunity to attend, ex parte interviews by defense counsel with plaintiff Alexa's treating physicians.[3]

A trial court's decision on discovery motion is reviewed for an abuse of discretion. *Holman v Rasak*, 486 Mich 429, 436; 785 NW2d 98 (2010). Questions of statutory interpretation are reviewed de novo as questions of law. *Id*.

The parties agree that the trial court is authorized to permit ex parte meetings with witnesses, in the inter-

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[1] Defendants-appellants, B. Najem, M.D., and Huron Valley Pediatrics, P.C., actually filed the application for leave to appeal, and defendants-cross-appellants, Joy Inyang, M.D., Michael Falzon, M.D., and Huron Valley Hospitals, Inc., filed a cross-appeal raising the identical issue raised by defendants-appellants. Defendants-cross-appellants had likewise filed a concurrence with defendants-appellants' motion in the trial court that is the subject of this appeal. Accordingly, we will address the two claims together on appeal.

[2] *Szpak v Inyang*, unpublished order of the Court of Appeals, entered October 16, 2009 (Docket No. 292625).

[3] The protective order actually prohibited *all* ex parte contact with the treating physicians of plaintiffs David Szpak and Michelle Szpak. The trial court has since dismissed the individual claims of David and Michelle, leaving only the claims of Alexa, their daughter. As a result, defendants' challenge to § II of the order concerning the physicians of David and Michelle is now moot.

ests of efficient discovery. Our Supreme Court has recently affirmed this position on facts very similar to the instant case. In *Holman*, the Court stated:

> Ex parte interviews are permitted under Michigan law, and nothing in HIPAA specifically precludes them. Because it is possible for defense counsel to insure that any disclosure of protected health information by the covered entity complies with [HIPAA] by making "reasonable efforts" to obtain a qualified protective order, HIPAA does not preempt Michigan law concerning ex parte interviews. [*Holman*, 486 Mich at 442; see also *G P Enterprises, Inc v Jackson Nat'l Life Ins Co*, 202 Mich App 557, 567; 509 NW2d 780 (1993) (ex parte interviews with treating physicians are generally proper).]

Toward the end of its opinion, the Court concluded that "a trial court retains its discretion under MCR 2.302(C) to issue protective orders and to impose conditions on ex parte interviews." *Holman*, 486 Mich at 447-448. The Court in *Holman*, however, was not asked to consider the validity of any actual conditions imposed on ex parte interviews.

MCR 2.302(C) provides, in relevant part:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

Thus, the issue to be resolved is whether there has been a demonstration of good cause requiring the conditions imposed by the trial court on the proposed ex parte interviews, i.e., whether imposition of § I(D). (requiring defendants to give plaintiffs' attorney notice of the time, date and locations of meeting) and § I(E). (allowing plaintiffs' counsel to attend the meetings) of the order was an abuse of discretion.

The protective order in this case was sought by *defendants* in an effort to comply with HIPAA. See *Holman*, 486 Mich at 438-442 (discussing HIPAA requirements and Michigan law). The first part of the protective order—the portion sought by defendants—specifically prohibits defendants from using or disclosing any health information acquired in the covered interviews, as required by HIPAA. See 45 CFR 164.512(e)(1)(v). The additional conditions imposed by the trial court—that plaintiffs' counsel must have notice and may be present at the interviews—were sought by plaintiffs only in response to appellants' motion and have no bearing on the disclosure of health information. Thus, MCR 2.302(C) requires that the additional conditions be justified in their own right.

Plaintiffs argued in the trial court that the treating physicians in this case could be subject to intimidation "when confronted with an Order permitting him or her to meet with Defense counsel." Plaintiffs further argue on appeal that "topics of conversation that could arise in an ex parte conversation are subjects such as malpractice in general, the witness's insurance company, how premiums could rise against all doctors in the event of a verdict, mutual acquaintances, just to name a few." We observe that the specter of intimidation raised by plaintiffs would be theoretically present in any medical malpractice case. Plaintiffs have not identified any facts in *this* case supporting a specific fear that defense counsel would "intimidate" the treating physicians during a voluntary ex parte interview. See *Herald Co v Tax Tribunal*, 258 Mich App 78, 88-89; 669 NW2d 862 (2003) (protective order appropriate to protect trade secrets); *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35-36; 654 NW2d 610 (2002) (protective order proper in the absence of any demonstration that proposed discovery is relevant). Further,

plaintiffs have not argued that the interviews sought by defendants are not relevant to the issues in this case, or that there is any specific danger of "annoyance, embarrassment, oppression, or undue burden or expense." MCR 2.302(C). They only argue that there is a generalized danger of intimidation.

Thus, in the words of MCR 2.302(C), there has been no showing that "justice requires" the conditions requested by plaintiffs and imposed by the trial court. Because the trial court's authority to issue a protective order is defined by MCR 2.302(C), the trial court abused its discretion when it imposed the conditions within § I(D) and § I(E) of the order on ex parte interviews with the treating physicians unrelated to compliance with HIPAA, or any related privacy concerns, and in the absence of evidence to support a reasonable concern for intimidation, harassment, and the like. *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007) (error of law may lead to abuse of discretion).[4]

Reversed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

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[4] Defendants have not challenged any parts of the order other than § I(D) and § I(E), except § II, which is already noted as now moot.

PEOPLE v LIGHT

Docket No. 293746. Submitted November 10, 2010, at Detroit. Decided November 23, 2010, at 9:20 a.m.

Michael D. Light pleaded no contest in the Leelanau Circuit Court to a charge of unarmed robbery and was sentenced by the court, Thomas G. Power, J. Defendant appealed by leave granted, contending that the court erred by scoring 5 points for sentencing offense variable (OV) 12, MCL 777.42, after determining that defendant had committed two contemporaneous felonious criminal acts involving crimes other than the sentencing offense, i.e., carrying a concealed weapon and either larceny from a person or larceny in a building. It was unclear from the record which form of larceny the court chose to use for its scoring decision.

The Court of Appeals *held*:

1. A felonious criminal act is defined to be contemporaneous if the act occurred within 24 hours of the sentencing offense and will not result in a separate conviction. When scoring OV 12, a court must look beyond the sentencing offense and consider as contemporaneous felonious criminal acts only those separate acts or behavior that did not establish the sentencing offense.

2. Defendant's physical act of wrongfully taking money from the owner of a grocery store while inside the grocery store was, for purposes of scoring OV 12, the same single act for all forms of larceny—robbery, larceny from a person, and larceny in a building. Therefore, even though the trial court sentenced defendant for unarmed robbery, defendant's sentencing offense included all acts occurring in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property. Here, the robbery completely subsumed the larceny.

3. Because defendant's sentencing offense was unarmed robbery, neither larceny from a person nor larceny in a building could be used as a contemporaneous felonious criminal act to increase defendant's OV 12 score.

4. Defendant's act of carrying a concealed weapon contemporaneously with the robbery provided a proper basis for determining that defendant committed one contemporaneous felonious criminal act for purposes of scoring OV 12. Defendant should have been assessed only 1 point under OV 12. A different recommended minimum guideline range results when OV 12 is properly scored. The sentencing order must be reversed and the case must be remanded to the trial court for resentencing.

Reversed and remanded.

1. SENTENCES — OFFENSE VARIABLE 12 — CONTEMPORANEOUS FELONIOUS CRIMINAL ACTS.

A felonious criminal act is contemporaneous with the sentencing offense, for purposes of scoring offense variable 12, if the act occurred within 24 hours of the sentencing offense and will not result in a separate conviction; a court must look beyond the sentencing offense and consider as contemporaneous felonious criminal acts only those separate acts or behavior that did not establish the sentencing offense (MCL 777.42).

2. SENTENCES — OFFENSE VARIABLE 12 — UNARMED ROBBERY — LARCENY FROM A PERSON — LARCENY IN A BUILDING.

Neither larceny from a person nor larceny in a building may be used as a contemporaneous felonious criminal act to increase the offense variable 12 score of a defendant convicted of unarmed robbery when the physical act of taking that supported the unarmed robbery conviction is the same physical act used to establish larceny from a person or larceny in a building (MCL 750.357, 750.360, 750.530, 777.42).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Joseph T. Hubbell*, Prosecuting Attorney, for the people.

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

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM. Defendant, Michael Light, appeals by leave granted his prison sentence imposed after plead-

ing no contest to a charge of unarmed robbery.[1] The trial court sentenced Light to serve a prison term of 4 to 15 years, with credit for 242 days served in jail. We conclude that the trial court did not properly score offense variable (OV) 12[2] when it sentenced Light. Therefore, we reverse and remand this case to the trial court for resentencing consistent with this opinion.

I. BASIC FACTS

A. OVERVIEW

On December 28, 2007, Light approached the Cherry Bend grocery store and stood outside for approximately 20 minutes. After waiting outside, Light entered the store and took a six-pack of beer from the cooler. Light proceeded to the check-out counter and handed the beer to Daniel Plamondon, the store's owner. Then, Light pulled out a four- or five-inch knife and held it in a stabbing position. While wielding the knife, Light yelled, "[G]ive me your f---ing money." Plamondon handed Light approximately $300, and Light fled.[3] Immediately after, Plamondon called 911 and his neighbor, Suttons Bay Police Chief Del Moore.

Chief Moore responded to the scene and followed Light's footprints in the fresh snow south to a residence. As Chief Moore approached the residence, he

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[1] MCL 750.530. The prosecution originally charged Light with armed robbery , MCL 750.529, and notified him that he could be sentenced as a second-offense habitual offender, MCL 769.10, but agreed to dismiss the habitual-offender sentence enhancement notice pursuant to a June 23, 2008 plea agreement.

[2] MCL 777.42.

[3] The prosecutor's presentence investigation report indicated that two young children were present in the store at the time, although subsequent questioning by the police showed that the children had been oblivious to the events that took place.

observed Light standing outside. Light matched Plamondon's description of the robber, so Chief Moore gave an oral command to Light. Because Light did not respond to Chief Moore's oral command and because he appeared to be preparing to escape, Chief Moore drew his gun and arrested Light. Plamondon identified Light in a photo lineup, and two witnesses from the store's parking lot identified Light in a physical lineup.

B. LIGHT'S PLEA AGREEMENT AND SENTENCING

As previously stated, the prosecutor charged Light with armed robbery.[4] The prosecutor also filed a notice of Light's status as a second-offense habitual offender.[5] However, as part of a plea agreement, the prosecutor later dismissed the habitual-offender notice.

During sentencing, Light's attorney objected to the scoring of 5 points for sentencing OV 12. The trial court overruled the objection, finding that Light had committed two or more contemporaneous felonious acts. The trial court used the carrying of a concealed weapon as one of the two contemporaneous felonious criminal acts because of the knife that Light carried and then used to commit the robbery. For the second contemporaneous act, the trial court considered both larceny from a person and larceny in a building. The trial court may have determined that larceny in a building was an appropriate contemporaneous act because it is a cognate lesser offense of robbery. However, the trial court's statements on the record were unclear regarding which form of larceny it ultimately chose to use for its scoring decision.

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[4] See MCL 750.529.

[5] See MCL 769.10.

II. TRIAL COURT'S SCORING OF OV 12

A. STANDARD OF REVIEW

When a defendant appeals his or her sentence, we review the trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."[6] Because this appeal also involves a question of the interpretation of the statutory sentencing guidelines under MCL 769.34, we review it de novo.[7]

B. THE PLAIN LANGUAGE OF OV 12

Under MCL 777.42, OV 12 establishes the scoring guidelines for the trial court to use "to determine whether [a] defendant engaged in any 'contemporaneous felonious criminal acts.' "[8] "If [the] defendant did not engage in any contemporaneous felonious criminal acts, the trial court [must] score OV 12 at zero points."[9] "However, if [the] defendant did engage in contemporaneous felonious criminal acts, the trial court [must] evaluate the number of acts and whether the acts constituted crimes against a person or other crimes, see MCL 777.42(1)(a) to (f), and then assign 'the number of points attributable to the [corresponding subdivision of the statute] that has the highest number of points,' MCL 777.42(1)."[10] Specifically, if the trial court finds that the defendant committed two contemporaneous felonious criminal acts involving other crimes, then the

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[6] *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[7] *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003); *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009).

[8] *Bemer*, 286 Mich App at 32, quoting MCL 777.42(1).

[9] *Id*., citing MCL 777.42(1)(g).

[10] *Id.* (some alteration by *Bemer*).

trial court may allocate 5 points for OV 12.[11]

C. INTERPRETING THE LANGUAGE OF OV 12

This Court interprets sentencing guidelines in accordance with the rules of statutory construction.[12]

> The primary goal of statutory construction is to give effect to the intent of the Legislature. If the language of the statute is unambiguous, judicial construction is not permitted because the Legislature is presumed to have intended the meaning it plainly expressed. Judicial construction is appropriate, however, if reasonable minds can differ concerning the meaning of a statute. Where ambiguity exists, this Court seeks to effectuate the Legislature's intent by applying a reasonable construction based on the purpose of the statute and the object sought to be accomplished. "The court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute." In construing a statute, the statutory provisions must be read in the context of the entire statute in order to produce a harmonious whole; courts must avoid a construction that would render statutory language nugatory.[13]

As stated, MCL 777.42 establishes the scoring guidelines to determine a defendant's OV 12 sentencing score for any "contemporaneous felonious criminal acts."[14] "A felonious criminal act is defined to be contemporaneous if the *act* occurred within 24 hours of the *sentencing offense* and will not result in a separate conviction."[15] According to the Michigan Supreme Court, " 'the Legislature unambiguously made it known when *behavior outside the*

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[11] MCL 777.42(1)(e).

[12] *People v Lyons (After Remand)*, 222 Mich App 319, 322; 564 NW2d 114 (1997).

[13] *McLaughlin*, 258 Mich App at 672-673 (citations omitted).

[14] See MCL 777.42(1); *Bemer*, 286 Mich App at 32.

[15] *Bemer*, 286 Mich App at 32-33, citing MCL 777.42(2)(a) (emphasis added).

offense being scored is to be taken into account.' "[16] Significantly, OV 12 distinguishes within the same sentence between the "act" that occurred and the "sentencing offense."[17] This indicates that the Legislature specifically intended to draw a distinction between the two words.[18] There is support for this rationale within the language of two other offense variables, OV 11 and OV 13. OV 11 states, "Multiple sexual penetrations of the victim by the offender *extending beyond the sentencing offense* may be scored in offense variables 12 or 13."[19] Thus, the language of OV 11 suggests that the Legislature did not intend for contemporaneous felonious criminal acts to be the same acts that established the sentencing offense. Likewise, the language of OV 13 indicates that a trial court should allocate points when the "[sentencing] *offense* was *part* of a pattern of felonious criminal activity . . . ."[20] OV 13 clearly distinguishes the offense from the activity. Therefore, when scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense.

D. APPLYING THE LANGUAGE OF OV 12 TO LIGHT'S UNARMED-ROBBERY CONVICTION

In this case, Light pleaded guilty to a charge of "unarmed robbery" under MCL 750.530. The Legislature defined "unarmed robbery" as follows:

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[16] *People v McGraw*, 484 Mich 120, 125; 771 NW2d 655 (2009), quoting *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008) (emphasis added).

[17] MCL 777.42(2)(a)(*i*).

[18] See *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 14; 795 NW2d 101 (2009) (noting that "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings").

[19] MCL 777.41(2)(b) (emphasis added).

[20] MCL 777.43(1)(a) through (f) (emphasis added).

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (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, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.[21]

Neither party disputes that the trial court scored OV 12 on the basis of the sentencing offense of unarmed robbery. Further, neither party disagrees that carrying a concealed weapon constituted one of the two contemporaneous felonious acts needed to score 5 points for OV 12. However, the parties differ in their views about which form of larceny the trial court properly used as the second contemporaneous felonious act, which allowed the trial court to allocate 5 points for OV 12.

Light argues that the trial court erred by allocating 5 points for his OV 12 score because the trial court incorrectly identified larceny from a person as the second separate contemporaneous felonious act. Light further argues that larceny from a person is a necessarily included lesser offense of robbery[22] and that it cannot be labeled as a contemporaneous felonious act for the purpose of scoring OV 12. Accordingly, Light claims that, at most, the trial court should have only assessed 1 point under OV 12 for carrying a concealed weapon. Light contends that this would result in a total OV level of III, PRV Level C, for a guideline range of 19

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[21] MCL 750.530.

[22] *People v Adams*, 128 Mich App 25, 31; 339 NW2d 687 (1983) (noting that "the larceny which is an element of robbery is a larceny from a person").

to 38 months[23] and that the trial court's sentence of 48 months falls outside the minimum guideline range.

In contrast, the prosecution argues that the trial court correctly scored 5 points for OV 12 because larceny in a building is not a necessarily included lesser offense of robbery, but rather a cognate offense.[24] The prosecution concludes that the trial court properly used larceny in a building and carrying a concealed weapon as two separate contemporaneous felonious acts under OV 12.

Light is correct that larceny from a person is a necessarily included lesser offense of robbery.[25] Likewise, the prosecution is correct that larceny in a building is a cognate offense of robbery because robbery does not include the "building" element and larceny does not require the use of force.[26] And, as previously stated, the trial court did not clearly state whether it based its scoring on larceny from a person or larceny in a building. However, for OV 12 scoring purposes, Light's physical act of wrongfully taking Plamondon's money while inside a grocery store is the same single act for all forms of larceny—robbery, larceny from a person, and larceny in a building. Therefore, even though the trial court sentenced Light for unarmed robbery, Light's sentencing offense included all acts "occur[ring] in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property."[27]

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[23] See MCL 777.64.

[24] See also *People v Ramsey*, 218 Mich App 191, 195; 553 NW2d 360 (1996).

[25] *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002) (noting that it is impossible to commit the greater offense without first having committed the included lesser offense).

[26] See *People v Stein*, 90 Mich App 159, 167; 282 NW2d 269 (1979).

[27] MCL 750.530(2).

Here, the robbery completely subsumed the larceny. The fact that the larceny occurred in a building, and thus could have subjected Light to multiple convictions,[28] does not change the outcome. Even though the trial court did not convict Light of either form of larceny, both offenses form the basis of Light's "sentencing offense" of unarmed robbery. Because Light's sentencing offense was unarmed robbery, neither form of larceny could be used as the contemporaneous felonious act needed to increase Light's OV 12 score. In other words, the language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense.

III. CONCLUSION

The trial court erred when it determined that larceny from a person or larceny in a building was a contemporaneous felonious act under MCL 777.42. Because both forms of larceny served as the basis of Light's sentencing offense, the trial court should not have scored 5 points for Light's unarmed-robbery conviction under OV 12. However, the parties do not dispute that Light's act of carrying a concealed weapon provides a proper basis for a contemporaneous felonious criminal act for purposes of scoring OV 12. The act of carrying a concealed weapon occurred contemporaneous with the robbery. Accordingly, the trial court should have assessed only 1 point under MCL 777.42(1)(f) for carrying a concealed weapon. This correction reduces Light's total OV score from level IV to level III (from 35 points to 31 points), which will change the recommended minimum

[28] See *People v Smith*, 478 Mich 292, 296, 300-301; 733 NW2d 351 (2007).

guideline range to 19 to 38 months.[29] Therefore, because the erroneous score would result in a different recommended range when corrected, we reverse and remand this case to the trial court for resentencing consistent with this opinion.[30]

Reversed and remanded. We do not retain jurisdiction.

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[29] See MCL 777.64.

[30] *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

HARING CHARTER TWP v CITY OF CADILLAC
SELMA TWP v CITY OF CADILLAC

Docket Nos. 292122 and 292164. Submitted September 8, 2010, at Lansing. Decided October 12, 2010. Approved for publication November 23, 2010, at 9:25 a.m.

Haring Charter Township and Selma and Clam Lake Townships brought separate actions in the Wexford Circuit Court against the city of Cadillac, raising counts for breach of contract, seeking specific performance, and requesting declaratory judgment regarding the parties' rights under disputed contracts. In 1977 and 1980, the townships, through Wexford County, entered into agreements with the city for the provision of wastewater treatment and disposal services. The agreements expressly provided they are to terminate on May 12, 2017, and may be renewed by mutual agreement of the parties. In 2006, defendant notified plaintiffs that it did not intend to renew the contracts after May 2017. These suits followed. The court, William M. Fagerman, J., consolidated the cases, and defendant moved for summary disposition of the request for declaratory judgment. Regarding the parties' rights under the agreements, plaintiffs asserted that they had not merely contracted for services for a finite length of time but had purchased a percentage of the system and thus had ownership rights that could not be terminated unilaterally by defendant. Plaintiffs asserted that defendant had a duty to provide wastewater treatment services through the "design life" of the system, which was, according to them, 75 years, and that the contracts only set forth the terms under which the services were to be provided. The court found there was no ambiguity in the contracts' termination clauses, concluding that plaintiffs had purchased "capacity" in the system for a fixed length of time, not ownership rights, and that federal regulations regarding "design life" did not create an ambiguity in the contracts. Under MCL 123.742, the contracts could not exceed 40 years, and their expiration date, set at 40 years from execution of the 1977 contract, showed the parties were aware of the statutory limitation. Defendant was not a public utility and so statutes concerning such entities were inapplicable. The court granted defendant's motion for summary disposition on the issue. Haring Township and Selma Township appealed separately, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The contracts are unambiguous. Both the 1977 and 1980 contracts contain an explicit expiration date; they are fixed-term contracts that expire on May 12, 2017. Plaintiffs were purchasing "capacity" of the system for that length of time; there is no indication that plaintiffs were purchasing any ownership interest in defendant's facilities. To the contrary, the contracts explicitly provided that defendant's system and plaintiffs' systems are separate, and defendant and plaintiffs are separately responsible for the operation, maintenance, expansion, improvements, and administration of their own systems. There were no provisions in the contracts for shared ownership or for plaintiffs to have any ownership interest in defendant's system.

2. Under the Federal Water Pollution Control Act of 1972, the federal government provided grants for the construction and expansion of wastewater treatment works, but imposed certain requirements on recipients of grant funding. Grant money had to be used solely for the purposes of the project as approved. However, at the time the grants were awarded to defendant, the regulations did not require defendant to provide services to plaintiffs for the "design life" of the facilities. Nor did they require defendant to operate the treatment works in a particular manner or for a particular period of time. Defendant used the money according to the requirement that it be used solely for the project as approved.

3. Under MCL 123.742(1), the parties had discretion to enter into a contract for sewage disposal for a period not exceeding 40 years. Because this is discretionary, defendant is not a public utility and thus had no legal duty to continue to provide sewage disposal services beyond the unambiguous date of the contracts.

Affirmed.

JANSEN, J., dissenting, would have dismissed these matters as unripe for adjudication. The contracts had an express termination date of May 12, 2017. Although defendant gave notice in 2006 that it did not intend to renew the contracts after May 2017, it does not necessarily follow that future city administrators actually will decline to renew the contracts; they might instead decide to renew them and continue providing services to plaintiffs.

1. WASTE — WASTEWATER TREATMENT SERVICES — FEDERAL GRANTS — REQUIREMENTS.

Federal grant money provided for the construction and expansion of wastewater treatment works imposes certain requirements on

recipients of grant funding; however, the regulations in effect in 1974 did not require the project to be operated for the length of its design life (40 CFR 35.935-1[b]).

2. MUNICIPAL CORPORATIONS — CONTRACTS — SEWAGE TREATMENT — TIME LIMIT.

Parties have discretion to enter into a contract for sewage disposal for a period not exceeding 40 years; this does not make either party a public utility and thus the parties have no legal duty to continue to provide sewage disposal services beyond the unambiguous date of the contracts (MCL 123.742[1]).

Mika Meyers Beckett & Jones, PLC (by *Ronald M. Redick*), and *Marco S. Menezes* for Haring Charter Township.

Mika Meyers Beckett & Jones, PLC (by *Ronald M. Redick*), for Selma Township.

McCurdy Wotila & Porteous, Professional Corporation (by *Roger L. Wotila* and *Nathan Piwowarski*), for the city of Cadillac.

Amici Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John H. Bauckham*), for the Michigan Townships Association.

Varnum LLP (by *Randall W. Kraker* and *Beverly Holaday*) for the Michigan Municipal League.

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

BANDSTRA, J. In Docket No. 292122, plaintiff, Haring Charter Township, appeals by leave granted the May 4, 2009, order granting partial summary disposition in favor of defendant, city of Cadillac. In Docket No. 292164, plaintiff, Selma Township, appeals as of right the May 4, 2009, order granting summary disposition in favor of defendant, city of Cadillac. We affirm.

I. FACTS AND PROCEEDINGS BELOW

These consolidated cases arise from a dispute about the scope and meaning of contracts between plaintiffs and defendant for the provision of wastewater treatment services to the townships. By their express terms, these contracts expire on May 12, 2017. After defendant informed plaintiffs that it did not intend to renew the contracts, plaintiffs filed the instant actions asserting that defendant is obligated to continue providing wastewater treatment and disposal services to them for the "design life" of the treatment system, which plaintiffs assert to be at least 75 years. Plaintiffs do not dispute that the contracts specify an expiration date of May 12, 2017, but they argue that this date applies only to the particular terms and conditions set forth in the contracts and not to defendant's obligation to provide wastewater treatment services. Defendant moved for summary disposition, asserting that the contracts expire on May 12, 2017, as clearly and explicitly stated therein, and that it has no duty to provide wastewater treatment services to plaintiffs beyond that date. The trial court agreed, and granted defendant's motion.

A. BACKGROUND

In 1975, having become concerned about water quality in Lake Cadillac and Lake Mitchell, plaintiffs, defendant, Cherry Grove Township, and Wexford County (the County), prepared a "Facilities Plan," as part of an application for grant funding under the Federal Water Pollution Prevention and Control Act of 1972, 33 USC 1251 *et seq*., (more commonly referred to as the "Clean Water Act" or "CWA") for the expansion and improvement of defendant's wastewater treatment facilities to service the region. Required as part of the grant application process, the Facilities Plan sought "to

define the wastewater collection needs in the City of Cadillac for the next twenty year period" and to project the needs of the townships for wastewater treatment "through the year 1995." It originally envisioned eleven wastewater treatment service districts, primarily within the surrounding townships, creating a wastewater "treatment loop" around Lakes Mitchell and Cadillac to protect the lakes from adverse environmental effects arising from the presence and use of septic systems to manage waste. However, the Facilities Plan was amended by the parties to reflect that local political processes resulted in only certain service districts being approved by local governments for subsequent design and construction. The remaining service districts, including Haring Township, were not included in the initial implementation of the treatment system.

The portion of the Facilities Plan authored by the County utilized the following depreciation schedule, "assuming zero salvage value at the end of the period," when analyzing the cost effectiveness of various approaches to wastewater treatment for the affected areas:

Land	Does not Depreciate
Structures (concrete, piping, earthwork, etc.)	40 years
Process Equipment (lift stations, aeration equip., etc.)	20 Years
Auxiliary equipment (electrical, lab equipment, auxiliary power, etc)	15 years

In this context, the County represented that no component of the treatment works, other than the land upon which it sits, had a service life longer than 40 years. Observing that the future projections would entirely consume the then-existing capacity of the treatment plant in 20 years, defendant, in its portion of the Facilities Plan, set treatment plant expansion for 1990.

Ultimately, defendant received approximately $5.3 million in grant funds for expanding and improving its existing treatment facility in accordance with the Facilities Plan. In 1977, defendant and the Wexford County Board of Public Works (on behalf of the then-participating townships of Selma, Clam Lake, and Cherry Grove) entered into a contract for the collection and treatment of wastewater from those townships (the 1977 Contract). This contract provided that the County would construct and operate sanitary sewer collection systems in the townships (the "County System") that the County would connect to defendant's system (the "City System") for transportation of all wastewater emanating from the County System to defendant's wastewater treatment plant for treatment and disposal. The 1977 Contract afforded the County certain "capacity rights": the right to send up to 360,000 gallons of wastewater daily to the City System for treatment and disposal. In exchange for reservation of this capacity, the County (on behalf of the then-participating townships) paid defendant $566,728, an amount constituting 18 percent of the local cost share of construction (including 18 percent of the local cost share of the 1962 construction of defendant's treatment plant) and corresponding to 18 percent, or 360,000 gallons daily, of the facility's then-existing treatment capacity of 2.0 million gallons daily (MGD). The 1977 Contract provided further:

> 1. The City, to the best of its ability, agrees to sell, and the County agrees to purchase, sewage treatment and disposal service for the County System. . . .
>
> 2. It is agreed that those portions of the City System within the City Limits shall remain the sole and exclusive responsibility of the City, for all operations, maintenance, expansions, additions, improvements and administration including review and revision of the charge for treatment.

> 3. It is agreed that those portions of the County System outside of the City Limits shall remain the sole and exclusive responsibility of the County for all operations, maintenance, expansion, additions, improvements and administration, unless otherwise provided in this Agreement. The County shall have the sole responsibility for expansion of the County System so long as the quantity of wastewater emanating from such County System, as expanded, does not exceed the capacity of the City System available to the County as authorized herein and set forth on Table 1. The County shall be responsible for all costs for distribution, maintenance and collection of charges for the County System.

Finally, the contract specified that it

> shall become effective upon execution by the duly authorized representatives of the parties hereto and approval and confirmation by the Commission of the City of Cadillac, the Board of Public Works of the County of Wexford and the Wexford County Board of Commissioners, *and shall remain in effect for a period of forty (40) years from the date hereof*, and at the end of said forty (40) year period, this agreement *may be renewed for successive ten (10) year terms, by mutual agreement*. [Emphasis added.]

The effective date of the agreement being May 13, 1977, it is undisputed that the terms of the contract expire on May 12, 2017.

By 1980, Haring Township determined that it, too, wished to obtain wastewater treatment services via the County and City Systems. Accordingly, on April 8, 1980, the County, acting on behalf of Haring Township, entered into an agreement with defendant for the provision of additional wastewater treatment services to the County to accommodate Haring Township (the 1980 Contract). The 1980 Contract provided that the County would construct and operate a sanitary sewer system in Haring Township, which it would connect to the City System for the transportation of all wastewater

emanating from the Haring Township System to defendant's wastewater treatment plant for treatment and disposal.

Like the 1977 Contract, the 1980 Contract provides that the city agreed to sell and the County agreed to purchase "sewage treatment and disposal service," for Haring Township, "up to a maximum capacity of 100,000 gallons per day average daily flow," and the County agreed, "subject to the terms and conditions of an agreement between it and Haring Township," to pay buy-in costs of $69,283, an amount constituting five percent of the local cost share of construction (including 5 percent of the 70 percent local share of costs of the 1962 construction of defendant's wastewater treatment plant, as well as of later improvements to the treatment technology) and corresponding to a treatment capacity of 100,000 gallons per day average daily flow, or five percent of the then existing treatment capacity of 2.0 MGD. The 1980 Contract provided further that the

> operation, maintenance, expansion, improvements and additions, and administration (including the review and revision of rates and charges charged to users within the City) of the City System shall be and remain the sole and exclusive responsibility of the City. The County shall have no obligation[,] liability, or responsibility for the City System.
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> * * *
>
> . . . [T]he responsibility for operation, maintenance, expansion, additions, improvements, and administration (including review and revision of rates and charges to users outside the City and within the Haring Township System) shall be the sole and exclusive responsibility of the County. The City shall have no obligation, liability, or responsibility for the Haring Township System. The County, subject to the terms and conditions of an agreement between it and

> Haring Township, shall have the ability to expand the Haring Township System within the [designated geographic] area . . . , so long as the quantity of wastewater emanating from the Haring Township System, as expanded, does not exceed the [contracted-for] capacity [of 100,000 gallons per day average daily flow]. The County, subject to the terms and conditions of an agreement between it and Haring Township, shall be responsible for all costs of distribution, maintenance and collection of charges for the Haring Township System.

The 1980 Contract also specified that it

> shall become effective only upon its execution by the authorized representatives of the parties hereto after its approval and authorization for execution by the Commission of the City of Cadillac, the Board of the Department of Public Works and the Wexford County Board of Commissioners and the simultaneous execution of an agreement between the County and Haring Township after approval and authorization of execution of said agreement by the respective parties to that agreement. Once effective, *the agreement shall remain in effect until May 12 of the year 2017*. At that time, the agreement *may be renewed if the parties agree* for successive ten (10) year terms. *Either party may terminate this agreement at the end of the initial or subsequent terms upon a two (2) year written notice to the other party*. [Emphasis added.]

Defendant had undertaken several improvement projects to the treatment system, at a cost of nearly $6 million, during the 1990s, including projects to increase biological treatment measures, increase hydraulic capacity, and increase treatment and collection capacity, without financial contribution from the plaintiffs. In November 2006, defendant provided written notice to plaintiffs that it did not intend to renew the contracts upon their expiration in May 2017. Thereafter, Haring Township filed its three-count complaint, alleging that defendant has a legal obligation to continue providing

wastewater treatment and disposal service to the township after the "ostensible" expiration of the 1980 contract on May 12, 2017.[1] Shortly thereafter, Selma and Clam Lake Townships filed a one-count complaint also alleging that defendant has a legal obligation to continue providing wastewater treatment and disposal service beyond May 12, 2017.

B. TRIAL COURT PROCEEDINGS

Defendant filed motions for summary disposition, under MCR 2.116(C)(8) and (10), asserting that the 1977 and 1980 contracts clearly provide it with the authority to discontinue wastewater treatment services to plaintiffs as of May 12, 2017. Plaintiffs responded by seeking summary disposition pursuant to MCR 2.116(I)(2), asserting, consistent with their complaints, that defendant has an obligation to continue to provide services after May 12, 2017. Plaintiffs asserted that under the terms of the 1977 and 1980 contracts, plaintiffs acquired contractual ownership of, and title to, a portion of the capacity of defendant's sewer system, that defendant is required to provide services to the townships through at least the expiration of the "design life" of the grant-funded sewage collection system pursuant to requirements imposed on defendant by the CWA's grant-funding program and associated federal regulations, and that defendant has held itself out as a public utility in the townships.

The trial court granted defendant's motions for summary disposition by written opinion and order, concluding that the language of the contracts was "clear and explicit" and provided a specific termination date of May 12, 2017, that permissive language allowing extensions of the contracts did not create a right in any of the contracting parties to an automatic extension, and that

[1] Haring Township's complaint sets forth three counts; only count III is at issue here.

it was required to enforce the contracts as written. In reaching this result, the trial court concluded that plaintiffs did not purchase an ownership interest in the sewer system, but rather purchased a certain capacity of service in terms of millions of gallons per day for a fixed term expiring on May 12, 2017. The trial court also rejected plaintiffs' argument that the contracts contain a latent ambiguity as a result of any obligation imposed by the CWA. Finally, the trial court concluded that defendant had not become a public utility within plaintiff townships.

II. ANALYSIS OF THE ISSUES RAISED ON APPEAL

On appeal, plaintiffs assert that the 1977 and 1980 contracts are both patently and latently ambiguous and that defendant has an extracontractual legal duty to continue providing wastewater treatment service to the townships beyond the expiration of the Contracts. Plaintiffs agree that

> the particular terms and conditions upon which the City has been providing sewage treatment and disposal services, as reflected in the 1977 and 1980 Contracts, unambiguously expire after May 12, 2017, such that the City does not thereafter have to provide [such services] to the Townships *on those particular terms and conditions*.

However, plaintiffs argue that, nonetheless, defendant "is legally obligated to continue providing sewage treatment and disposal services to the Townships after May 12, 2017," on "payment terms that comply with applicable state and federal law." Therefore, plaintiffs assert, the trial court erred by granting defendant's motions for summary disposition.

This Court reviews de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This appeal also

involves questions of statutory and contract interpretation. "[B]oth the interpretation of a statute and a contract are questions of law this Court reviews de novo." *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). When interpreting a contract, this Court is to discern the parties' intent by reading the contract as a whole. *Roberts v Titan Ins Co* (*On Reconsideration*), 282 Mich App 339, 357; 764 NW2d 304 (2009) ("When presented with a contractual dispute, a court must read the contract as a whole with a view to ascertaining the intention of the parties, determining what the parties' agreement is, and enforcing it."). If a contract is unambiguous, then it must be enforced by its plain terms. *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 248; 760 NW2d 828 (2008); *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 650; 473 NW2d 268 (1991). Terms are ambiguous *only if* they cannot possibly be read together in harmony. *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). Furthermore, a court will not create ambiguity where none previously existed. *Smith v Physicians Health Plan, Inc*, 444 Mich 743, 759; 514 NW2d 150 (1994).

Plaintiffs first argue that they contracted not only for ongoing sewage treatment and disposal services from defendant, but that they also purchased—and thus own—capacity in the City System in the amounts designated in the respective contracts. They refer to their required, up-front, "buy-in" payments to defendant, corresponding "on a one-for-one basis with the actual costs-of-construction for the capacity that was granted to the Townships," and assert that considering these payments "it is absurd to suggest that the Townships were paying only for 'service' for a fixed term, instead of purchasing 'capacity.' " Plaintiffs further assert that they will continue to own capacity in the

City System after May 12, 2017, and that this ownership interest renders the expiration dates specified in the contracts "patently ambiguous." We disagree.

Both the 1977 and 1980 contracts contain an explicit expiration date; they are fixed-term contracts that expire on May 12, 2017. Indeed, plaintiffs acknowledge as much. Therefore, the trial court's conclusion that the contracts expire on that date was indisputably correct. Contrary to plaintiffs' arguments, we agree with the trial court that defendant's obligation to provide services under the contracts ends on May 12, 2017. The contracts do not provide for any automatic extension, or right to an extension; rather they provide only that the parties *may* by mutual agreement, extend the contracts. We find no patent or latent ambiguity in the plain expiration date set forth in the contracts.

Further, the up-front payments required by the contracts do not compel a different result. The contracts, by their plain terms, provide plaintiffs with the right to utilize a certain capacity—that is, with "capacity rights"—for a fixed term to expire as specified in the contracts. The contracts are thus akin to leases—here, for a certain amount of wastewater treatment capacity for a fixed term, in exchange for an up-front payment correlating to the cost of construction of the treatment system, together with monthly payments for the amount of wastewater actually treated.[2] There is no indication that plaintiffs were purchasing any ownership interest in defendant's facilities. The contracts explicitly provide that all responsibility for the opera-

[2] The contracts resemble a vehicle lease, in which a certain lump sum payment is due at signing, and additional monthly payments are made for the duration of the lease. In that situation, there is no basis for asserting that a lessee has purchased an ongoing ownership interest in the vehicle, merely because a percentage of its worth was paid at the start of the contract. Yet that is essentially what plaintiffs are asserting here.

tion, maintenance, expansion, improvements and administration of the City System rests exclusively with defendant and that the County was to have no obligation, liability, or responsibility for that system,[3] while at the same time the County was to bear all responsibility for the County System, including the Haring Township system, with the City bearing no obligation, liability, or responsibility for that system.[4]

Plaintiffs next argue that defendant has an ongoing obligation to provide wastewater treatment and disposal services beyond the expiration date of the contracts as a result of extrinsic requirements imposed on defendant by the CWA. Plaintiffs rely on 40 CFR 35.935-1(b), which sets forth the responsibilities borne by a grant recipient:

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[3] The 1977 Contract specifically provides that "[i]t is agreed that those portions of the City System within the City Limits *shall remain the sole and exclusive responsibility of the City*, for all operations, maintenance, expansions, additions, improvements and administration including review and revision of the charge for treatment." (Emphasis added.) Likewise, the 1980 Contract states that

> [i]t is agreed by the parties that the operation, maintenance, expansion, improvements and additions, and administration (including the review and revision of the rates and charges charged to users within the City) of the City System shall be and remain the *sole and exclusive responsibility of the City. The County shall have no obligation*[,] *liability, or responsibility for the City System.* [Emphasis added.]

[4] The 1977 Contract provides that "[i]t is agreed that those portions of the County System outside of the City Limits shall remain the sole and exclusive responsibility of the County for all operations, maintenance, expansions, additions, improvements and administration, unless otherwise provided in this Agreement." Similarly, the 1980 Contract provides that

> [i]t is agreed that the responsibility for operation, maintenance, expansion, additions, improvements, and administration (including review and revision of rates and charges to users outside the City and within the Haring Township System) shall be the sole and exclusive responsibility of the County. The City shall have no obligation, liability, or responsibility for the Haring Township System.

> By its acceptance of the grant, the grantee agrees to complete the treatment works in accordance with the facilities plan, plans and specifications, and related grant documents approved by the Regional Administrator, and to maintain and operate the treatment works to meet the enforceable requirements of the Act for the design life of the treatment works. The Regional Administrator is authorized to seek specific enforcement or recovery of funds from the grantee, or to take other appropriate action . . . if he determines that the grantee has failed to make good faith efforts to meet its obligations under the grant.

Plaintiffs argue that, pursuant to this regulation, defendant is obligated to provide wastewater treatment service to them for the "design life" of the treatment facility, regardless of the term of the contract, and further, that the "design life" of the instant treatment system is 75 years to perpetuity, as averred by plaintiffs' engineering expert. Plaintiffs cite *State Hwy Comm'r v Detroit City Controller*, 331 Mich 337, 352; 49 NW2d 318 (1951), to establish that parties reach agreements with awareness of the statutory law in effect at the time of the agreement and therefore that statutory law becomes part of the agreement, and *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496-498; 628 NW2d 491 (2001), and *Stillman v Goldfarb*, 172 Mich App 231, 239-241; 431 NW2d 247 (1988), to establish that courts are compelled to construe contracts in accordance with applicable statutory law whenever it is possible to do so. Thus, plaintiffs assert that "the obligations of the CWA clearly 'enter into and form a part' of the Contracts" and therefore, defendant has a continuing obligation to provide wastewater treatment services beyond May 12, 2017, as part of those contracts.[5]

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[5] Plaintiffs note that they are not asserting "direct claims against the City under the CWA," but, rather, are

As plaintiffs acknowledge, however, 40 CFR 35.935-1(b), is not applicable here because it was not in effect in 1975, when the Facilities Plan was prepared and submitted, or in 1976 and 1977 when the grants were actually awarded to defendant; 40 CFR 35.935-1 did not go into effect until October 1, 1978. 43 Fed Reg 44022 (September 27, 1978). Therefore, as plaintiffs acknowledge before this court, "these grants were subject to the 1974 [United States Environmental Protection Agency (EPA)] regulations." The 1974 regulations speak in terms of the "service life" of various parts of the treatments works, which the regulations define as the "period of time during which a component of a waste treatment management system will be capable of performing a function." 40 CFR Appendix A(d)(4); 39 Fed Reg 5269 (February 11, 1974). The regulations further provide that

> The service life of treatment works for a cost-effectiveness analysis shall be as follows:
>
> Land. . . . . Permanent
>
> Structures . . . . . 30-50 years
>
> (includes plant buildings, concrete process tankage, basins, etc.; sewage collection and conveyance pipelines; lift station structures; tunnels; outfalls)[.]

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relying upon the CWA and its implementing regulations for the purpose of demonstrating that the ostensible May 12, 2017 expiration date of the Contracts could not, at the time of Contract formation, have been understood by the parties to represent a date at which the City could wholly abandon its obligation to provide sewage treatment and disposal services to the Service Districts within the Townships.

In fact, while the CWA regulation upon which plaintiffs seek to rely authorizes the regional administrator to take action if he determines that the grantee is not compliant with the requirements and regulations governing use of the grant and the resulting treatment works, it does not confer standing on private parties to seek such enforcement. 40 CFR 35.935-1(b).

> Process equipment . . . . . 15-30 years
>
> (includes major process equipment such as clarifier mechanisms, vacuum filters, etc.; steel process tankage and chemical storage facilities; electrical generating facilities on standby service only).
>
> Auxiliary equipment . . . . . 10-15 years
>
> (includes instruments and control facilities; sewage pumps and electric motors; mechanical equipment such as compressors, aeration systems, centrifuges, chlorinators, etc,; electrical generating facilities on regular service).
>
> Other service life periods will be acceptable when sufficient justification can be provided. [CFR 40 Appendix A(f)(7); 39 Fed Reg 5270 (February 11, 1974).]

Accordingly, as previously noted, the cost-effectiveness analysis set forth in the 1975 Facilities Plan, submitted by the parties as part of their application for grant funding under the CWA, identifies the service life of the components of the treatment works as follows:

Land	Does not Depreciate
Structures (concrete, piping, earthwork, etc.)	40 years
Process Equipment (lift stations, aeration equip., etc.)	20 Years
Auxiliary equipment (electrical, lab equipment, auxiliary power, etc)	15 years

Plaintiffs assert that 40 CFR 35.935-1(b), although not directly applicable here, merely reflects a preexisting requirement culled from a combination of then-existing EPA regulations and grant documents and thus that the obligation to provide service for the "design life" of the treatment works was part of the parties' agreement, regardless of the effective dates of that agreement. More specifically, plaintiffs note that the 1974 regulations required that defendant use the

awarded grant funds to complete the construction of an "operable treatment works" and "a complete waste treatment system . . . of which the project is a part," 40 CFR 35.935-1 and 35.905-3, and further, that grant agreements signed by defendant require that the treatment works be "completed as a cost-effective, integral component of the overall program to provide a complete waste treatment system," and that the grantee "agrees that the funds awarded will be used solely for the purposes of the project as approved," here, to "service the City of Cadillac and portions of the townships" with wastewater treatment services. Plaintiffs assert that the 1974 regulations and grant agreements, considered together, require that defendant use the grant monies solely for the purposes of providing wastewater collection, transport, treatment, and disposal services to the designated township service districts, and that if defendant ceases using the treatment works to collect, transport, treat, and dispose of plaintiffs' wastewater, it will have ceased using the grant monies "solely for the purposes of the project approved" in violation of the 1974 regulations. From this, plaintiffs assert that defendant has a continuing extracontractual duty to operate the treatment works for the benefit of plaintiff townships for the "design life" of the treatment works, which plaintiffs assert is at least 75 years. We disagree.

There is no dispute that the grant monies received by defendant were, in fact, used "solely for the purposes of the project as approved": to construct the treatment works described in the approved Facilities Plan. There is no assertion that defendant misappropriated grant funds for any other purpose. There is nothing in the regulations explicitly imposing a perpetual duty to operate the treatment works in a particular manner or for a particular period of time. The 1974 regulations required that the Facilities Plan include a "cost-

effectiveness analysis" defining the service life of the treatment works's various component parts, 40 CFR 35.917-1(d); 39 Fed Reg 5253 (February 11, 1974), and the 1975 Facilities Plan did so, indicating that no component's service life exceeded 40 years, consistent with the applicable regulation.

Additionally, plaintiffs' argument completely disregards the import of the term "service life" and the definition of "service life" provided in the 1974 regulations. Plaintiffs continue to refer to "design life": the term used in the 1978 regulations. Plaintiffs correctly point out that the 1974 regulations define "service life" in the context, and for purposes, of cost-effectiveness analysis. However, plaintiffs can point to nothing in the 1974 regulations specifically obligating defendant to operate the treatment works for the "design life" of the system, or indeed, for any particular period of time. Rather, as pieced together by plaintiffs, the regulations require that defendant complete and operate the project as approved: that is, as set forth by the Facilities Plan, which included the parties' representation of the service life of the system's components. In this regard, we find the definition of "service life" set forth in the 1974 regulations to be persuasive in considering whether the CWA and its implementing regulations impose any duty on defendant to operate the treatment works beyond the expiration date of the contracts. We conclude that the regulations impose no such duty.

Defendant completed construction of the treatment works in accordance with the Facilities Plan and has maintained and operated the treatment works as contemplated; plaintiffs do not assert otherwise. At issue is simply whether on May 12, 2017, defendant will have done so for the proper amount of time, or whether defendant is obligated to continue to provide such services

beyond that date. Considering the 1974 regulations and the representations set forth in the approved Facilities Plan, we conclude that it will have done so, and there being no ambiguity in the expiration date set forth in the 1977 and 1980 contracts, the contracts, and all accompanying duties expire on that date.[6]

Finally, plaintiffs argue that defendant has held itself out as a public utility in plaintiff townships and as a consequence defendant remains obligated to continue providing sewer service to the townships beyond the expiration of the contract. In support of this assertion, plaintiffs note the definition of a public utility set forth in *Schurtz v Grand Rapids*, 208 Mich 510, 524; 175 NW 421 (1919):

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[6] Both parties note that MCL 123.742(1) provides:

> A county operating under this act and any 1 or more municipalities including the county itself may enter in a contract or contracts for the acquisition, improvement, enlargement, or extension of a water supply, *a sewage disposal*, or a refuse system, or the making of lake improvements or erosion control systems and for the payment of the costs by the contracting municipalities, with interest, over a period not exceeding 40 years.

Thus, plainly under Michigan law, the 1977 and 1980 contracts could not exceed 40 years in duration. Defendant points to this as further evidence that the parties understood that defendant's obligation to provide services could not extend beyond the expiration date of the contracts. Plaintiffs argue, however, that the existence of the statute, which prevented the parties from contracting for a term exceeding 40 years regardless of any continuing duty on the part of defendant to operate the treatment facility for plaintiffs' benefit beyond that period of time, demonstrates, again, a latent ambiguity with regard to the import and effect of that expiration date on defendant's duty to provide treatment services. In advancing this argument, plaintiffs rely on the notion that they purchased, and continue to own, capacity in defendant's system. However, for the reasons previously discussed, plaintiffs do not own capacity in defendant's treatment system, and defendant has no ongoing, underlying legal duty to continue to provide wastewater treatment services to plaintiffs beyond the plain and unambiguous date set forth in the contracts.

> "[P]ublic utility" means every corporation . . . that may own, control, or manage, except for private use, any equipment, plant or generating machinery in the operation of a public business or utility. Utility means the state or quality of being useful. Was this plant one useful to the public? If so, it was a public utility.

Plaintiffs observe that defendant is the only source of sewage treatment in the townships. Plaintiffs assert that "[i]t cannot be doubted . . . that the City Sewage System is a 'public utility' for purposes of Michigan law" and that defendant has held itself out as a public utility within certain areas of the townships by entering into the 1977 and 1980 contracts. However, Michigan law provides municipalities with the discretion to provide services to extraterritorial units such as the townships. See MCL 123.742(1); *Nelson v Wayne Co*, 289 Mich 284, 297-299; 286 NW 617 (1939).[7] Additionally, the Michigan Constitution, as well as Michigan statutory law, provides for and recognizes defendant's discre-

[7] The plaintiff in *Nelson* challenged the denial of his request to tap into a water main constructed under a contract entered into between the Detroit Board of Water Commissioners and Wayne County to supply water from Detroit to the Wayne County Training School. The Supreme Court affirmed that denial, explaining that

> [t]he courts as a rule are not disposed to interfere with the management of an authorized business, conducted by the municipal authorities presumably in the interest and for the benefit of the city and its inhabitants, unless dishonesty or fraud is manifest, or the vested power with its implied discretion has been clearly exceeded or grossly abused. . . .
>
> . . . [A city] may conduct [a utility] in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters. [*Nelson*, 289 Mich at 297-298 (quotation marks and citations omitted).]

tion in extending sewage removal services beyond its border. Article 7, § 24 of the 1963 Michigan Constitution provides that

> [s]ubject to this constitution, any city or village *may* acquire, own or operate, within *or without* its corporate limits, public service facilities for supplying water, light, heat, power, sewage disposal and transportation to the municipality and the inhabitants thereof.
>
> Any city or village may sell and deliver heat, power or light without its corporate limits in an amount not exceeding 25 percent of that furnished by it within the corporate limits, except as greater amounts may be permitted by law; *may sell and deliver water and provide sewage disposal services outside of its corporate limits in such amount as may be determined by the legislative body of the city or village*; and may operate transportation lines outside the municipality within such limits as may be prescribed by law. [Emphasis added.]

Likewise, MCL 123.742(1) provides that municipalities "*may* enter into a contract or contracts for . . . *sewage disposal* . . . for the payment of the costs by the contracting municipalities, with interest, over a period not exceeding 40 years." (Emphasis added.) And, MCL 123.232 provides that "[a]ny 2 or more political subdivisions *may* contract for the joint ownership, use and/or operation of sewers and/or sewage disposal facilities. . . . Any such contract . . . shall be effective for such term as shall be prescribed therein not exceeding 50 years." Each of these provisions contains the term "may," indicating permissive, discretionary activity. *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 485; 679 NW2d 98 (2004). Thus, plainly, Michigan law affords defendant the ability to provide sewage treatment services beyond its borders, subject to contracts of limited duration; however, there is nothing in Michigan law requiring that defendant do so. Simply by exercising its

discretion to provide wastewater treatment services to plaintiffs for a fixed duration in accordance with applicable law, defendant did not become a public utility obligated to continue to provide that service beyond the expiration of the contract.

In sum, the issue presented here is straightforward: Do the 1977 and 1980 contracts expire on May 12, 2017, as plainly stated therein? We find no basis for concluding that the contracts mean anything other than that which they plainly provide. Therefore, the trial court did not err by concluding that defendant's duty to provide wastewater treatment services to plaintiffs was governed by the 1977 and 1980 contracts, which expire "as prescribed therein," on May 12, 2017.[8]

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

BORELLO, P.J., concurred.

JANSEN, J. (*dissenting*). Because I would dismiss these consolidated matters as unripe for adjudication, I respectfully dissent. Defendant city of Cadillac executed contracts with plaintiff townships for the provision of wastewater treatment services. By their express terms, these contracts were set to expire May 12, 2017. The contracts provided that "[e]ither party may terminate this agreement at the end of the initial term or subsequent terms upon a two (2) year written notice to the other party." In November 2006, defendant provided written notice to plaintiffs that it did not intend to renew the contracts upon their expiration in May 2017.

[8] Having determined that defendant is not obligated to provide wastewater treatment services for the "design life" of the treatment works, we need not address the issue whether plaintiffs successfully established a genuine issue of material fact as to the length of the "design life" of the system.

Thereafter, plaintiffs brought the instant actions in the Wexford Circuit Court, alleging that defendant had a legal obligation to continue providing wastewater treatment services to them beyond that date. With respect to this issue, the circuit court ultimately granted summary disposition for defendant, ruling that defendant was entitled to abide by the express termination date of May 12, 2017, and that defendant could accordingly terminate its services to plaintiffs at that time.

In my opinion, these consolidated matters are unripe for adjudication. At the time of the circuit court's ruling, the termination date of the parties' contracts remained years away. Indeed, defendant was not contractually required to provide written notice of its intent to terminate the contracts until two years before May 2017—in other words, May 2015, still almost five years in the future. Although defendant notified plaintiffs in November 2006 that it did not intend to renew the contracts or continue providing wastewater treatment services beyond May 2017, it does not necessarily follow that defendant *will actually* terminate its services to plaintiffs at that time. While Cadillac's current city council and city administrators may fully intend to terminate the wastewater treatment services to plaintiffs on May 12, 2017, it is axiomatic that one city council may not bind its successors in office. See *Hazel Park v Potter*, 169 Mich App 714, 722-723; 426 NW2d 789 (1988); see also *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991). In fact, future Cadillac city councils and city administrators may view the situation completely differently, and might, for reasons unknowable at this time, determine that the contracts should be renewed and that the services should be continued. The point is that we simply do not know what will happen in the future, and therefore the present controversy strikes me as entirely unripe for

judicial consideration. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008) (stating that "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all"); *Huntington Woods v Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008) (observing that "[t]he doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained" and that "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (quotation marks and citations omitted). It is well settled that "[t]he ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues." 1A CJS, Actions, § 75, p 287.

Because these consolidated matters are not yet ripe for adjudication, the circuit court should have dismissed plaintiffs' claims on the ground of ripeness. I would dismiss the present consolidated appeals for this same reason.

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tions are (1) when there was an express or implied assumption of liability, (2) when the transaction amounted to a consolidation or merger, (3) when the transaction was fraudulent, (4) when some elements of a good-faith purchase were lacking or the transfer was without consideration and the predecessor's creditors were not provided for, and (5) when the successor is a mere continuation or reincarnation of the predecessor. *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503.

2. A successor limited liability company can be held liable for its predecessor's liabilities when the successor is a mere continuation or reincarnation of the predecessor; a prima facie case of continuity of enterprise exists when the plaintiff establishes the following: (1) a continuation of the predecessor company, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor, (2) that the predecessor ceased its ordinary business operations, liquidated, and dissolved as soon as legally and practically possible, and (3) that the successor assumed those liabilities and obligations of the predecessor ordinarily necessary for the uninterrupted continuation of normal business operations of the predecessor company; an additional relevant consideration is whether the successor held itself out to the world as the effective continuation of the predecessor. *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503.
3. The elements for piercing the corporate veil apply to limited liability companies; those elements are (1) that the business entity is a mere instrumentality of another individual or entity, (2) that the business entity was used to commit a wrong or fraud, and (3) that there was an unjust injury or loss to the plaintiff. *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503.

SUBSIDIARIES

4. Absent some abuse of the corporate form, parent and subsidiary corporations are treated as separate entities; to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff must allege the existence of a parent-subsidiary relationship and facts that justify piercing the corporate veil; the plaintiff must show all the following: (1) that the corporate entity

is a mere instrumentality of another entity or individual, (2) that the corporate entity was used to commit fraud or a wrong, and (3) that, as a result, the plaintiff suffered an unjust injury or loss. *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635.

COSTS

ATTORNEY FEES

1. *Keinz v Keinz*, 290 Mich App 137.

COURT OF CLAIMS—*See*

JURISDICTION 1

COURTS

ORDERS

1. A court must sign and enter an order if all parties approve the form of the order and, in the court's determination, the order is in conformity with the court's decision (MCR 2.602[B]). *In re Leete Estate*, 290 Mich App 647.

SEALING COURT RECORDS

2. A court may not seal court records unless (1) a party has filed a written motion that identifies the specific interest to be protected, (2) the court has made a finding of good cause, in writing or on the record, that specifies the grounds for the order, and (3) there is no less restrictive means to adequately protect the specific interest asserted; however, the court is specifically prohibited from sealing a court order or opinion (MCR 8.119[F] [1], [5]). *Jenson v Puste*, 290 Mich App 338.

CRIMINAL DEFENSES—*See*

CONTROLLED SUBSTANCES 1, 2

CRIMINAL LAW

See, also, CONTROLLED SUBSTANCES 1, 2
SENTENCES 1, 2, 3

AIDING AND ABETTING

1. *People v Bennett*, 290 Mich App 465.

FORFEITURES AND PENALTIES

2. The term "intentionally" in the statute providing that an individual who feloniously and intentionally kills the decedent forfeits all benefits with respect to the dece-

of the State Employees' Retirement System seeks retirement on the basis of a non-duty-related injury or disease; when determining whether the member is totally incapacitated an thus eligible to retire, it is impermissible to consider other jobs or employment fields that might be suitable for the member; total incapacitation relates solely to the incapacity of the member to continue performing, or to further perform, the state job from which the member seeks retirement. *Nason v State Employees' Retirement System*, 290 Mich App 416.

ENDORSEMENTS—*See*

INSURANCE 1

ENTITLEMENT TO APPEAL—*See*

APPEAL 1

ENVIRONMENT—*See*

PROPERTY 1

ESTATES AND PROTECTED INDIVIDUALS CODE—*See*

ESTATES IN PROPERTY 1, 2, 3

ESTATES IN PROPERTY

ESTATES AND PROTECTED INDIVIDUALS CODE

1. The Estates and Protected Individuals Code applies to a nonresident's property located in this state (MCL 700.1301[b]). *In re Leete Estate*, 290 Mich App 647.
2. The Estates and Protected Individuals Code applies to a governing instrument executed before the code came into effect as long as the code does not affect an accrued right and as long as the governing instrument, including a will or a deed, does not contain a clear indication of contrary intent (MCL 700.8101[2][a], [d], and [e]). *In re Leete Estate*, 290 Mich App 647.
3. The Estates and Protected Individuals Code requires that a coowner survive a deceased coowner by more than 120 hours to be entitled to property that passes due to a right of survivorship, unless a governing instrument, including a will or a deed, expressly provides otherwise; if two coowners with rights of survivorship die within 120 hours of one another, the property is divided in equal shares between each coowner's estate; survivorship must be

proved by clear and convincing evidence (MCL 700.2702[3]). *In re Leete Estate*, 290 Mich App 647.

EVIDENCE

See, also, CONSTITUTIONAL LAW 1, 2

HEARSAY

1. Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted; a printout of machine-generated information does not constitute hearsay because a machine is not a person and therefore not a declarant capable of making a statement (MRE 801[b], [c]). *People v Dinardo*, 290 Mich App 280.
2. A hearsay document may be admitted if the document pertains to matters about which the declarant once had knowledge, the declarant now has an insufficient recollection about those matters, and the document is shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his or her memory (MRE 803[5]). *People v Dinardo*, 290 Mich App 280.

EX CONTRACTU CLAIMS AGAINST THE STATE—*See*

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EX PARTE INTERVIEWS WITH HEALTH-CARE PROVIDERS—*See*

HEALTH 1

EXCEPTIONS TO EXEMPTIONS FOR RENAISSANCE ZONES—*See*

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EXCESSIVE BRUTALITY—*See*

SENTENCES 3

EXEMPTIONS FOR RENAISSANCE ZONES—*See*

TAXATION 2

EXEMPTIONS FROM USE TAX—*See*

TAXATION 5

were not undertaken with malice, and (3) the acts were discretionary, as opposed to ministerial. *Oliver v Smith*, 290 Mich App 678.

3. "Gross negligence" by a governmental employee, for purposes of governmental immunity, involves conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results; the issue is a factual question for the jury if reasonable jurors could honestly reach different conclusions regarding whether the subject conduct constituted gross negligence; the issue may be determined by the court in response to a motion for summary disposition if reasonable minds could not differ regarding whether the subject conduct constituted gross negligence. *Oliver v Smith*, 290 Mich App 678.
4. A governmental employee enjoys a qualified right to immunity with regard to alleged intentional torts if (1) the employee's challenged acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he or she was acting, within the scope of his or her authority, (2) the acts were undertaken in good faith, or were not undertaken with malice, and (3) the acts were discretionary, rather than ministerial, in nature; the "good faith" element is subjective in nature. *Oliver v Smith*, 290 Mich App 678.

GRIEVANCES—*See*

ARBITRATION 1

GROSS NEGLIGENCE—*See*

GOVERNMENTAL IMMUNITY 1, 3

HEALTH

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT

1. Ex parte interviews by defense counsel are permitted under Michigan law as long as the party seeking discovery moves for a qualified protective order as required by HIPAA; on reasonable notice and for good cause shown, the court may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense (42 USC 1320d *et seq.*; 45 CFR 164.512[e][1]; MCR 2.302[C]). *Szpak v Inyang*, 290 Mich App 711.

LIBEL AND SLANDER

DEFAMATION

1. *Wilson v Sparrow Health System*, 290 Mich App 149.

LIENS

JUDGMENT LIENS

1. A judgment lien under the Michigan judgment lien act does not attach to an interest in real property owned as tenants by the entirety unless the judgment was entered against both the husband and the wife; however, the statute does not protect a woman who has only a dower interest in property from the filing and attachment of a judgment lien when her spouse is the sole judgment debtor (MCL 600.2807[1]). *Thomas v Dutkavich*, 290 Mich App 393.
2. The judgment debtor is obligated under the Michigan judgment lien act to pay the judgment creditor from the proceeds of a sale of real estate to which a judgment lien had attached; the purchaser of the property is not obligated to pay the judgment creditor (MCL 600.2819). *Thomas v Dutkavich*, 290 Mich App 393.
3. A judgment lien recorded under the Michigan judgment lien act remains attached to the property and is not dischargeable if the judgment debtor has not made payment from the proceeds of a sale of the property despite the fact of new ownership of the property (MCL 600.2801 *et seq*.). *Thomas v Dutkavich*, 290 Mich App 393.
4. There is no right to foreclose a judgment lien created under the Michigan judgment lien act (MCL 600.2819). *Thomas v Dutkavich*, 290 Mich App 393.

LIMITATION OF ACTIONS

MEDICAL MALPRACTICE

1. A medical-malpractice action that is not commenced within the time prescribed by MCL 600.5838a is barred. *Hoffman v Boonsiri*, 290 Mich App 34.
2. A second notice of intent to bring a medical malpractice action that is sent with fewer than 182 days remaining in the limitations period can initiate tolling under MCL 600.5856(c) as long as the first notice of intent to sue did not initiate such tolling. *Hoffman v Boonsiri*, 290 Mich App 34.
3. Deficiencies in the content of a notice of intent to bring

MILITARY DISABILITY BENEFITS—*See*

ARMED SERVICES 1

MILITARY RETIREMENT PAY—*See*

ARMED SERVICES 1

MISCONDUCT OF PROSECUTING ATTORNEYS—*See*

APPEAL 3

MOOT ISSUES—*See*

APPEAL 2

MOTIONS AND ORDERS—*See*

COURTS 1

MOTIONS TO QUASH BINDOVERS—*See*

CRIMINAL LAW 3

MOTOR VEHICLES—*See*

VEHICLE CODE 1

MUNICIPAL CORPORATIONS

CONTRACTS

1. Parties have discretion to enter into a contract for sewage disposal for a period not exceeding 40 years; this does not make either party a public utility and thus the parties have no legal duty to continue to provide sewage disposal services beyond the unambiguous date of the contracts (MCL 123.742[1]). *Haring Charter Twp v City of Cadillac*, 290 Mich App 728.

MUNICIPAL SPECIAL ASSESSMENTS—*See*

TAXATION 3

MURDER—*See*

CRIMINAL LAW 1

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT—*See*

PROPERTY 1

NEED-BASED ATTORNEY FEES—*See*

DIVORCE 1

NEGLIGENCE

See, also, GOVERNMENTAL IMMUNITY 1, 3

HEALTH 1

COMPARATIVE-FAULT STATUTES

1. The purpose of enacting the comparative-fault statutes was to eliminate joint and several liability in situations in which that liability exists; the comparative-fault statutes are inapplicable with respect to fact patterns entailing multiple torts separated in time, multiple torts separated by individual causal chains, and multiple torts that did not produce a single, indivisible injury (MCL 600.2956, 600.2957, 600.6304). *Vandonkelaar v Kid's Kourt, LLC*, 290 Mich App 187.

MEDICAL MALPRACTICE

2. MCL 600.2301 allows for the amendment of processes, pleadings, or proceedings and may be used to cure defects in a notice of intent under MCL 600.2912b; determining whether MCL 600.2301 applies involves a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice; in medical malpractice cases, in which the defendants are health professionals with enough medical expertise to understand the nature of the claims against them, defects present in a notice of intent do not implicate substantial rights; when a plaintiff makes a good-faith attempt to comply with the requirements for the notice of intent set forth in MCL 600.2912b, allowing an amendment to cure any defects in the notice is in the furtherance of justice. *Swanson v Port Huron Hospital (On Rem)*, 290 Mich App 167.

3. *Beebe v Hartman*, 290 Mich App 512.

PREMISES LIABILITY

4. Premises liability is based on both possession and control over the land because the person having possession and control is normally best able to prevent harm to others; possession for purposes of premises liability depends on the actual exercise of dominion and control over the property; a person, however, may be under a legal duty with respect to premises by voluntarily assuming a function that the person is not legally required to perform. *Hoffner v Lanctoe*, 290 Mich App 449.

5. A landowner generally does not have a duty to remove

open and obvious dangers, but a landowner does have a duty to protect invitees from an open and obvious danger when special aspects of the condition make it unreasonably dangerous, that is, when the danger is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm; a business owner cannot defend a claim by arguing that customers it has invited onto its premises technically had the option of declining the invitation and that the condition was therefore avoidable. *Hoffner v Lanctoe*, 290 Mich App 449.

RES IPSA LOQUITUR

6. Instructing a jury on the doctrine of res ipsa loquitur is appropriate when the requesting party presents sufficient evidence (1) that the event was of a kind that ordinarily does not occur in the absence of someone's negligence, (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant, (3) that it was not due to any voluntary action or contribution on the part of the plaintiff, and (4) that evidence of the true explanation of the event is more readily accessible to the defendant than the plaintiff. *Swanson v Port Huron Hospital (On Rem)*, 290 Mich App 167.

SUPERSEDING CAUSES OF INJURIES

7. *Wilson v Sparrow Health System*, 290 Mich App 149.

WRONGFUL-DEATH STATUTE

8. MCL 600.2922a(2)(b) provides that a person is not liable for damages for the death of an embryo or fetus if the death was the result of a medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and (1) performed with the pregnant individual's consent, (2) performed with the consent of an individual who may lawfully provide consent on the pregnant individual's behalf, or (3) performed without consent as necessitated by a medical emergency. *Johnson v Pastoriza*, 290 Mich App 260.

9. An action under the wrongful-death statute must be brought in the name of the personal representative of the estate of the deceased; the persons who may be entitled to damages under the statute must submit to the personal representative a claim for those damages (MCL 600.2922[7]). *Johnson v Pastoriza*, 290 Mich App 260.

1. A felonious criminal act is contemporaneous with the sentencing offense, for purposes of scoring offense variable 12, if the act occurred within 24 hours of the sentencing offense and will not result in a separate conviction; a court must look beyond the sentencing offense and consider as contemporaneous felonious criminal acts only those separate acts or behavior that did not establish the sentencing offense (MCL 777.42). *People v Light*, 290 Mich App 717.
2. Neither larceny from a person nor larceny in a building may be used as a contemporaneous felonious criminal act to increase the offense variable 12 score of a defendant convicted of unarmed robbery when the physical act of taking that supported the unarmed robbery conviction is the same physical act used to establish larceny from a person or larceny in a building (MCL 750.357, 750.360, 750.530, 777.42). *People v Light*, 290 Mich App 717.

SENTENCING GUIDELINES

3. Fifty points must be assessed under the sentencing guidelines for offense variable 7 (aggravated physical abuse) when a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense; score of 50 points is appropriate when the defendant committed specific acts of sadism, torture, or excessive brutality; only the defendant's actual participation should be scored, however, and 50 points should not be assessed for sadism, torture, or excessive brutality if the defendant did not commit, take part in, or encourage others to commit such acts (MCL 777.37[1][a]). *People v Hunt*, 290 Mich App 317.

SENTENCING GUIDELINES—*See*

SENTENCES 1, 2, 3

SETTLEMENTS—*See*

COSTS 1

SEVERAL LIABILITY—*See*

NEGLIGENCE 1

SEWAGE TREATMENT—*See*

MUNICIPAL CORPORATIONS 1

property is reassessed upon the sale or transfer of the property according to the following year's state equalized value, a process called "uncapping"; under MCL 211.27a(7), certain types of conveyances are excepted and do not give rise to uncapping, but conveyances by deed involving tenancies in partnership are not among them. *Schwass v Riverton Twp*, 290 Mich App 220.

RENAISSANCE ZONE ACT

2. Property located in a renaissance zone is exempt from taxes under the General Property Tax Act unless an exception applies; the statutory exception for ad valorem property taxes only extends to those levied for the payment of principal and interest of obligations approved by the electors of the local governmental unit or for obligations pledging the unlimited taxing power of the local governmental unit; because a school district is not a local governmental unit under the Michigan Renaissance Zone Act, an obligation approved by the electors of a school district does not fall within the exception (MCL 125.2683, MCL 211.7ff[2][b]). *Lafarge Midwest, Inc v City of Detroit*, 290 Mich App 240.

SPECIAL ASSESSMENTS

3. The procedures applicable to special assessments imposed by a board of public works under chapter 2 of 1957 PA 185 do not apply to special assessments imposed by a municipality other than a county (MCL 123.743; MCL 123.751 *et seq*.). *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328.

4. A special assessment is valid if (1) the improvement subject to the special assessment confers a benefit on the assessed property and not just the community as a whole and (2) the amount of the special assessment is reasonably proportionate to the benefit derived from the improvement; a key question is whether the property's market value increased as a result of the improvement. *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328.

USE TAX

5. The exemptions from the Use Tax Act for property purchased for demonstration purposes and for property purchased for resale require that the property be purchased, not merely manufactured, to qualify for the exemptions; a purchase requires a transfer of property for consideration from one person to another; for purposes of the exemp-

causing a termination of the expectancy, and (4) resultant damage to the plaintiff; a valid business expectancy is one in which there exists a reasonable likelihood or probability that the expectancy will come to fruition. *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, 290 Mich App 577.

2. The principles to be applied in determining whether a valid business expectancy exists for purposes of determining whether a defendant tortiously interfered with that business expectancy include (1) the presence of some level of discretion exercisable by a governmental body or decision-maker does not automatically preclude a recognition of a valid business expectancy, (2) if the discretion of the governmental body or decision-maker is expansive and not restricted by limiting criteria and factors to the extent that it makes it impossible to reasonably infer that the claimed expectancy would likely have come to fruition, there is no valid business expectancy, (3) an expectancy must generally be specific and reasonable, (4) it must be shown that there was a reasonable likelihood or probability that the expectant relationship would have developed as desired absent tortious interference with the expectancy, (5) a party need not prove that the expectancy equated to a certainty or guarantee, (6) innate optimism or mere hope is insufficient, and (7) the prior history of the governmental body or decision-maker and governing internal and external rules, policies, and laws constitute factors for a court to consider in determining whether a business expectancy was valid and likely achievable. *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, 290 Mich App 577.
3. A plaintiff claiming tortious interference with a business expectancy must demonstrate that the defendant acted both intentionally and either improperly or without justification; one who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a wrongful act per se 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; a wrongful act per se is an act that is inherently wrongful or that can never be justified under any circumstances; the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference when the defendant's conduct was not wrong-

ful per se; to establish that a lawful act was done with malice and without justification, the plaintiff must prove with particularity affirmative acts taken by the defendant that corroborate the improper motive of the interference; when motivated by legitimate business reasons, a defendant's actions do not constitute improper motive or interference. *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, 290 Mich App 577.

4. A plaintiff must establish that the defendant was a third party to the contract or business relationship in order to maintain a claim of tortious interference with a business expectancy; corporate agents are not liable for tortious interference with respect to the corporation's contracts and relationships when acting for the benefit of the corporation and within the scope of their authority; an agent can be liable, however, if the agent acted not for the benefit of the corporation or entity involved in the transaction or prospective transaction, but for his or her own benefit or pursuant to a personal motive. *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, 290 Mich App 577.