MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

June 22, 2010, through September 9, 2010

CORBIN R. DAVIS
CLERK OF THE SUPREME COURT

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State Court Administrator: CARL L. GROMEK

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COURT OF APPEALS CASES

SCHREUR v DEPARTMENT OF HUMAN SERVICES

Docket No. 285792. Submitted November 10, 2009, at Lansing. Decided June 22, 2010, at 9:00 a.m.

Amanda Schreur filed a petition for review in the Bay Circuit Court after a Department of Human Services hearing referee entered an order that dismissed as untimely a request by Schreur for a hearing regarding the department's denial of Schreur's application for Medicaid disability benefits. The department had mailed Schreur a notice that it had denied the application on June 10, 2005. The notice stated as the reasons for the denial that Schreur's disability was not expected to last for at least 12 consecutive months and that it would not prevent her from working in any substantial gainful employment. The notice also contained several apparently incorrect references to sections of the department's program eligibility manual and program administrative manual. The notice informed Schreur that she could request a hearing within 90 days of the date of the notice. Schreur filed her request for a hearing 368 days after the date of the notice and 278 days after the expiration of the 90-day period in which to request a hearing. Schreur contended that the notice she received was inadequate and ineffective to start the 90-day period. The hearing referee disagreed with Schreur and issued an order dismissing the request for a hearing. The circuit court, William J. Caprathe, J., agreed with Schreur and concluded that because the department's notice did not conform to the requirements of 42 CFR 431.210 and 42 CFR 431.221, the 90-day period did not begin to run and the request for a hearing was timely. The court vacated the hearing referee's order and reinstated Schreur's request for a hearing on the substantive issue whether she is disabled. The department appealed.

The Court of Appeals *held*:

1. Because Schreur was an applicant for benefits, not a recipient of benefits, the department was not required by the relevant federal regulations to cite the specific provision supporting its denial, and its failure to do so did not affect the validity of the denial letter that the department sent or the timing of a request

for a hearing. The information that the department provided to Schreur regarding her application for benefits was sufficient under the relevant federal regulations, and she was provided with a reasonable amount of time to request a hearing as required under the federal regulations. Schreur's request for a hearing was untimely under the circumstances. The circuit court erred by ruling that the department was required to cite the specific regulations in support of its decision and by ruling that Schreur filed a timely request for a hearing.

2. The Michigan Administrative Code provides that applicants such as Schreur are entitled to a hearing. The code does not require the department to cite the specific provisions supporting its denial when, as in this case, the denial of an application for Medicaid benefits does not discontinue, terminate, suspend, or reduce public assistance or services. Because Schreur was not already a recipient of such benefits, the department was not required to cite the specific provisions supporting its denial, and its failure to do so did not affect the validity of the denial letter or the timing of a request for a hearing. Deference must be given, absent express guidance on how long applicants have to request a hearing following a denial of benefits, to the department's determination that 90 days from the date of the denial decision is a reasonable time limit on requests for a hearing.

Reversed.

1. SOCIAL SECURITY — MEDICAID — APPLICANTS — DENIALS — HEARINGS — NOTICES.

A state plan for administrating the Medicaid program must provide for granting an opportunity for a fair hearing to any individual whose application for medical assistance is denied or is not acted upon with reasonable promptness; the agency must inform the applicant, in writing at the time of the application, of the right to a hearing, the method by which to obtain a hearing, and that the applicant may represent himself or use legal counsel, a relative, a friend, or other spokesman; the agency must then allow the applicant a reasonable time to request a hearing; the information provided need not conform with the requirements for a notice of action provided in 42 CFR 431.210 and need not inform the applicant of the specific regulations that support the agency's decisions (42 USC 1396a[a][3]; 42 CFR 431.200, 431.206[b] and [c][1], 431.220[a][1], and 431.221[d]).

2. SOCIAL SECURITY — MEDICAID — APPLICANTS — DENIALS — HEARINGS — NOTICES.

The Michigan Administrative Code provides the right to a hearing to a Medicaid applicant whose claim has been denied; the notice of such denial need not cite the specific provisions supporting the denial, and the applicant must be given a reasonable time within which to request a hearing (Mich Admin Code, R 400.901, 400.903).

Foster, Swift, Collins & Smith, P.C. (by *Richard C. Kraus*), for petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Joshua S. Smith*, Assistant Attorney General, for respondent.

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

PER CURIAM. Respondent, the Department of Human Services (the Department) appeals by leave granted a circuit court order that held that the Department failed to provide proper notice to petitioner, Amanda Schreur, of her right to request a hearing regarding a denial of her application for Medicaid benefits. This Court also granted the Department's motion for a stay of the benefit payments.[1] We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

On April 29, 2005, Schreur filed an application for Medicaid disability benefits. Schreur, then 24 years old, had undergone back surgery in January 2005 to remove a tumor from her spine. She claimed that she was physically unable to work because she suffered from low back pain and weakness. Schreur could not stand or walk for more than a half-hour before her back got sore,

[1] *Schreur v Dep't of Human Servs*, unpublished order of the Court of Appeals, entered November 10, 2008 (Docket No. 285792).

but she had no problem sitting for long periods. Previously, Schreur had worked at a day-care center. Schreur sought benefits retroactively, in part, from January 2005 forward. It is undisputed that at the time of Schreur's application, she was not already a recipient of Medicaid disability benefits.

On June 10, 2005, the Department mailed Schreur notice that it had denied her application for Medicaid benefits because her disability was not "expected to last for at least 12 consecutive months" and would not prevent her from "working in any substantial gainful employment." At the top of the form, there was a short statement to the applicant: "If you do not understand the information in this notice, please contact me immediately. If you wish, you may meet with my manager and me to discuss the action(s) taken on your application." (Presumably, "me" referred to the specialist who signed and provided her contact information on the form.)

The notice also contained several "Manual Policy References." On the line marked "PEM" (acronym for Program Eligibility Manual), was typed "400 500 166." On the line marked "PAM" (acronym for Program Administrative Manual), was typed "110 115." Below the Manual Policy References was the following statement: "If your application is being denied, you may apply for assistance if your circumstances changes [sic]."

The backside of the notice further provided, "Procedures For Requesting A Fair Hearing." Specifically, the notice stated:

> If you believe this action is illegal, you may request a hearing within 90 days of the date of this notice. . . . All . . . requests for a hearing must be made IN WRITING and signed and dated by you.

* * *

> Complete the "Request for Hearing" section below or any other written request. State that you want a hearing on the decision made by the Agency and briefly explain your reasons.

Immediately beneath this section was a form to fill out to request a hearing.

Schreur did not request a hearing within 90 days. Instead, she waited until June 13, 2006, to mail her request for review of the Department's decision to deny her application. The Department received the request on June 15, 2006. *Therefore, Schreur filed her hearing request 368 days after the date of the notice and 278 days after expiration of the 90-day period for requesting a hearing.*

On December 14, 2006, an administrative hearing was held regarding Schreur's substantive claim of disability and to determine whether Schreur's hearing request was timely. Schreur argued that her hearing request was timely because the Department's denial notice contained incorrect citations to the Department's administrative and eligibility manuals, which, she contended, made the notice inadequate and ineffective to start the 90-day period to request a hearing. More specifically, according to Schreur, the citations to the Department's policy manuals, PAM and PEM, were not relevant to the denial of Schreur's application for assistance because they did not pertain to disability determinations. Indeed, the Department concedes that manual item PEM 400 refers to assets, PEM 500 refers to income, PEM 166 refers to aged, blind, and disabled individuals, PAM 110 explains application filing and registration procedures, and PAM 115 explains application processing. Rather clearly, these manual items do not directly pertain to disability determinations.

The Department explained that the notice is "a Word document that workers often pre-fill . . . , and they just use the same [form] over and over again." The Department argued that the notice was adequate because it explained the reason for the denial of the application: that the impairment "has not lasted nor is expected to last for at least 12 consecutive months and does not prevent working in any substantial gainful employment." According to the Department, the notice informed Schreur of her right to a hearing and the 90 days she had to request a hearing. The Department argued that the incorrect manual citations should have prompted Schreur to request a hearing if she was confused about the reason for the denial of her application. In other words, according to the Department, the incorrect citations should have simply been an additional basis to request a hearing.

Citing Mich Admin Code, R 400.902, R 400.903, and R 400.904, the hearing referee explained that "[a]ny hearing request which protests a denial, reduction, or termination of benefits must be filed within 90 days of the mailing of the negative action notice." The referee rejected Schreur's argument that the Department's failure to cite the correct policy manual provisions underlying its decision to deny Schreur's Medicaid benefits application rendered the notice provided insufficient or defective. The referee reasoned that, although the Department was required to cite the specific provisions underlying its decision, the failure to do so merely constituted an additional ground on which to request a hearing to contest the Department's decision. The referee stated, "[T]he 90 day period to request a hearing applies to any issues connected with [the Department]'s actions of which the claimant has been notified of [sic], and that would include an omission of the

specific manual item(s) on which the action is based on [sic]." The referee found that the notice explained the specific reason for the denial and informed Schreur of her right to request a hearing within 90 days. Accordingly, the hearing referee issued an order dismissing Schreur's request for a hearing as untimely.

Schreur then filed a petition for review in the Bay Circuit Court. Schreur argued that the policy manual citation errors in the notice made it inadequate and defective and "tolled" the period that she had in which to request a hearing. Schreur agreed with the circuit court's assessment of her position that, if the section for manual references had said "PEM 260," it would have been a proper and adequate notice because PEM 260 covers Medicaid disability and sets forth the regulations regarding how a person is determined to be disabled under the Department's policy. Schreur readily acknowledged that she could have filed a request for a hearing within 90 days, but Schreur's counsel had decided to rely on the citation errors and waited a year to request a hearing in order to give her client an advantage. More specifically, Schreur's counsel explained:

> Part of the elements in defining disability are that you have to have a severe impairment which has lasted or will continue to last for a year. The younger a person, the more chances are is, is that they are going to—are—they are going to heal from that; they are going to be able to go back to work; they are not going to be found disabled. It was in the best interests of our client for us to wait, to be able to make a determination of whether she was going to meet that period of duration.

The Department reiterated its prior arguments and also argued that Schreur had neither alleged nor established any prejudice. The Department urged the circuit court not to reward Schreur's gamesmanship.

The circuit court agreed with Schreur's position and held that Schreur's claim was timely. The circuit court held that the 90-day period "begins at the point when timely and adequate notice of denial has been provided to an applicant." But the circuit court concluded that because the notice did not conform to the requirements of 42 CFR 431.210 and 42 CFR 431.221, the statutory 90-day period had not begun to run. The circuit court reasoned, "[I]f a person is going to lose their ability to have a review because they didn't respond within 90 days, it's a technical argument against them; then the technical aspect of the trigger not actually taking place appropriately, I think is—is equally viable." The circuit court therefore vacated the hearing referee's order and reinstated Schreur's request for a hearing on the substantive issue whether she was disabled. The Department now appeals the circuit court's holding and asserts that the circuit court's interpretation of the applicable law was erroneous.

II. NOTICE REQUIREMENTS

A. STANDARD OF REVIEW

The Department argues that because 42 CFR 431.221(d) unambiguously restricts an applicant's right to request a hearing to 90 days, the circuit court erred when it held that Schreur timely filed a request for a hearing. According to the Department, Schreur received adequate notice that the Department denied her application for Medicaid disability benefits and a nonconforming notice does not permit an applicant to exceed the 90-day limitation to request a hearing, absent a showing of actual prejudice. The Department adds that Schreur did not suffer any actual prejudice from its failure to cite the precise departmental policies underlying its denial; Schreur knew precisely why the

Department denied her application and that she had 90-days to request a hearing.

We review a circuit court's review of an agency's decision for clear error,[2] but we review de novo questions regarding interpretation of statutes and administrative rules.[3] Although our review is de novo, " 'the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.' "[4] "This standard requires 'respectful consideration' and 'cogent reasons' for overruling an agency's interpretation."[5] "[T]he agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as express in the language of the statute at issue."[6]

B. PRINCIPLES OF STATUTORY INTERPRETATION

The goal of statutory interpretation is to give effect to the intent of the Legislature.[7] The first step in determining the intent of the Legislature is to examine the language of the statute.[8] If the plain and ordinary meaning of the language is clear, judicial construction is

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[2] *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003).

[3] *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008); *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007).

[4] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935) (citation and quotation marks omitted).

[5] *In re Rovas Complaint*, 482 Mich at 103.

[6] *Id.*

[7] *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004).

[8] *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004).

neither necessary nor permitted.[9] The Legislature is presumed to have intended the meaning it plainly expressed.[10] We must enforce clear statutory language as written.[11] The rules of statutory construction apply with full force to administrative regulations.[12] We are to presume that drafters of regulations know the rules of grammar, and we must read regulatory language in its grammatical context unless a different intent is clearly expressed.[13]

C. MEDICAID DENIAL AND RIGHT TO A HEARING

Schreur does not contest that the Department informed her of the reasons for the denial of Medicaid benefits and that the Department informed her of her right to a hearing for review of that decision. Schreur contends, rather, that the 90-day hearing-request period did not bind her because the Department did not properly cite the "specific provisions" supporting the denial. On the surface, therefore, the salient question here would appear to be whether the Department's failure to cite the correct, specific provisions supporting its denial consequently failed to start the running of a hearing-request period. But the underlying and more basic question relates to Schreur's status under both federal and state law. We conclude that, because Schreur was an *applicant* for benefits, not a *recipient* of benefits, the Department was

[9] *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

[10] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

[11] *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

[12] *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004).

[13] *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Mgrs, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009).

not required to cite the specific provisions supporting its denial. Consequently, its failure to do so did not affect the validity of the denial letter that it sent or the timing for a request for a hearing.

1. FEDERAL LAW

a. OVERVIEW

Medicaid is a cooperative program of the federal and state governments that assists participating states in providing medical services to the needy.[14] The program is authorized under the Social Security Act,[15] which directs participating states to promulgate Medicaid program plans consistent with its provisions and the applicable regulations codified in title 42 of the Code of Federal Regulations. Although the federal and state governments jointly finance Medicaid benefit programs, the programs are administered by the states "[w]ithin broad federal rules . . . ."[16] In other words, while each state "decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures," their administration of these services is governed by, and is within the confines of, the statutes and applicable federal regulations.[17] Among other things, a state plan must "provide for granting an opportunity for a fair hearing . . . to any individual whose claim for medical assistance . . . is denied or is not acted upon with reasonable promptness[.]"[18] Accordingly, a particular set of federal regulations establishes certain notice and hearing procedures.

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[14] 42 USC 1396.

[15] 42 USC 1396 *et seq*.

[16] 42 CFR 430.0.

[17] *Id*.

[18] 42 USC 1396a(a)(3); see also 42 CFR 431.200.

b. APPLICANTS VERSUS RECIPIENTS

The federal Medicaid rules provide:

> (a) The State agency must grant an opportunity for a hearing to the following:
>
> (1) Any *applicant* who requests it because his claim for services is denied or is not acted upon with reasonable promptness.
>
> (2) Any *recipient* who requests it because he or she believes the agency has taken an action erroneously.[19]

Thus, both applicants and recipients are, under the delineated circumstances, entitled to a hearing. With respect to the timing of a requested hearing, pursuant to 42 CFR 431.221(d), "[t]he agency must allow the applicant or recipient a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearing." At first glance, this provision might seem to indicate that both applicants and recipients are entitled to a reasonable time, not to exceed 90 days, to request a hearing. However, a closer review of the plain language of 42 CFR 431.221(d) reflects that there is a triggering event to the applicability of the 90-day period: an agency must first mail a "notice of action."

The regulations provide definitions for the terms "notice" and "action." The regulations define "notice" as "a written statement that meets the requirements of [42 CFR] 431.210."[20] And the regulations define "action" as "a termination, suspension, or reduction of Medicaid eligibility or covered services."[21] Further, 42 CFR 431.210 provides:

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[19] 42 CFR 431.220 (emphasis added); see also 42 CFR 431.200.

[20] 42 CFR 431.201.

[21] *Id*.

> A notice required under § 431.206(c)(2), (c)(3), or (c)(4) of this subpart must contain—
>
> (a) A statement of what action the State . . . intends to take;
>
> (b) The reasons for the intended action;
>
> (c) The specific regulations that support, or the change in Federal or State law that requires, the action;
>
> (d) An explanation of—
>
> (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or
>
> (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
>
> (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

And 42 CFR 431.206, titled "[i]nforming applicants and recipients," provides, in pertinent part:

> (b) The agency must, at the time specified in paragraph (c) of this section, inform every applicant or recipient in writing—
>
> (1) Of his right to a hearing;
>
> (2) Of the method by which he may obtain a hearing; and
>
> (3) That he may represent himself or use legal counsel, a relative, a friend, or other spokesman.
>
> (c) The agency must provide the information required in paragraph (b) of this section—
>
> (1) At the time that the individual applies for Medicaid;
>
> (2) At the time of any action affecting his or her claim;
>
> (3) At the time a skilled nursing facility or a nursing facility notifies a resident in accordance with §483.12 of this chapter that he or she is to be transferred or discharged; and

> (4) At the time an individual receives an adverse determination by the State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

Reading all these definitions and provisions together, it becomes evident that, unlike a *recipient*, an *applicant* for benefits will never receive a 42 CFR 431.210 *notice* of *action*. That is, because an applicant has not yet established a right to services, he or she can never be subjected to an "action" in the form of "a *termination*, *suspension*, or *reduction* of Medicaid eligibility or covered services."[22] Moreover, we find it significant that 42 CFR 431.206(c)(2), (3), and (4), which describe particular instances in which a "notice" complying with 42 CFR 431.210 must be sent, do not apply to *applicants*, but only to actions or events affecting *recipients*. Only 42 CFR 431.206(c)(1), which requires that "[t]he agency must provide the information required in paragraph (b) . . . [a]t the time that the individual *applies* for Medicaid,"[23] covers applicants.

It is important to understand that these provisions distinguish between those persons who are applicants and those who are recipients and have already established a right to services. The regulations make a distinction between applicants and recipients in terms of providing those individuals notice of agency decisions. Applicants, because they by definition cannot receive a 42 CFR 431.210 notice of action, are entitled to a hearing with no particularized requirement regarding the timing of that hearing. Recipients, by contrast, are entitled to "a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request

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[22] See 42 CFR 431.201 (defining "action") (emphasis added); see also 42 CFR 431.200(b).

[23] Emphasis added.

a hearing."[24] With this distinction in mind—as confusing, circular, and internally contradictory as it might be—we next turn to deciphering the separate rights and responsibilities associated with applicants and recipients.

c. RIGHTS AND RESPONSIBILITIES REGARDING RECIPIENTS

Whenever a state agency terminates, suspends, or reduces a recipient's Medicaid eligibility or covered services,[25] the agency must inform the recipient, in writing, "(1) [o]f his right to a hearing; (2) [o]f the method by which he may obtain a hearing; and (3) [t]hat he may represent himself or use legal counsel, a relative, a friend, or other spokesman."[26] And this writing—this notice of action—must contain:

> (a) A statement of what *action* the State . . . intends to take;
>
> (b) The reasons for the intended *action*;
>
> (c) *The specific regulations* that support, or the change in Federal or State law that requires, the *action*;
>
> (d) An explanation of—
>
> (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or
>
> (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
>
> (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.[27]

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[24] 42 CFR 431.221(d).

[25] 42 CFR 431.201 (defining "action"); see also 42 CFR 431.206(c)(2), (3), and (4).

[26] 42 CFR 431.206(b).

[27] 42 CFR 431.210 (emphasis added).

The recipient must then be given "a reasonable time, not to exceed 90 days from the date that *notice of action* is mailed, to request a hearing."[28]

d. RIGHTS AND RESPONSIBILITIES REGARDING APPLICANTS

Whenever a state agency denies an applicant's request for services or does not act upon the request with reasonable promptness, the state agency must grant that applicant an opportunity for a hearing.[29] In keeping with this hearing opportunity, the state agency accordingly must inform the applicant, in writing, "(1) [o]f his right to a hearing; (2) [o]f the method by which he may obtain a hearing; and (3) [t]hat he may represent himself or use legal counsel, a relative, a friend, or other spokesman."[30] And, pursuant to 42 CFR 431.221(d), "[t]he agency must allow the applicant or recipient a reasonable time . . . to request a hearing."

Notably, we repeat that, unlike the notice of action that is sent to a *recipient*, the information provided to an *applicant* need not adhere to the 42 CFR 431.210 notice-of-action requirements. By its plain terms, 42 CFR 431.206(c)(1) only applies to applicants and, significantly, 42 CFR 431.210 does not cross-reference that subsection.[31] In other words, any information an *applicant* receives with regard to his or her Medicaid application need not conform with the notice requirements of 42 CFR

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[28] 42 CFR 431.221(d) (emphasis added). See *Grossi v Delaware Dep't of Health & Social Servs, Div of Social Servs*, 1995 Del Super LEXIS 388, *4 (Del Super, August 8, 1995, No. 94A-08-016) ("[B]efore the 90 period [sic] begins to run notice that adequately informs the medicaid recipient of the agency's decision must be mailed.").

[29] 42 CFR 431.220(a)(1); see also 42 CFR 431.200.

[30] 42 CFR 431.206(b); 42 CFR 431.206(c)(1).

[31] 42 CFR 431.206(c)(1) states: "The agency must provide the information required in paragraph (b) of this section . . . [a]t the time that the individual applies for Medicaid[.]"

431.210 because those requirements apply only to *recipients*. Thus, in instances in which a decision is made with regard to a Medicaid application, the agency is not required to inform the applicant of the "*specific regulations* that support" that decision.[32] Nor does the 42 CFR 431.221(d) definition of a "reasonable time" to request a hearing—that is, that such time not exceed 90 days—apply to an *applicant*.

e. RIGHTS AND RESPONSIBILITIES REGARDING SCHREUR

i. SCHREUR'S STATUS AS AN APPLICANT

It is undisputed that before Schreur applied for Medicaid disability benefits, she was not already a recipient of Medicaid benefits. Accordingly, by definition, when the Department denied Schreur's application for Medicaid benefits, it did not perform an "action." That is, a denial is not "a termination, suspension, or reduction of Medicaid eligibility or covered services."[33] Therefore, any writing that the Department sent to Schreur regarding its denial would not have been a notice of action. Consequently, the Department was not required to inform Schreur of the specific regulations that supported its denial decision. In other words, because the denial letter that the Department sent to Schreur did not constitute a notice of action, the denial was not defective for failing to meet the 42 CFR 431.210(c) content-of-notice requirements, which require the Department to cite the *specific* regulations in support of its decision.

ii. TIMING OF SCHREUR'S REQUEST FOR A HEARING

As an applicant, Schreur was not expressly bound by the 90-day hearing-request limitation in 42 CFR

[32] 42 CFR 431.210(c).

[33] 42 CFR 431.201 (defining "action").

431.221(d) that governs a recipient's opportunity to request a hearing. She was, rather, allowed a "reasonable time" to request her hearing.[34] However, the question remains: if the Department was required to allow Schreur a reasonable time to request a hearing, then how long was that *reasonable time*?

Although the 90-day hearing-request limitation of 42 CFR 431.221(d) only expressly governs a *recipient's* opportunity to request a hearing, we nevertheless find it a useful guide to gauge what constitutes a reasonable time for an *applicant* to request a hearing. And in using that 90-day period as a guide, we conclude that there can be no legitimate argument that 368 days—more than a year—after the date of the denial decision was a reasonable time. Indeed, there can be no dispute that 368 days after the denial decision was clearly an *unreasonable* time.

Moreover, we also reach this conclusion in light of the fact that the Department, in keeping with its responsibility to notify applicants "[o]f the method by which [they] may obtain a hearing,"[35] specifically notified Schreur that she had 90 days from the date of the denial decision to request a hearing. Thus, the Department, while perhaps failing to recognize the distinctions between an applicant and a recipient, nonetheless expressed its determination that 90 days was a reasonable time limit on requests for a hearing, and we give deference to the Department's decision.[36]

We also find it significant that at no time has Schreur ever argued that the 90-day time limitation was unreasonable or that she was unable to comply with it.

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[34] 42 CFR 431.221(d).

[35] 42 CFR 431.206(b)(2).

[36] See *In re Rovas Complaint*, 482 Mich at 103; *Boyer-Campbell*, 271 Mich at 296-297.

Indeed, Schreur admits that she was aware of the deadline and could have filed a request for a hearing within 90 days. Yet she and her counsel purposefully chose to disregard the deadline as a matter of strategy.

In sum, the information that the Department provided to Schreur regarding her application for benefits was sufficient under the regulations and she was provided with a reasonable amount of time to request a hearing. Thus, under the circumstances, the necessary conclusion is that Schreur's request for a hearing was untimely. Accordingly, we conclude that the circuit court erred by ruling that the Department was required to cite the specific regulations in support of its decision and by ruling that Schreur timely filed her request for a hearing.

2. MICHIGAN LAW

Consistently with the federal regulations, Michigan also provides an applicant whose Medicaid claim has been denied a right to a hearing.[37] An applicant's right to an opportunity to challenge a denial of services is addressed *generally* in Mich Admin Code, R 400.901 and *specifically* in Mich Admin Code, R 400.903.

Rule 400.901, titled "Notice of right to hearing," states as follows:

> An applicant, recipient, or licensee shall be informed in writing at the time of application and at the time of any action affecting his claim:
>
> (a) Of his right to a hearing, as provided in R 400.903.
>
> (b) Of the method by which he may obtain a hearing, as provided in R 400.903.

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[37] See *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 177; 428 NW2d 335 (1988).

> (c) That he may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman or he may represent himself.

Moreover, Rule 400.903, titled "Right to hearing," specifically addresses denials of applicants' claims and provides, in relevant part:

> (1) *An opportunity for a hearing shall be granted to an applicant who requests a hearing because his claim for assistance is denied* or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by an agency action resulting in suspension, reduction, discontinuance, or termination of assistance.[38]

Thus, under the Michigan Administrative Code, applicants are entitled to a hearing. However, as with the federal regulations, the question then becomes how long applicants have to request such a hearing.

Only one section of the Michigan Administrative Code provides any guidance on this question. Mich Admin Code, R 400.904(4), titled, "Request for hearing; timeliness," provides: "A claimant shall be provided 90 days from the mailing of the notice in R 400.902 to request a hearing." And Mich Admin Code, R 400.902(1) states:

> In cases of proposed action to discontinue, terminate, suspend, or reduce public assistance or services, the department shall mail a timely notice before a proposed change would be effective. Timely means that the notice is mailed at least 10 days before the action would become effective. A notice shall include the following:
>
> (a) A statement of what action the department intends to take.
>
> (b) The reasons for the intended action.
>
> (c) The specific regulations supporting the action.

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[38] Emphasis added.

> (d) An explanation of the individual's right to request a hearing.
>
> (e) The circumstances under which assistance or service is continued if a hearing is requested.

When read together, the plain language of Rule 400.904(4) and Rule 400.902(1) clearly states that the 90-day limitation on the ability to request a hearing starts from the mailing of a notice of negative action "to *discontinue, terminate, suspend,* or *reduce public assistance or services* . . . ."[39] And only those types of notice of negative action are required to include "[t]he specific regulations supporting the action."[40]

Again, it is undisputed that when Schreur applied for Medicaid disability benefits, she was not already a recipient of such benefits. Thus, the Department's decision to deny Schreur's application for Medicaid disability benefits would not "discontinue, terminate, suspend, or reduce public assistance or services . . . ." Accordingly, the Department's decision would not constitute a "[n]otice of negative action" as Rule 400.902 defines such an action and would not trigger the running of a 90-day hearing-request period. Therefore, under Michigan law, we conclude that the Department was not required to cite the specific provisions supporting its denial. And its failure to do so did not affect the validity of the denial letter that it sent or the timing for a request for a hearing.

And, as we concluded under the federal provisions, in the absence of express guidance on how long applicants have to request a hearing following a denial of benefits, we give deference to the Department's determination

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[39] Mich Admin Code, R 400.902(1) (emphasis added).

[40] Mich Admin Code, R 400.902(1)(c).

that 90 days from the date of the denial decision was a reasonable time limit on requests for a hearing.[41]

3. THE DEPARTMENT'S POLICIES

The parties also cite several provisions of the Department's internal policies to support their respective positions. However, a rule not enacted pursuant to the procedures outlined in the Administrative Procedures Act[42] does not have the force of law.[43] Thus, the parties' reliance on the provisions of the Department's internal policies are persuasive only to the extent that we give deference to the Department's determination that 90 days from the date of the denial decision was a reasonable time limit on requests for a hearing.

III. DUE PROCESS

Because Schreur was only an *applicant* and not a Medicaid *recipient*, the procedural due process issues outlined in *Goldberg v Kelly*[44] are not applicable to this case. That the regulations treat applicants and recipients differently is not surprising. What process is due requires a consideration of the government's interest, the private interest affected by the government's action, and the risk of an erroneous deprivation.[45] Here,

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[41] See *In re Rovas Complaint*, 482 Mich at 103; *Boyer-Campbell*, 271 Mich at 296-297.

[42] MCL 24.201 *et seq*.

[43] *Faircloth v Family Independence Agency*, 232 Mich App 391, 402; 591 NW2d 314 (1998).

[44] *Goldberg v Kelly*, 397 US 254, 260; 90 S Ct 1011; 25 L Ed 2d 287 (1970) (stating that "the constitutional issue to be decided" in that case was "the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits").

[45] *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).

the differing interests at stake account for the divergent procedural safeguards. Medicaid applicants have not secured, or otherwise shown, that they are entitled to the welfare benefit. By contrast, Medicaid recipients are statutorily entitled to, and are already receiving, those benefits. Accordingly, the notice and hearing requirements with regard to recipients are more stringent than those that apply to applicants.

We reverse.

UNITED SERVICES AUTOMOBILE ASSOCIATION
v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION

Docket No. 289579. Submitted May 11, 2010, at Lansing. Decided June 22, 2010, at 9:05 a.m.

United Services Automobile Association brought an action in the Washtenaw Circuit Court against the Michigan Catastrophic Claims Association, seeking reimbursement for personal protection insurance benefits it paid to its insured, Raoul Farhat, in excess of the statutory threshold for indemnification under MCL 500.3104(2). Farhat was injured in an automobile accident in Florida in 1996. Farhat had moved to Florida from Michigan in 1995. He purchased the vehicle that he was driving at the time of the accident in Florida, and the vehicle was registered in Florida. Farhat had requested that plaintiff add the vehicle to his Michigan no-fault automobile insurance policy, but because of an underwriting error, the vehicle was inadvertently omitted from Farhat's insurance policy. After the accident, plaintiff retroactively reformed Farhat's insurance policy to include coverage for the vehicle. In the circuit court, plaintiff moved for summary disposition. Defendant responded that it was not required to indemnify plaintiff because plaintiff had failed to make a premium payment to defendant for the vehicle and because defendant is only required to indemnify member insurers for losses associated with Michigan vehicles that are registered in Michigan. The court, Timothy P. Connors, J., denied plaintiff's motion for summary disposition and granted summary disposition to defendant, reasoning that because plaintiff failed to make a premium payment to defendant for the vehicle involved in the accident during the coverage period before the accident, plaintiff could not reform the insurance policy to include the vehicle after the accident in order to be reimbursed by defendant. Plaintiff appealed.

The Court of Appeals *held*:

1. Indemnification is only required under MCL 500.3104(2) when no-fault benefits were provided to a Michigan "resident." For purposes of the no-fault act, a resident is either someone who lived in Michigan and was required to purchase a no-fault automobile insurance policy written in this state that provided the

compulsory security requirements of MCL 500.3101(1) or someone who did not live in Michigan but was nonetheless required to register and insure his or her vehicle in this state. The evidence in this case indicated that Farhat intended to live in Florida indefinitely and that the bulk of his permanent connections were in Florida at the time of the accident. Thus, he cannot be deemed a resident on the basis of his domicile. Nor was Farhat required to register the vehicle involved in the accident in Michigan because it was not operated in Michigan. Because plaintiff did not pay benefits pursuant to a policy written in Michigan that provided the required security under MCL 500.3101(1) for a vehicle required to be registered in Michigan, defendant was not required to indemnify plaintiff.

2. Whether plaintiff failed to make a premium payment to defendant for the vehicle involved in the accident during the coverage period before the accident was of no consequence because the threshold requirement for indemnification, that the insured be a resident of Michigan for purposes of the no-fault act, was not met. Nonetheless, the circuit court correctly granted summary disposition in favor of defendant, albeit for the wrong reason.

Affirmed.

Garan Lucow Miller, *P.C.* (by *Caryn A. Gordon*), for plaintiff.

Dykema Gossett PLLC (by *Joseph K. Erhardt* and *K. J. Miller*) for defendant.

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

DONOFRIO, J. Plaintiff appeals as of right an order of the circuit court denying its motion for summary disposition and granting summary disposition to defendant. Because the trial court properly concluded, albeit for the wrong reason, that defendant was not required to indemnify plaintiff for personal protection insurance (PIP) benefits over the statutory threshold that plaintiff paid on behalf of its insured, Raoul Farhat, we affirm.

Raoul Farhat, M.D., is a physician who had been an officer in the United States Army and affiliated with the Michigan National Guard. Farhat said that he was licensed to practice medicine in Michigan, Florida, and California. Farhat was in an automobile accident on August 9, 1996, in Florida. Farhat explained that he was driving to work at an emergency room in a Florida hospital in a convertible Chrysler LeBaron when the accident occurred. Farhat stated that he had lived with his ex-wife in Florida from some time in 1995 until the accident, because they were trying to reunite in Florida after their 1993 Michigan divorce. Farhat explained that he owned a residence in Michigan through his mother's trust and that he grew up in Michigan and lived with his wife in Michigan before their divorce.

In December 1995, Farhat insured the LeBaron through his Michigan no-fault automobile insurance policy with plaintiff. According to plaintiff, Farhat had five vehicles insured by plaintiff, but the underwriting department mistakenly omitted the LeBaron from his policy. After the accident, plaintiff retroactively reformed Farhat's insurance policy to include coverage on the LeBaron. After Farhat won a judgment for PIP benefits against plaintiff in the Washtenaw Circuit Court, plaintiff sought to recover from defendant the amount in excess of $250,000 that it paid on behalf of Farhat.

The instant case involves plaintiff's effort to recover those benefits. It is plaintiff's position that Farhat properly insured the LeBaron under Michigan law because Farhat intended to drive the vehicle in Michigan and that Farhat had family and property in Michigan, was licensed to practice medicine in Michigan, and traveled to Michigan for obligations to the military, so defendant was required to reimburse plaintiff for benefits that it paid to Farhat. It is defendant's position

that it is permissible for it to review coverage decisions and that Farhat should not have been insured under a Michigan no-fault policy written by plaintiff for an accident that occurred in Florida involving a vehicle that was both purchased and registered in Florida.

In the trial court, at the hearing on plaintiff's motion for summary disposition, plaintiff stated that it was a member of defendant association and that defendant was required by statute, MCL 500.3104(2), to reimburse plaintiff for benefits that it paid to its insured persons. Plaintiff further argued that the statute does not mention any mechanism for defendant to refuse to reimburse members if defendant determines that a policy was not mandated. Plaintiff represented that it paid $896,106.60 in no-fault benefits to or on behalf of Farhat and that it was entitled to reimbursement from defendant in the amount of $646,106.60. Defendant responded at the hearing that it was not required to reimburse plaintiff because plaintiff failed to make a premium payment to defendant for the vehicle that was involved in the accident. Defendant also argued that the statute provides that it can only reimburse member insurers for losses associated with Michigan vehicles that are registered in Michigan.

The trial court denied plaintiff's motion for summary disposition and granted summary disposition to defendant. The trial court stated that it was following the holding of *Liberty Mut Ins Co v Mich Catastrophic Claims Ass'n*, 248 Mich App 35; 638 NW2d 155 (2001). The trial court reasoned that *Liberty Mut* indicated that if an insurer did not make a premium payment to defendant on a vehicle during the coverage period before it was in an accident, the insurer could not reform the insurance contract to include the vehicle after the accident in order to be reimbursed by defen-

dant.[1] The trial court did not address defendant's argument that it can only reimburse for Michigan vehicles that are registered in Michigan. Plaintiff now appeals as of right.

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*.

Defendant association was created by the Legislature in 1978 to respond to concerns that Michigan's no-fault law provision for unlimited PIP benefits placed too great a burden on insurers, particularly small insurers, paying "catastrophic" injury claims. *In re Certified Question* (*Preferred Risk Mut Ins Co v Mich Catastrophic Claims Ass'n*), 433 Mich 710, 714; 449 NW2d 660 (1989). MCL 500.3104(1) provides for the creation of the association and requires membership by specified insurers. Defendant's primary purpose is to indemnify member insurers for losses sustained as a result of the payment of PIP benefits beyond the "catastrophic" level, which is established according to a sliding scale depending on the date the policy in question was issued

[1] Michigan no-fault insurers that provide the security required by MCL 500.3101(1) must be members of defendant. MCL 500.3104(1). Members of defendant are required to make premium payments to defendant. MCL 500.3104(7)(d). Those premiums are based on the number of car years of insurance that a member writes in Michigan. *Id*. Insurers usually pass this per vehicle assessment on to their policyholders.

or renewed. MCL 500.3104(2); *In re Certified Question*, 433 Mich at 714-715. Defendant "charges each of its members a premium for the coverage it provides, which is based on the number of car years of insurance the member writes in Michigan." *In re Certified Question*, 433 Mich at 716, citing MCL 500.3104(7)(d).

Our Supreme Court in *In re Certified Question* was faced with a very similar situation. The question certified was the following:

> "Does the Motor Vehicle Personal and Property Protection Act, Mich Comp Laws Ann §§ [500.3101 to 500.3179] . . . , require the Michigan Catastrophic Claims Association to indemnify member insurers for losses paid in excess of $250,000 to insureds who are not residents of the State of Michigan but who were injured as a result of an automobile accident occurring in the State of Michigan?" [*Id.* at 713.]

Our Supreme Court held that MCL 500.3104(2) does not require defendant to indemnify its member insurers for losses paid to insureds who are not considered residents of this state. The Court stated that for purposes of the catastrophic claims provisions, "resident" referred to those insureds who actually live within this state and are required to purchase no-fault automobile insurance policies written in this state that provide the compulsory security requirements of MCL 500.3101(1), and also to certain insureds who do not live within this state but are nonetheless required to register, and thus insure, their vehicles in this state. *Id.* at 719-720, 723. Specifically, the Supreme Court held as follows:

> [W]e conclude that [MCL 500.3104(2)] requires indemnification only when the member insurer has paid benefits in excess of $250,000 under a policy which was written in this state to provide the security required by [MCL 500.3101(1)] of the no-fault act for the "owner or registrant of a motor vehicle required to be registered in this

state . . . ." [Defendant], whose policy of restricting indemnification to "residents of this state" is the subject of this dispute, has acknowledged that for purposes of indemnification under [MCL 500.3104(2)] it considers all owners or registrants of motor vehicles required to be registered here to be "resident[s] of the State for purposes of the Act," regardless of whether they actually live within this state.[10] With this acknowledgment in mind, we must conclude, in answering the question as certified, that [defendant] is required to indemnify member insurers only for losses paid to "residents" of this state.

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[10] In its supplemental brief on appeal, [defendant] acknowledges that there are situations in which persons who do not actually live within this state are nonetheless required to register and insure their vehicles in this state. See, e.g., MCL 257.243(b)-(d) . . . . In such cases, [defendant] concedes, these insureds are "deemed to be" residents of this state by virtue of their purchase of compulsory insurance coverage in this state pursuant to [MCL 500.3101(1)]:

"In assessing the validity of the Michigan-only restriction, the Association urges the Court to focus not on the physical location of the owner/registrant of the motor vehicle, but on whether or not the vehicle is required, because of the state of registration, to maintain security for the payment of Michigan PIP benefits. If the owner or registrant is required to maintain such security, the insurer of the motor vehicle has paid an assessment to the Association on that policy. Indemnification for incurred no-fault losses in excess of $250,000 under the policy is proper. *The owner or registrant, even though physically located outside Michigan, appropriately is deemed a resident of the State for purposes of the Act.*"

[*Id.* at 719-720.]

In this case, plaintiff argues that Farhat was required to insure the LeBaron in Michigan because of his activity in the state. Defendant argues that Farhat

could not have been required to register the LeBaron in Michigan and in turn carry no-fault insurance in Michigan and, therefore, Farhat was not a resident. As stated above, our Supreme Court in *In re Certified Question* concluded that defendant is not liable to indemnify all insurance coverage that its members provide, but only that coverage provided to residents according to MCL 500.3101(1). Thus, the question that must be answered in the instant case is whether Farhat was a " 'resident[] of the State for purposes of the Act,' regardless of whether [he] actually live[d] within this state." *Id.* at 719 (citation omitted). In other words, *In re Certified Question* interpreted the plain language of the catastrophic claims provisions as requiring indemnification under MCL 500.3104(2) only when coverage was provided to "owners or registrants of motor vehicles *required to be registered here* . . . regardless of whether they actually live within the state." *Id.* at 719 (emphasis added).

With regard to residency status, this Court has concluded multiple times that a resident of Michigan cannot be a nonresident under the no-fault act. *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 40; 592 NW2d 395 (1998); *Wilson v League Gen Ins Co*, 195 Mich App 705, 710; 491 NW2d 642 (1992). Thus, a critical question is whether Farhat was a Michigan resident; if he was, he was not a nonresident for these purposes, regardless of his connections to Florida.

"Residence" and "domicile" are legally synonymous. *Cervantes v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 410, 414; 726 NW2d 73 (2006). Many factors have been considered with respect to the question of residency, and the determination varies according to the factual circumstances. *Id.* at 414-415. The factors that may be considered include, but are not limited to, the

person's intent; mailing address; the address listed on the person's driver's license, tax returns, and other documents; the location of bank accounts; maintenance of a telephone number; and property ownership. *Id.*; see also *Witt v American Family Mut Ins Co*, 219 Mich App 602, 605-606; 557 NW2d 163 (1996).

Farhat stated that he grew up in Michigan and lived with his wife in Michigan before their 1993 Michigan divorce. But Farhat moved to Florida in an effort to reunite with his ex-wife in 1995. On June 13, 1995, Farhat informed plaintiff that he had moved to Florida. Farhat was working in Florida at the time of the accident. Farhat purchased the LeBaron in Florida, registered it in Florida, obtained Florida license plates for it, and never drove it in Michigan. In June 1996, Farhat called plaintiff to request a homeowner's policy for his Florida home. Also, in June 1996, Farhat updated his billing address to Florida. On the date of the accident, August 9, 1996, Farhat had a Florida driver's license. In early 1997, Farhat claimed a homestead exemption on his Florida home. While Farhat testified that he had a residence in Michigan through his mother's trust and had two cars garaged in Michigan, it appears that Farhat's intent at the time was to live in Florida indefinitely and that the bulk of his permanent connections were in Florida at the time of the accident. We therefore conclude that Farhat was domiciled in Florida and was not a resident of Michigan for purposes of the no-fault act.

Accordingly, we must determine whether Farhat could alternatively be deemed a resident of this state for purposes of the act if his LeBaron was otherwise "required to be registered" in Michigan. *In re Certified Question*, 433 Mich at 719. In order to determine if the LeBaron was

required to be registered in Michigan, we look to the applicable statutory language. MCL 257.216 states as follows:

> Every motor vehicle, recreational vehicle, trailer, semi-trailer, and pole trailer, when driven or moved on a street or highway, is subject to the registration and certificate of title provisions of this act except the following:
>
> (a) A vehicle driven or moved on a street or highway in conformance with the provisions of this act relating to manufacturers, transporters, dealers, or nonresidents.

And MCL 257.243(1) states as follows:

> A nonresident owner, except as otherwise provided in this section, owning any foreign vehicle of a type otherwise subject to registration under this act may operate or permit the operation of the vehicle within this state without registering the vehicle in, or paying any fees to, this state if the vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration certificate and registration plate or plates issued for the vehicle in the place of residence of the owner.

MCL 257.216(a) and MCL 257.243(1) both discuss when vehicles are required to be registered in this state, and both indicate that nonresident owners are not required to register their motor vehicles in Michigan. Thus, Farhat, as a nonresident owner who had never driven the LeBaron in Michigan, was not required to register it in Michigan under either MCL 257.216(a) or MCL 257.243(1).

Next, we examine the compulsory-insurance requirement of MCL 500.3101(1), which provides 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 insur-

> ance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway.

And finally, we consider MCL 500.3102(1), which provides:

> A nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter.

Reading MCL 500.3101(1) and MCL 500.3102(1) *in pari materia* with MCL 257.216(a) and MCL 257.243(1), the LeBaron was not required to be registered in Michigan, and because the vehicle was not operated in Michigan, it was not required to be insured in Michigan.

The record reflects that plaintiff conducted an investigation that concluded that "Farhat was residing, working and driving" the LeBaron in Florida on the date of the accident and that the vehicle was registered, titled, and used in Florida. At oral argument before us in this appeal, plaintiff admitted the following facts contained in the record:

- On June 13, 1995, Farhat told USAA he had moved to Florida.
- Farhat purchased the LeBaron in Florida.
- The LeBaron was registered in Florida.
- The LeBaron had Florida license plates.
- The LeBaron was never driven in Michigan.
- Farhat had a Florida driver's license on August 9, 1996.
- The accident occurred in Florida.

• There is no testimony in Farhat's deposition that he had any intention of driving the LeBaron in Michigan.

• There is no testimony in Farhat's deposition that he ever drove the LeBaron in Michigan.

Given these facts, there is no evidence in the record that the LeBaron, which was purchased, registered, titled, and garaged in Florida, was going to be driven in Michigan for any period in 1996 by Farhat, a nonresident who was living and working in Florida. Thus, Farhat's LeBaron was not required to be registered in Michigan. Because Farhat was a nonresident and the LeBaron was not required to be registered in Michigan, MCL 500.3101(1) does not apply. *In re Certified Question*, 433 Mich at 719-720, 723. Defendant need only indemnify an insurer under MCL 500.3104(2) if the insurer paid benefits pursuant to a policy written in Michigan that provided the required security under MCL 500.3101(1) for a vehicle required to be registered in Michigan. *In re Certified Question,* 433 Mich at 719-720, 723. Thus, for all these reasons, we conclude that defendant was not required to reimburse plaintiff.

Our conclusion is further supported by the holding in *Allied Prop & Cas Ins Co v Mich Catastrophic Claims Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2008 (Docket No. 277765).[2] In *Allied Prop & Cas Ins Co*, the Court also applied the reasoning of *In re Certified Question* and likewise determined that defendant was not required to reimburse the plaintiff for an accident in Texas involving an uninsured Texas-registered vehicle because the insured was not required to register his vehicle in Michigan according to MCL 500.3101(1). *Id.* at 3. The *Allied Prop & Cas Ins Co* Court noted the holding of *In re Certified*

[2] While we understand that unpublished cases are not binding authority, MCR 7.215(C)(1), we find the reasoning in this similar case instructive.

Question in stating that defendant need only indemnify an insurer under MCL 500.3104(2) if the insurer compulsorily paid PIP benefits to residents of the state under MCL 500.3101(1). *Id*.

The trial court in the instant case saw this action differently, resolving it on the basis of the issue whether defendant was required to indemnify plaintiff in light of the fact that plaintiff had reformed its insurance contract with Farhat after the accident. The trial court stated that it was granting summary disposition to defendant because it had to under *Liberty Mut Ins Co*, specifically relying on the following language of *Liberty Mut Ins Co*:

> We conclude that the clear language of the statute does not allow plaintiff to make a premium payment to cover a period from August 1992 through March 1993 five years after the accident and claim occurred and the covered period expired. To allow reformation of an insurance policy and allow the insurer to make a premium payment to [defendant] at the time of reformation, and not during the applicable period of coverage, would be an absurd interpretation of MCL 500.3104. If we were to accept plaintiff's argument, we would set a precedent by which an insurer could withhold premium payments for policyholders who moved to Michigan, then, upon a loss exceeding $250,000, the insurer could simply reform the contract, submit the previously due premium payments, and be reimbursed for claims paid in excess of $250,000. Under that situation, [defendant] would be deprived of premiums for policies on which no claims are made, thus defeating the "spread the risk" concept in insurance. We decline to establish such a precedent. [*Liberty Mut Ins Co*, 248 Mich App at 46-47 (citations omitted).]

In the current case, indeed, Farhat's policy omitted the LeBaron involved in the accident. Farhat's LeBaron was not listed on the policy that plaintiff provided him at the time of Farhat's accident on August 9, 1996. According to plaintiff's own investigation, Farhat re-

quested that the LeBaron be added to his automotive policy after he purchased the vehicle in December 1995, stating that it would be kept and used in Michigan. The vehicle was insured from December 11, 1995, until January 1, 1996. However, plaintiff apparently inadvertently failed to renew the LeBaron's insurance in January 1996 and, thus, the LeBaron was not included on Farhat's automobile insurance policy at the time of the accident. Therefore, Farhat did not pay, and plaintiff did not collect, a premium for the applicable period on the LeBaron and it was not included in plaintiff's premium payment to defendant.

But whether plaintiff did or did not receive the premium required from Farhat is of no consequence for the reason that the threshold requirement is not met—defendant need only indemnify an insurer under MCL 500.3104(2) if the insurer paid benefits pursuant to a policy written in Michigan that provided for the required security under MCL 500.3101(1) for a vehicle *required to be registered* in Michigan. *In re Certified Question*, 433 Mich at 719, 723.[3] We have concluded that, as a matter of law, Farhat's LeBaron was not required to be registered in Michigan and, therefore, MCL 500.3101(1) does not apply and defendant was not required to reimburse plaintiff. *Id*. " 'A trial court's ruling may be upheld on appeal where the right result [was] issued, albeit for the wrong reason.' " *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005), quoting *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). The trial court did not

[3] Unlike *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (On Rehearing), 484 Mich 1; 795 NW2d 101 (2009), which contested the reasonableness of the reimbursement for benefits provided under a policy subject to indemnity, this action is concerned with entitlement to indemnity in the first instance and not the benefits paid. Therefore, *United States Fidelity* is not implicated.

err when it denied plaintiff's motion for summary disposition and granted summary disposition to defendant.

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

TBCI, PC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 288853. Submitted April 6, 2010, at Detroit. Decided April 27, 2010. Approved for publication June 22, 2010, at 9:10 a.m.

TBCI, P.C., brought an action in the Oakland Circuit Court against State Farm Mutual Automobile Insurance Company, seeking payment under the no-fault motor vehicle insurance act, MCL 500.3101 *et seq*., for health-care services allegedly provided to Eric Afful, State Farm's insured, following an automobile accident. State Farm had refused to pay benefits, contending that Afful had submitted fraudulent claims for the services. Afful had also brought a separate action in the Wayne Circuit Court against State Farm after State Farm denied his claims for the services. Following a jury trial in the Wayne Circuit Court action, the Wayne Circuit Court entered a judgment of no cause of action against Afful, consistent with the jury's determination that Afful's claim for benefits was fraudulent. State Farm then moved for summary disposition in the Oakland Circuit Court action, arguing that the judgment in the Wayne Circuit Court action barred the action by TBCI under the doctrine of res judicata. The trial court, Daniel P. O'Brien, J., agreed with State Farm and granted it summary disposition, dismissing the action. TBCI appealed.

The Court of Appeals *held*:

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. It is applicable when the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involved the same parties or their privies. The judgment in the first case must have been final for the doctrine to apply. There is no dispute that the judgment by the Wayne Circuit Court was a final judgment on the merits and that the claims of TBCI were, or could have been, resolved in that first lawsuit. The essential evidence presented in the first action sustained the dismissal of both actions. TBCI, although not a party to the first case, was in privity with Afful. A privy of a party includes a person so identified in interest with another that he or she represents the same legal right. The Oakland Circuit Court properly dismissed TBCI's suit.

Affirmed.

Ihrie O'Brien (by *Harold A. Perakis*) for plaintiff.

Hewson & Van Hellemont, P.C. (by *James F. Hewson* and *Mark R. Richard*) (*Steven G. Silverman*, of counsel), for defendant.

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM. In this case brought under the no-fault motor vehicle insurance act, MCL 500.3101 *et seq.*, plaintiff, TBCI, P.C., a health-care provider, appeals as of right the trial court's order dismissing its complaint that sought to recover first-party benefits. We affirm.

I. BASIC FACTS

On February 6, 2006, Eric Afful was allegedly injured in an automobile accident. As a result, Afful claimed to have received attendant-care services as well as other medical treatment. However, Afful's no-fault insurer, defendant, State Farm Mutual Automobile Insurance Company, refused to pay Afful's claims for the services, contending the claims he submitted were fraudulent. Thus, Afful sued defendant in a separate litigation in the Wayne Circuit Court.[1] The case went to trial and, on May 15, 2008, the jury found that Afful's claim for attendant-care benefits was fraudulent. This barred coverage for Afful's claim under the exclusionary clause of the policy. The relevant provision stated:

> There is no coverage under this policy if you or any other person insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

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[1] *Afful v State Farm Mut Auto Ins Co*, unpublished judgment of the Wayne Circuit Court, entered June 3, 2008 (Docket No. 06-630073-NF).

Accordingly, a judgment of no cause of action was entered against Afful on June 3, 2008.

Plaintiff also allegedly provided Afful with therapeutic and rehabilitative services for his injuries from the accident. Defendant also refused to pay for these services, and plaintiff brought the present suit against defendant for payment. Specifically, plaintiff alleged that defendant owed it approximately $35,000 for the services plaintiff had provided Afful. Plaintiff's complaint, filed in February 2007, alleged that defendant had breached the insurance policy and that its failure to pay the claim had violated the no-fault act. At the time of the trial in the Wayne Circuit Court, the present matter was pending in the Oakland Circuit Court.

After the judgment was entered in the Wayne Circuit Court case, defendant in the present matter moved for summary disposition. It argued that the Wayne Circuit Court's judgment barred plaintiff's claim under the doctrine of res judicata. Defendant contended that once the jury found that Afful had committed fraud, there was no longer any coverage under the policy and, consequently, plaintiff's claim failed. Plaintiff responded, in part, that the present claim was "an independent cause of action" involving a claim for services that "was not adjudicated in the Wayne County action." The trial court agreed with defendant, finding that the core issue—whether there was coverage for Afful's claims—was common between the two suits and that the decision of the jury in the Wayne Circuit Court action, combined with the clear language of the policy, decided the issue in defendant's favor. The court reasoned:

> [T]here is one issue that is identical between this and the Wayne County case, to-wit whether there is valid coverage by the defendant for the alleged insured.

> Looking at the—looking at the language, not having to go to contract construction or anything else, but just using the English language there is no coverage under this policy if you have made false statements in connection with any claim under this policy.
>
> * * *
>
> If an insured's conduct is thus or so, or specifically fraudulent, the whole coverage is spoiled . . . .
>
> * * *
>
> I find that there is no question whatsoever but that the jury declaration or adjudication in Wayne County navigates the course of this proceedings [sic], any fraud spoils the coverage . . . .

Thus, the trial court granted summary disposition for defendant and dismissed the action. This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews 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). Further, questions concerning the correct interpretation and application of an insurance contract are reviewed de novo, *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001), as are questions concerning a trial court's decision on the applicability of res judicata, *Begin v Mich Bell Tel Co*, 284 Mich App 581, 598; 773 NW2d 271 (2009).

III. ANALYSIS

Plaintiff argues that the trial court erred by interpreting the policy's exclusionary language in such a way

that it voided all coverage under the policy, including mandatory coverage for personal protection insurance benefits. In plaintiff's view, this interpretation of the policy conflicted with the no-fault act's mandatory-coverage requirement, and it should have been declared void as against public policy. Plaintiff also contends that the language of the provision is ambiguous. We disagree. In our opinion, it is unnecessary for us to reach the substance of plaintiff's arguments because its claim was barred by res judicata.

"The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *Id.* at 599. Accordingly, "[r]es judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). It is applicable when "the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 376; 652 NW2d 474 (2002) (citation omitted). For the doctrine to apply, the judgment in the first case must have been final. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

Here, there is no serious dispute whether the judgment in the first case was a final judgment on the merits. The jury determined that Afful had submitted a fraudulent claim for benefits, and a judgment pursuant to the verdict was entered on June 3, 2008. Further, there is no question whether plaintiff's claims were, or could have been, resolved in the first lawsuit. This is because the essential evidence presented in the first

case sustained dismissal of both actions. See *Eaton Co Rd Comm'rs*, 205 Mich App at 375. Plaintiff, by seeking coverage under the policy, is now essentially standing in the shoes of Afful. Being in such a position, there is also no question that plaintiff, although not a party to the first case, was a "privy" of Afful. "A privy of a party includes a person so identified in interest with another that he represents the same legal right . . . ." *Begin*, 284 Mich App at 599. As noted, the jury determined that Afful submitted a fraudulent claim. The result under the plain language of the exclusion provision interpreted in the first action is that Afful and his privies were not entitled to coverage under the policy. Plaintiff is simply attempting to relitigate precisely the same issue in order to obtain coverage under the policy. The trial court properly dismissed plaintiff's suit to the extent that it found its claim was barred by res judicata. For this reason, plaintiff's claim of appeal fails.

Affirmed.

ROSE v ROSE

Docket No. 286568. Submitted January 5, 2010, at Grand Rapids. Decided June 22, 2010, at 9:15 a.m.

Rebecca Ann Rose obtained a divorce from Wesley Allen Rose, Sr., in the Ottawa Circuit Court, pursuant to a consent judgment entered in 2006. At the time of the parties' divorce, their most valuable asset was Die Tron, Inc., of which defendant was the sole owner. In the consent judgment, the parties agreed that defendant would pay plaintiff spousal support in the amount of $230,000 a year for 20 years and that plaintiff would forgo any interest in Die Tron. The judgment stated that the spousal-support obligation was nonmodifiable. After the parties' divorce, defendant ceded operational responsibility for Die Tron to David Rose, his son from a prior marriage. In January 2008, defendant learned that the company was failing, and his subsequent efforts to rescue the company were unsuccessful. In April 2008, plaintiff moved to enforce the judgment's spousal-support provision. Defendant countered with a motion to modify his support obligation and for relief from the spousal-support provision under MCR 2.612. The court, Jon H. Hulsing, J., denied defendant's motion to modify the judgment, citing the fact that the divorce judgment was nonmodifiable by its terms. However, the court granted defendant's motion for relief from judgment under MCR 2.612(C)(1)(f) and reduced defendant's support obligation to $900 a month. Plaintiff appealed by leave granted.

The Court of Appeals *held*:

The statutory right to seek modification of a spousal-support provision under MCL 552.28 may be waived by the parties to a divorce when the parties specifically forgo that right and agree in a consent judgment that the spousal-support provision is nonmodifiable. MCR 2.612(C)(1) authorizes a court to grant relief from a final judgment in certain circumstances. When the parties to a consent judgment have chosen to make the judgment nonmodifiable, a court considering granting relief from the judgment under MCR 2.612(C)(1)(f), which permits a court to set aside a judgment for any reason justifying relief other than those set forth in MCR 2.612(C)(1)(a) through (e), must strictly apply the factors limiting

relief from a judgment. Specifically, relief may only be granted in extraordinary situations not covered by MCR 2.612(C)(1)(a) through (e), and courts must refrain from vacating the judgment if doing so would detrimentally affect the substantial rights of the opposing party. In this case, the divorce judgment contained a clearly expressed nonmodifiable spousal-support provision. The circuit court erred by failing to afford proper deference to that binding agreement. The circuit court ruled that the spousal-support provision was inequitable and unconscionable given Die Tron's demise. However, by entering a nonmodifiable support provision in the divorce judgment, the parties waived their rights to a judicial determination of equitable spousal support, and the judgment cannot be deemed unconscionable on the basis of events that occurred after the contract's formation. Further, affording defendant relief from the provision would detrimentally affect plaintiff's substantial right to enforcement of the contract. While courts may have the power to set aside a judgment despite prejudice to the opposing party in rare cases, such exceptional circumstances were not present in this case. Die Tron's failure was tragic but hardly extraordinary.

Reversed and remanded.

JUDGMENTS — RELIEF FROM JUDGMENTS — DIVORCE — CONSENT JUDGMENTS — SPOUSAL SUPPORT — NONMODIFIABLE SPOUSAL-SUPPORT PROVISION.

The statutory right to seek modification of a spousal-support provision may be waived by the parties to a divorce when the parties specifically forgo that right and agree in a consent judgment that the spousal-support provision is nonmodifiable; when the parties to a consent judgment have chosen to make the judgment nonmodifiable, a court considering granting relief from the judgment must strictly apply the factors limiting relief from a judgment; the motion may only be granted in extraordinary situations not otherwise specifically enumerated by the court rule, and courts must refrain from vacating the judgment if doing so would detrimentally affect the substantial rights of the opposing party (MCR 2.612[C][1][f]).

Speaker Law Firm, *PLLC* (by *Liisa R. Speaker*), for plaintiff.

Wheeler Upham, *P.C.* (by *Nicholas S. Ayoub*), for defendant.

Before: STEPHENS, P.J., and GLEICHER and M. J. KELLY, JJ.

GLEICHER, J. In this postdivorce dispute over nonmodifiable spousal-support language in a divorce judgment, plaintiff, Rebecca Ann Rose, appeals by leave granted a circuit court order relieving defendant, Wesley Allen Rose, Sr., from the judgment and reducing his spousal-support obligation. We reverse and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

The parties, who wed in 1983, entered into a consent divorce judgment in 2006. During the 22 years of the parties' marriage, they acquired substantial wealth. The couple's most valuable marital asset consisted of stock that defendant owned in Die Tron, Inc., a tool and die company in which defendant partially acquired an interest in 1992. In 2000, defendant purchased the entirety of Die Tron's stock and became the company's sole owner. When the parties divorced, they valued defendant's interest in Die Tron at $6 million.

Defendant wished to avoid liquidating or selling Die Tron in the course of the parties' divorce, in part because he hoped that David Rose, his son from a prior marriage, would eventually buy the business. Instead of converting defendant's Die Tron holdings into cash, the parties agreed that defendant would pay plaintiff spousal support in the amount of $230,000 a year and that plaintiff would forgo any interest in Die Tron. The parties further agreed that plaintiff's spousal support would be nonmodifiable. The divorce judgment, which the parties negotiated with the assistance of counsel, includes the following relevant details concerning modification:

> B. The spousal support provided for herein shall be paid directly to or for the benefit of plaintiff by defendant and not through the Office of the Friend of the Court. The parties intend that the spousal support provided for herein shall be all of the spousal support that plaintiff shall receive from defendant. Spousal support payments shall automatically terminate upon plaintiff's death or upon defendant's death.
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> * * *
>
> D. It is the intention and understanding of the parties that the spousal support obligations of the defendant be non-modifiable regarding duration and amount, except:
>
> 1) If plaintiff has died, resulting in early termination as provided herein;
>
> (2) If defendant has died, since the parties have provided for the continuation of plaintiff's spousal support through the assignment by defendant to plaintiff of his New England Life Insurance Company Variable Universal Life Policy . . . , a significant part of the life insurance proceeds of which are intended to secure to plaintiff adequate spousal support in the event of defendant's death.
>
> This is the agreement of the parties, and it is the intention of the parties that regardless of any change in circumstances or in the lifestyles of plaintiff or defendant, this spousal support provision is to be non-modifiable.

After entry of the divorce judgment, defendant ceded responsibility for Die Tron's day-to-day operations to David Rose. In January 2008, defendant learned that David Rose had committed financial improprieties that severely compromised Die Tron's ability to remain solvent. Defendant shared this information with plaintiff, who agreed to temporarily modify the spousal-support payment schedule while defendant attempted to rescue Die Tron. Defendant's efforts proved unsuccessful, and Die Tron ceased operation in March 2008. In April 2008, plaintiff moved to enforce the divorce

judgment's spousal-support provision. Defendant countered with a motion to modify his support obligation and for relief from the spousal-support portion of the divorce judgment under MCR 2.612.

The circuit court denied defendant's motion to modify the judgment, finding that the spousal-support term "is non-modifiable and not subject to judicial review." After conducting an evidentiary hearing, the circuit court granted defendant's motion for relief from judgment and reduced his spousal-support obligation to $900 a month. This Court granted plaintiff's application for leave to appeal.

II. ANALYSIS

Plaintiff contends that because the parties clearly and unambiguously agreed to forgo their statutory right to petition for modification of spousal support, the circuit court abused its discretion by partially relieving defendant of his spousal-support obligation. A divorce judgment entered by agreement of the parties represents a contract. *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008). The "interpretation of a contract is a question of law reviewed de novo on appeal . . . ." *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). Likewise, "[t]he proper interpretation and application of a court rule is a question of law, which we review de novo." *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). We review for an abuse of discretion a circuit court's ultimate decision to grant or deny relief from a judgment. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002).

In *Staple v Staple*, 241 Mich App 562, 574; 616 NW2d 219 (2000), a special conflict panel of this Court considered whether parties to a divorce judgment may volun-

tarily relinquish their statutory right to seek modification of a spousal-support agreement "and instead stipulate that their agreement regarding alimony is final, binding, and nonmodifiable[.]" The Court in *Staple* answered this question affirmatively, holding that if divorcing parties negotiate a settlement in which they clearly and unambiguously forgo their statutory right to petition for modification of spousal support, courts must enforce their agreement. *Id*. at 564, 581. In this case, the parties agree that the holding in *Staple* supplies the appropriate analytical starting point.

Staple recognized that for some divorcing parties, "the general rule of finality is not always suitable . . . . In many situations, judgments of divorce must anticipate that circumstances will change for both the spouses who require support and the spouses who must provide that support." *Id*. at 565. In the face of changed circumstances, "flexibility in the form of modifiable arrangements may be more important than finality . . . ." *Id*. Recognizing the need for flexibility in this realm, our Legislature enacted MCL 552.28, which grants circuit courts the authority to modify the spousal-support award contained in a divorce judgment.[1]

This Court explained in *Staple*, 241 Mich App at 574-575, that the plain language of MCL 552.28 does not preclude a party from waiving his or her right to seek modification of a spousal-support award and that Michigan courts often enforce agreements to waive

[1] In MCL 552.28, the Legislature set forth that

> [o]n petition of either party, after a judgment for alimony or other allowance for either party or a child . . . and subject to [MCL 552.17], the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, . . . and may make any judgment respecting any of the matters that the court might have made in the original action.

statutory rights. The Court observed that, "[m]ore importantly," longstanding caselaw holds that when both parties waive their rights to seek spousal support altogether, "neither party has the right to petition the court" to modify that agreement by adding a provision for spousal support when none previously existed. *Id*. at 575. In light of these legal principles, we concluded in *Staple* that "the statutory right to seek modification of alimony may be waived by the parties where they specifically forgo their statutory right to petition the court for modification and agree that the alimony provision is final, binding, and nonmodifiable." *Id*. at 578.

After announcing this holding, the Court in *Staple* approvingly acknowledged the following "five public policy reasons why courts should enforce duly executed nonmodifiable alimony arrangements":

> (1) Nonmodifiable agreements enable parties to structure package settlements, in which alimony, asset divisions, attorney fees, postsecondary tuition for children, and related matters are all coordinated in a single, mutually acceptable agreement; (2) finality of divorce provisions allows predictability for parties planning their postdivorce lives; (3) finality fosters judicial economy; (4) finality and predictability lower the cost of divorce for both parties; (5) enforcing agreed-upon provisions for alimony will encourage increased compliance with agreements by parties who know that their agreements can and will be enforced by the court. [*Id*. at 579.]

The Court further emphasized that its decision "also advance[d] the public policy of requiring individuals to honor their agreements." *Id*. at 579-580.

The circuit court determined that the instant judgment's nonmodifiable spousal-support language fully complied with the requirements this Court identified in *Staple*. The circuit court then considered whether, de-

spite the parties' covenant not to seek any modification of spousal support, defendant had established a ground for relief from the judgment under MCR 2.612(C). MCR 2.612(C)(1) authorizes a court to relieve a party from a final judgment on the following grounds:

> (a) Mistake, inadvertence, surprise, or excusable neglect.
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> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> (d) The judgment is void.
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> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
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> (f) Any other reason justifying relief from the operation of the judgment.

A motion for relief from judgment under subrules (a), (b), or (c) must be made within one year after the judgment. MCR 2.612(C)(2).

The circuit court noted that "[a]t first glance" defendant's request for relief appeared unsupportable under MCR 2.612(C)(1)(a) through (e), "[b]ut, on deeper analysis, it does appear that there are some elements of MCR [2.612(C)(1)(a)] and (b) at issue." The court continued that "while a downturn in business was contemplated, it was not contemplated by any of the parties that a family member would falsify financial records that were relied upon by Defendant and third parties" or that the business "would be involuntarily closed." According to the circuit court, these circumstances "contain an element of surprise." The circuit court further found that any "neglect" of the business

by defendant was "excusable" because defendant had entrusted the business operations to his son. The court detected no "undiscovered evidence" that existed at the time the parties entered into the divorce judgment, but added that David Rose began altering the books "within months" thereafter. (Citation omitted.) The circuit court finally found that "within twenty months after the Judgment of Divorce was entered, the value of the company was reduced to scrap value, after debts were paid. As such, it appears that a significant mistake may have been made in the valuation of the Company."

Although the circuit court discovered some evidence supporting "elements of MCR 2.612(C)(1)(a) and (b)," the court recognized that because defendant filed his motion more than a year after entry of the judgment, those subrules did not apply. The circuit court then considered whether defendant had demonstrated grounds for relief under MCR 2.612(C)(1)(f), which permits a court to set aside a judgment for any reason justifying relief other than those listed in MCR 2.612(C)(1)(a) through (e).

This Court first considered the "exact parameters" of subrule (f) in *Kaleal v Kaleal*, 73 Mich App 181, 189; 250 NW2d 799 (1977), and adopted an approach to the subrule's use consistent with federal precedent.[2] The Court explained that federal courts generally grant relief under this provision " 'where the judgment was obtained by the improper conduct of the party in whose favor it was rendered, or resulted from the excusable default of the party against whom it was directed, under circumstances not covered' " by the other clauses permitting relief from a judgment " 'and where the substantial rights of other parties in the matter in contro-

[2] *Kaleal* construed GCR 1963, 528.3(6). The language of MCR 2.612(C)(1)(f) mirrors that of former GCR 1963, 528.3(6).

versy were not affected.' " *Id*. at 189, quoting 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 189. In *Lark v Detroit Edison Co*, 99 Mich App 280, 284; 297 NW2d 653 (1980), this Court set forth a three-part test for ascertaining whether the "extraordinary relief" envisioned in the predecessor of MCR 2.612(C)(1)(f) is warranted:

> (I) [T]he reason for setting aside the judgment must not fall under subrules (1) through (5) [now subrules (a) through (e)], (II) the substantial rights of the opposing party must not be detrimentally affected if the [judgment] is set aside, and (III) extraordinary circumstances must exist which mandate setting aside the judgment in order to achieve justice.

And in *McNeil v Caro Community Hosp*, 167 Mich App 492, 497; 423 NW2d 241 (1988), we specifically reiterated that generally "relief is to be granted only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered."

In *Heugel v Heugel*, 237 Mich App 471; 603 NW2d 121 (1999), this Court affirmed a circuit court's invocation of MCR 2.612(C)(1)(f) in setting aside the property division and spousal-support terms of a divorce judgment. In *Heugel*, the parties stipulated to the entry of a divorce judgment after a 14-year marriage that had produced one child. *Id*. at 473. The judgment awarded the wife a property settlement primarily consisting of a lump-sum payment of $50,000, and she received no other spousal support. *Id*. at 473-474. The wife suffered from "severe health problems" and claimed that she had agreed to the property settlement because her husband deceived her into believing that the couple would remain together after the divorce. *Id*. at 475-477. The circuit court set aside as "unconscionable" the judgment's property and spousal-support provisions,

concluding that the husband's fraud tolled the one-year time limit set forth in MCR 2.612(C)(2). The circuit court also invoked MCR 2.612(C)(1)(f). *Id*. at 477.

This Court affirmed the circuit court's reliance on subrule (f), reasoning that, like its federal counterpart, FR Civ P 60(b)(6), MCR 2.612(C)(1)(f)

> provides the court with a grand reservoir of equitable power to do justice in a particular case and vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. . . . [W]e believe that a trial court may properly grant relief from a judgment under MCR 2.612(C)(1)(f), even where one or more of the bases for setting aside a judgment under subsections a through e are present, when additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand. [*Id*. at 480-481 (quotation marks and citation omitted).]

The Court in *Heugel* identified as "additional factor[s]" supporting relief from the judgment the husband's " 'abuse[] [of] the unique nature of the husband-wife relationship,' " leading the wife "to believe that the entry of the divorce judgment was an irrelevant formality," and the wife's physical condition, which prevented her from working. *Id*. at 481 (citation omitted). This Court concluded that under the circumstances, relief from the judgment under subrule (f) "is therefore proper because the judgment was obtained by [the husband's] improper conduct." *Id*. The Court further observed that "plaintiff's substantial rights are not detrimentally affected" by relieving him from the judgment "because he is not permitted to enforce an unconscionable agreement." *Id*. at 482.

Using *Heugel* as an analytical framework, the circuit court in the instant case found that extraordinary circumstances existed to justify relieving defendant from the divorce judgment's nonmodifiable spousal-

support language. The circuit court identified the extraordinary circumstances on which it relied:

> • The business that provided a substantial income to both parties no longer exists.
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> • Defendant is not responsible for the loss of the business. Defendant was presented with false financial documents prepared by the Company's president. When Defendant was made aware of the Company's dire financial predicament, Defendant immediately took action to attempt to salvage the business. This included meeting with bankers, divesting an asset and reconfiguring rental agreements.
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> • Plaintiff was and is aware that Defendant's ability to pay spousal support rested on the continued viability of the Company. In fact, the checks for spousal support were written by Die Tron. Defendant timely informed Plaintiff of Die Tron's financial instability. Plaintiff acknowledged in the January, 2008 modification to the non-modifiable spousal support provision of the Judgment that Defendant "will be unable to make the required payments for a period of time."
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> • Defendant is no longer able to pay spousal support of $230,000 per year, since he is now earning $52,000 per year.
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> • Defendant's only ability to pay the ordered amount of spousal support is through the liquidation of his assets. Defendant's assets amount to approximately $500,000 out of which $79,000 is due and owing for spousal support as noted above. Defendant also has $300,000 in a 401K plan. The complete liquidation of Defendant's estate will only satisfy approximately three years of his spousal support obligations. After the exhaustion of Defendant's estate, he will still owe spousal support for an additional 15 years, which is 75% of the obligation.
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> • The above shows that it is impossible for Defendant to comply with the spousal support provisions contained in the Judgment of Divorce.
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> • Plaintiff has spent $870,718.19 since August, 2006. Plaintiff has liquidated much of the cash value of a $6

> million life insurance policy that was designed to provide her with continued spousal support in the event of Defendant's death. Defendant is not responsible for Plaintiff's choices in spending or business investments. Plaintiff has, through unwise investments, nearly destroyed her estate. Plaintiff would require that this Court allow the complete destruction of Defendant's estate to pay Plaintiff's post marital debt.
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> • In March, 2008 Plaintiff filed a motion to modify the non-modifiable spousal support agreement.

The circuit court explained that plaintiff's substantial rights were not "detrimentally affected" by reducing defendant's spousal-support obligation:

> Plaintiff would have this Court determine that it is Plaintiff's reliance on receiving $230,000 in spousal support that must be analyzed. The Court disagrees. Spousal support is equitable in nature. Plaintiff is only entitled to an equitable amount of spousal support. *Heugal* [sic] is in accord when it stated: "We cannot find that plaintiff's substantial rights are detrimentally affected because he is not permitted to enforce an unconscionable agreement." *Id*., at 482.
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> Likewise, Plaintiff argues that in lieu of 50% of Die Tron, she received the spousal support provision. As mentioned, the appraisal value of Die Tron was not admitted into evidence. But, the Court notes that upon liquidation of the Company, Defendant received $150,000 of which one-half went to pay debts associated with the Company. Obviously, Die Tron was worth only scrap value. To claim $230,000 a year for an additional 18 years to compensate Plaintiff for 50% of a Company that is worth only scrap value is not equitable.

The circuit court concluded that although relief from a judgment under MCR 2.612(C)(1)(f) is generally granted only " 'when the judgment was obtained by the improper conduct of the party in whose favor it was rendered' . . . , in domestic relations actions, the court must equitably divide the marital estate and set, if

applicable, an equitable amount of support." (Citation omitted.) In light of the goal to equitably apportion the marital estate, the circuit court opined that "this case is an exception to the general rule," reasoning that "nothing in MCR 2.612(C)(1) limits the rule's application to misconduct of a party." After relieving defendant from his obligation to pay $230,000 in annual spousal support, the circuit court applied the factors analyzed in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992), and ruled that defendant must pay plaintiff spousal support of $900 a month.

Well-settled policy considerations favoring finality of judgments circumscribe relief under MCR 2.612(C)(1). See *Wayne Creamery v Suyak*, 10 Mich App 41, 51; 158 NW2d 825 (1968). The first five grounds for vacating a judgment, subrules (a) through (e), delineate narrow, time-critical pathways for relief. Subrule (f) indisputably widens the potential avenues for granting relief from a judgment. But the competing concerns of finality and fairness counsel a cautious, balanced approach to subrule (f), lest the scale tip too far in either direction. Thus, while permitting relief under this subrule for "any other reason" justifying it, our courts have long required 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. Cautious application of MCR 2.612(C)(1) in divorce cases also advances the policy considerations described in *Staple*, 241 Mich App at 579-580.

It is equally well settled that contracts must be enforced as written: "[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions con-

tained in such contracts, if the contract is not contrary to public policy." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007) (quotation marks and citation omitted). The parties in this case negotiated a divorce judgment containing unambiguous spousal-support terminology prohibiting future modifications "regardless of any change in circumstances or in the lifestyles of plaintiff or defendant . . . ." "A long line of case-law reflects that divorcing parties may create enforceable contracts." *Holmes*, 281 Mich App at 595. When plaintiff and defendant included the clear and unambiguous language in their divorce judgment making spousal support nonmodifiable, both had representation by counsel and presumably understood that, absent this language, the circuit court possessed the authority to revise spousal support if circumstances changed. Instead of opting for flexibility, the parties struck a bargain favoring finality, benefiting both. Defendant maintained full ownership of his business and the ability to transfer its ownership to his son; plaintiff obtained equitable and certain support. In striking their deal, both parties deliberately risked that future circumstances would render their contract inequitable.

Given the judgment's clearly expressed, enforceable, and nonmodifiable spousal-support wording, we conclude that the circuit court erred by failing to afford proper deference to the parties' binding agreement. When the parties have expressly elected finality in lieu of flexibility, a court considering relief under MCR 2.612(C)(1)(f) must strictly apply the factors limiting relief from a judgment set forth in *Kaleal*, 73 Mich App at 189, and subsequent cases. Those factors confine the application of subrule (f) to extraordinary situations not covered by subrules (a) through (e) and mandate that a

court refrain from vacating a judgment if doing so detrimentally affects the rights of the opposing party.

In this case the circuit court reasoned that because spousal support is "equitable in nature," plaintiff "is only entitled to an equitable amount of spousal support." Die Tron's demise, in the circuit court's estimation, rendered "unconscionable" plaintiff's enforcement of the spousal-support agreement and, consequently, did not detrimentally affect her substantial rights. We reject this analysis for the simple reason that by entering into a divorce judgment with a nonmodifiable support provision, the parties conclusively waived their rights to a judicial determination of equitable spousal support. The circuit court's invocation of its equitable authority to modify spousal support pursuant to MCL 552.28 ignores and invalidates the parties' election to forgo flexibility and their explicit waiver of the right to seek support modifications based on equitable considerations. Rather, the parties' carefully crafted compromise reflects their willingness to accept that changed circumstances might render this election unfair to one or the other.

In *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005), our Supreme Court underscored the importance of the right to contract, emphasizing that "the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." In this case the parties agreed to be bound by the judgment, not a circuit court's notion of fairness. Indisputably, affording defendant relief from this freely negotiated, nonmodifiable

judgment would detrimentally affect plaintiff's substantial right to enforcement of the contract. Accordingly, the circuit court erred by failing to consider plaintiff's substantial right to enforcement of the parties' agreement, and in so doing neglected "to honor the parties' clearly expressed intention to forgo the right to seek modification . . . ." *Staple*, 241 Mich App at 568. Because the circuit court incorrectly concluded that setting aside the plain terms of the parties' consent judgment with respect to spousal support would not detrimentally affect plaintiff's substantial rights, the circuit court abused its discretion by granting defendant's motion to set aside the judgment under MCR 2.612(C)(1)(f).

Moreover, we reject that *Heugel* operates as controlling authority in this case. Unlike in *Heugel*, the evidence here does not suggest that the spousal-support provision qualified as "unconscionable" when the parties negotiated it. We know of no authority permitting a court to find a contract unconscionable on the basis of events that occurred long after the contract's formation.[3] Furthermore, the parties' divorce judgment in *Heugel* apparently did not incorporate a nonmodification clause. Consequently, in that case the circuit court's discretion to favor fairness when it construed MCR 2.612(C)(1)(f) remained unconstrained by competing considerations of finality and freedom of contract.

Although we conclude that vacation of the spousal-support term detrimentally affected plaintiff's substantial rights in this case, we recognize that in rare cases, a circuit court's "grand reservoir of equitable power to

[3] "The determination of whether a given clause or contract is in fact unconscionable is to be made at the time of its making rather than at some subsequent point in time (e.g., at the time for performance) . . . ." 8 Williston, Contracts (4th ed), § 18:12, p 127.

do justice" may necessitate setting aside a judgment despite prejudice to the opposing party. *Heugel*, 237 Mich App at 481 (quotation marks and citation omitted). However, the record in this case does not support the existence of truly exceptional circumstances. The caselaw construing MCR 2.612(C)(1)(f) contemplates that extraordinary circumstances warranting relief from a judgment generally arise when the judgment was obtained by the improper conduct of a party. *Heugel*, 273 Mich App at 479; see also *Altman v Nelson*, 197 Mich App 467, 478; 495 NW2d 826 (1992). No such misconduct occurred in this case. Moreover, the events giving rise to Die Tron's failure qualify as tragic, but hardly extraordinary. As a seasoned business owner, defendant undoubtedly understood that an economic downturn or financial mismanagement could endanger the solvency of his company. He nevertheless agreed that plaintiff could receive nonmodifiable spousal support. We feel hard-pressed to conclude that a business failure amounts to a circumstance so unexpected and unusual that it may constitute a ground for setting aside a final, binding, and nonmodifiable spousal-support provision. "When a party makes a deliberate, strategic choice to settle, she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect." *United States v Bank of New York*, 14 F3d 756, 759 (CA 2, 1994). The extraordinary circumstances cited by the circuit court simply do not overcome the detrimental effect on plaintiff's substantial rights that would result from setting aside the judgment.

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

WRIGHT v KELLOGG COMPANY

Docket No. 290130. Submitted June 16, 2010, at Grand Rapids. Decided June 22, 2010, at 9:20 a.m.

Dennis L. Wright brought an action in the Calhoun Circuit Court against Kellogg Company, Wright's former employer, alleging violation of the Employee Right to Know Act (ERKA), MCL 423.501 *et seq.*, after Kellogg refused to release to Wright notes from a grievance investigation that Kellogg conducted after Wright filed a grievance concerning a disciplinary action against him. The court, Allen L. Garbrecht, J., granted summary disposition in favor of Kellogg, determining that the notes were exempt from disclosure under ERKA. Wright appealed.

The Court of Appeals *held*:

1. The ERKA definition of a "personnel record" in MCL 423.501(2)(c) includes a record that identifies the employee and "is used or has been used, or may affect or be used relative to the employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action." Records limited to grievance investigations that are kept separately and are not used for those purposes are excluded under MCL 423.501(2)(c)(*vi*) from the ERKA definition of "personnel record" and are not available to employees under the act.

2. The five-step grievance process in this matter was a systematic or official inquiry into the matter that fell within the plain meaning of the words "grievance investigations" in MCL 423.501(2)(c)(*vi*). The process was limited in scope and was not used for original or new actions related to an employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. The notes from the grievance investigation of a disciplinary action fall within the exclusion from the definition of "personnel record." The trial court did not err by granting summary disposition in Kellogg's favor on the basis of the grievance-investigation exclusion to the definition of a personnel record.

Affirmed.

MASTER AND SERVANT — EMPLOYEE RIGHT TO KNOW ACT — WORDS AND PHRASES — PERSONNEL RECORDS — GRIEVANCE INVESTIGATIONS.

The Employee Right to Know Act excludes from the definition of "personnel record" records limited to grievance investigations that are kept separately and are not used relative to an employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action; a "grievance investigation" is a systematic or official inquiry into a grievance that is not used for original or new actions related to an employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action, so notes from a grievance investigation of a disciplinary action fall within the grievance-investigation exclusion (MCL 423.501[2][c][*vi*]).

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

Miller Johnson (by *Craig H. Lubben*) for defendant.

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM. Plaintiff, Dennis Wright, appeals as of right from the trial court's order granting summary disposition in favor of defendant, Kellogg Company, and dismissing Wright's claim for a violation of the Employee Right to Know Act (ERKA).[1] We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Wright was a Kellogg employee for 35 years before retiring in 2005. In November 2002, Wright received a disciplinary action that included a 34-day suspension. After the suspension, Wright filed a grievance concerning the disciplinary action.

Wright was not satisfied with the grievance process and later requested copies of his personnel records related to the grievance procedure. On June 7, 2005,

[1] MCL 423.501 *et seq*.

Kellogg's human resources manager, Keith Sutton, wrote a letter stating that the requested documents were company property and not provided to employees.

On March 21, 2007, Wright's then attorney wrote a letter requesting Wright's employment file. Heather Hudson, counsel for Kellogg, responded in an e-mail dated March 28, 2007. She stated that Kellogg had previously sent Wright's personnel record to another attorney on behalf of Wright and that a follow-up request asked for notes from grievance meetings or other notes that management kept. According to Hudson, ERKA did not require such notes to be included with the personnel record and, therefore, Kellogg did not release them. Wright then filed this lawsuit claiming that Kellogg's refusal to release those notes with his personnel record was a violation of ERKA.

Kellogg moved for summary disposition on both procedural and substantive grounds. Procedurally, Kellogg claimed that Wright's complaint was improper because he did not follow ERKA's procedural steps to first review his file and then ask for copies of it. Substantively, Kellogg claimed that, under the statutory definition of "personnel record," the notes from the grievance proceedings were not part of the personnel record and therefore Kellogg did not have to release the notes to Wright.

The trial court determined that the procedural argument was moot and that Kellogg had waived the argument because it did in fact provide Wright with a copy of his personnel record. On the substantive issue, the trial court determined that the notes "are records maintained by management separately from these grievance hearings, and . . . there's no evidence that they've been used as a part of any disciplinary

action, and therefore they are exempt from disclosure." The trial court therefore granted Kellogg's motion for summary disposition. Wright now appeals. (We note that Kellogg has not filed a cross-appeal related to the trial court's decision on the procedural argument, and therefore this issue is not before us.)

II. INTERPRETING ERKA

A. STANDARD OF REVIEW

Wright argues that notes taken during a grievance proceeding are considered personnel records for purposes of ERKA and are not subject to exemption under MCL 423.501(2)(c)(*vi*) or (*viii*). We review de novo a trial court's decision on a motion for summary disposition.[2] We also review de novo questions of statutory interpretation.[3]

B. STATUTORY PROVISIONS

ERKA defines "personnel record" as follows:

> "Personnel record" means a record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. A personnel record shall include a record in the possession of a person, corporation, partnership, or other association who has a contractual agreement with the employer to keep or supply a personnel record as provided in this subdivision. A personnel record shall not include:
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[2] *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 196; 747 NW2d 811 (2008).

[3] *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 223; 779 NW2d 304 (2009).

> (*vi*) Records limited to grievance investigations which are kept separately and are not used for the purposes provided in this subdivision.
>
> * * *
>
> (*viii*) Records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record, and are not accessible or shared with other persons. However, a record concerning an occurrence or fact about an employee kept pursuant to this subparagraph may be entered into a personnel record if entered not more than 6 months after the date of the occurrence or the date the fact becomes known.[4]

C. LEGAL STANDARDS

The main objective in interpreting a statute "is to ascertain and give effect to the Legislature's intent."[5] When the Legislature does not define words, we are to give them their plain and ordinary meaning.[6] "[W]here a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls."[7]

> [T]he purpose of the ERKA is to establish an individual employee's right to examine the employee's personnel records, i.e., the documents that are being kept by the employer concerning that employee. In the ERKA, the term "personnel record" is generally defined, but certain materials and information are identified that are excluded from the definition, and are not available to the employee.[8]

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[4] MCL 423.501(2)(c).

[5] *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 558; 777 NW2d 1 (2009) (quotation marks and citation omitted).

[6] *Id*.

[7] *Id*. at 559 (quotation marks and citation omitted).

[8] *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 221; 514 NW2d 213 (1994).

D. MCL 423.501(2)(c)(*vi*) OF ERKA

As set out earlier in this opinion, the general statutory definition of "personnel record" in ERKA includes a record that identifies the employee and "is used or has been used, or may affect or be used relative to that employee's . . . disciplinary action."[9] MCL 423.501(2)(c)(*vi*) excludes one subset of materials and information from the general definition: "[r]ecords limited to grievance investigations which are kept separately and are not used for the purposes provided in this subdivision."[10] Therefore, these materials and information are not available to employees.

Wright argues that the proceeding in question was not a grievance "investigation," but was a process of appealing a disciplinary action. Therefore, he asserts, whatever action Kellogg took was necessarily related to a disciplinary action. Thus, according to Wright, all notes associated with the disciplinary action at every stage are part of his personnel record.

Black's Law Dictionary defines "investigate" as "[t]o inquire into (a matter) systematically" or "[t]o make an official inquiry."[11] It follows then that an investigation is a systematic inquiry or an official inquiry. The grievance process in this case was a five-step process following Wright's grievance over Kellogg's disciplinary actions. This five-step process was a systematic or official inquiry into the matter and therefore falls with the plain meaning of the words "grievance investigations."[12]

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[9] MCL 423.501(2)(c).

[10] MCL 423.501(2)(c)(*vi*).

[11] Black's Law Dictionary (7th ed), p 830.

[12] See *Wolverine*, 285 Mich App at 558.

Further, the exclusion for grievance-investigation records is a specific statutory provision that controls only the grievance process, as opposed to original disciplinary actions.[13] The grievance-investigation process is limited in scope and is not used for original or new actions related to an "employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action."[14] Therefore, notes from the grievance investigation of a disciplinary action fall within the exclusion under MCL 423.501(2)(c)(*vi*).

We note that Wright's interpretation of the statute would render the exclusion under MCL 423.501(2)(c)(*vi*) virtually meaningless because a grievance of any item listed in the general definition of "personnel record" would not fall within the exclusion, thereby limiting the exclusion only to grievances of issues already outside the definition of "personnel record."

E. MCL 423.501(2)(c)(*viii*) OF ERKA

Given our conclusions with respect to MCL 423.501(2)(c)(*vi*) of ERKA, we need not address Wright's arguments with respect to MCL 423.501(2)(c)(*viii*).

III. CONCLUSION

We affirm the trial court's order granting summary disposition in favor of Kellogg on the basis of the MCL 423.501(2)(c)(*vi*) grievance-investigation exclusion to ERKA's definition of "personnel record."

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[13] See MCL 423.501(2)(c)(*vi*).

[14] MCL 423.501(2)(c).

D'ANDREA v AT&T MICHIGAN

Docket No. 288483. Submitted May 11, 2010, at Detroit. Decided June 29, 2010, at 9:00 a.m.

Eugene D'Andrea and Gina Liverpool, owners of a lot in a platted subdivision in the city of Grosse Pointe Farms, brought an action in the Wayne Circuit Court against AT&T Michigan, alleging that defendant's installation in 2005 of certain additional equipment on or in a six-foot easement for public utilities on plaintiffs' lot materially increased the burden on their property and constituted a continuing trespass. Defendant moved for summary disposition, noting that all the equipment was installed within the confines of the easement and in accordance with building permits issued by the city and Wayne County. Defendant further maintained that the equipment was lawfully placed in accordance with the Land Division Act (LDA), MCL 560.101 *et seq.*, which does not limit the amount or the size of the equipment that defendant can install. The court, Kathleen Macdonald, J., agreed with defendant and granted its motion for summary disposition. Plaintiffs appealed.

The Court of Appeals *held*:

The LDA does not address the rights and limitations of defendant's development of the utility easement in this case. None of the provisions of the LDA addresses to what extent a utility may develop or build on a public utility easement placed on a subdivision lot. The trial court erred by dismissing the trespass claim on the basis of the LDA. The trial court also erred by granting summary disposition on the basis that defendant obtained building permits because defendant failed to establish that the city and the county had the legal authority to decide on the nature, size, or scope of the equipment that a utility may install in an easement or actually considered those questions when they issued the permits. The order of summary disposition must be reversed, and the matter must be remanded to the trial court for further proceedings.

Reversed and remanded.

1. EASEMENTS — TRESPASS.

Activities by the owner of the dominant estate that go beyond the reasonable exercise of the use granted by an easement may constitute a trespass to the owner of the servient estate.

2. EASEMENTS — LAND DIVISION ACT — PUBLIC UTILITY EASEMENTS — USE OF PUBLIC UTILITY EASEMENTS.

The Land Division Act does not define the extent to which a public utility may use an easement for public utilities dedicated under the act (MCL 560.190).

Richard R. Scarfone, P.C. (by *Richard R. Scarfone*), for plaintiffs.

Albert Calille for defendant.

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

SAAD, P.J. Plaintiffs appeal the trial court's order that granted summary disposition to defendant, AT&T Michigan. For the reasons set forth in this opinion, we reverse and remand for further proceedings consistent with this opinion.

I. FACTS

Plaintiffs contend that AT&T's installation of new and additional utility equipment on an easement on their property, a private residence in the city of Grosse Pointe Farms, constitutes a continuing trespass. The lot on which plaintiffs reside is part of a platted subdivision that was recorded in 1948. The plat shows a dedication of a six-foot "Easement for Public Utilities" at the back of plaintiffs' lot. In the 1970s, AT&T installed a "cross-box cabinet" on the easement. In 2005, AT&T replaced that cabinet with a new one and also added an additional aboveground cabinet and an underground cabinet. AT&T placed the aboveground cabinets on a con-

crete slab and planted bushes around the site, but declined plaintiffs' request to move the cabinets off their property.

In their complaint, plaintiffs alleged that AT&T's installation of the new cabinets in the utility easement materially increased the burden on their property because the new cabinets are much larger and, thus, further reduced plaintiffs' useable backyard area by almost half, and thereby diminished the market value of the property. In its motion for summary disposition, AT&T responded that plaintiffs cannot establish a trespass claim because the cabinets were installed within the confines of the utility easement. AT&T further maintained that the easement was lawfully dedicated in accordance with the Land Division Act (LDA), MCL 560.101 *et seq*., and that the LDA does not limit the number or size of utility cabinets AT&T may install. AT&T also argued that its use of the easement is lawful because the city of Grosse Pointe Farms and Wayne County approved the installation of the equipment by issuing building permits for the work. The trial court agreed with AT&T's arguments and explained:

> I think this case is governed by the Land Division Act, and it has its own limitations and rights of public utilities to use this area as they need to. In addition to that, they got permits, which I think also—I agree with you, that resolves the issue of reasonableness. I don't think that you would get a permit to erect a ten foot structure. So your motion is granted.

II. ANALYSIS[1]

Though AT&T installed the equipment within the confines of the utility easement, plaintiffs claim that

[1] We review a trial court's grant of a motion for summary disposition de novo. *Beattie v Mickalich*, 284 Mich App 564, 569; 773 NW2d 748 (2009).

AT&T overburdened the easement and thus committed a trespass on their private property. "A trespass is an unauthorized invasion upon the private property of another." *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000). Our courts have held that "[a]ctivities by the owner of the dominant estate that go beyond the reasonable exercise of the use granted by the easement may constitute a trespass to the owner of the servient estate." *Schadewald v Brulé*, 225 Mich App 26, 40; 570 NW2d 788 (1997).[2] As this Court explained in *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115, 129-130; 770 NW2d 359 (2009):

> "[T]he use of an easement must be confined strictly to the purposes for which it was granted or reserved." [*Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 41; 700 NW2d 364 (2005)] (quotation marks and citation omitted). Not surprisingly, these purposes are determined by the text of the easement. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003) (*Little II*). "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. If the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement." *Id.* (citation omitted).

Here, the language of the easement itself provides little guidance with regard to whether AT&T may place

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Summary disposition under MCR 2.116(C)(10) is proper when 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). Our Supreme Court has also held that "[w]hen construing the LDA, we are mindful that our primary goal is to ascertain and give effect to the Legislature's intent." *Tomecek v Bavas*, 482 Mich 484, 495-496; 759 NW2d 178 (2008).

[2] The land served or benefited by an easement is called the dominant estate and the land burdened by an easement is called the servient estate. *Schadewald*, 225 Mich App at 36.

additional equipment within its confines; the grant merely states that it is an "Easement for Public Utilities."

AT&T contends, and the trial court ruled, that plaintiffs failed to establish a trespass because AT&T was authorized to place equipment within the utility easement pursuant to the LDA. We disagree that the LDA addresses the rights and limitations of AT&T's development of the utility easement in this case.

Were we to hold that the LDA applies, the LDA simply does not address the issues raised by plaintiffs. The LDA states that utility easements in subdivision plats must comply with certain size and location requirements (not applicable here), and the statute sets forth limited guidelines with regard to how the easements may be used. MCL 560.139; MCL 560.190. However, these provisions merely state that public utility easements must be equitably shared among the public utilities, and the statute limits the uses servient property owners may make of a utility easement. None of the provisions address to what extent a utility may develop or build on a public utility easement placed on a subdivision lot. AT&T argues that the limited nature of the guidelines, i.e., their silence on this point, suggests that the Legislature intended that utilities have the unfettered right to place equipment within a utility easement, but nothing in the statute indicates that MCL 560.190 was intended to define the extent to which a public utility may use an easement. An appellate court cannot, and we will not, speculate about the Legislature's "intent beyond those words expressed in the statute." *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007). Moreover, we decline to infringe on the private property rights of a landowner through unsupported implication, particularly when there is a

complete absence of any legislative intent in the LDA to give a public utility free reign to build on an easement as it pleases. Because MCL 560.190 is simply silent on the matter and cannot reasonably be construed to set forth the rights or duties of AT&T with regard to its use of the easement, we hold that the trial court erred when it dismissed plaintiffs' trespass claim on the basis of the LDA.

We further hold that the trial court erred when it granted summary disposition to AT&T on the ground that AT&T obtained building permits from the city of Grosse Pointe Farms and Wayne County before it placed the additional crossbox cabinets on the easement. The trial court ruled that the city and county would only have issued building permits for "reasonable" construction within the easement and that this defeats plaintiffs' trespass claim. However, AT&T provided no legal basis, facts, or documentary evidence to establish that the city or county has the legal authority to decide on the nature, size, or scope of equipment a utility may install in a utility easement or whether the city or county actually considers those questions when it issues a building permit. MCR 2.116(G)(3)(b). Therefore, this part of the trial court's ruling is unsupported by any legal authority or evidence. Accordingly, it was error for the trial court to dismiss plaintiffs' trespass claim on this basis.

Reversed and remanded for further proceedings consistent with this opinion.[3] We do not retain jurisdiction.

[3] Plaintiffs contend that they had an agreement with AT&T to continue discovery after AT&T filed its motion for summary disposition. The trial court should address this matter on remand.

McNEEL v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 285008. Submitted September 9, 2009, at Grand Rapids. Decided June 29, 2010, at 9:05 a.m.

Kathleen McNeel, individually, and Wakelin McNeel, as trustee of the Kathleen McNeel Revocable Living Trust, brought an action in the Mecosta Circuit Court on October 5, 2004, against Farm Bureau General Insurance Company of Michigan, the insurer of a house purchased by Kathleen and transferred to the trust that was destroyed by fire on March 18, 2003. Defendant had investigated the loss and had determined that the loss was not covered under the policy's increase-in-hazard provision, which provided that defendant was not liable for losses occurring while the building "is vacant beyond a period of sixty consecutive days or is unoccupied beyond a period of six consecutive months." Defendant claimed that "nobody had lived in the house as a domicile since November 2001." Between April 2003 and October 14, 2003, a series of letters were exchanged and at least one meeting occurred between the parties. In April 2003, defendant denied coverage. That denial was withdrawn in a May 22, 2003, letter. A second formal denial was communicated in a June 26, 2003, letter. Following further communication, defendant indicated on October 14, 2003, that it would continue its denial. Defendant moved for summary disposition on the basis that plaintiffs had failed to file their claim within one year of the date that the claim was denied as required by the policy and MCL 500.2833(1)(q). The court, Ronald C. Nichols, J., denied the motion, noting that there was a factual dispute with regard to when the formal denial occurred. At the trial, defendant abandoned the issue of when the formal denial occurred, presenting no evidence on the issue and making no request that the jury determine the issue. The jury returned a verdict for plaintiffs, concluding that the house had not been vacant at least 60 consecutive days before the loss and that it had been occupied at least six consecutive months before the date of the fire. The court issued a judgment for plaintiffs on the verdict. Plaintiffs moved for case-evaluation sanctions, interest, and costs. The court determined that defendant's denial was reasonable, but also concluded that the decision in *Griswold Props, LLC v Lexington Ins Co*, 276

Mich App 551 (2007), applied retroactively. Under *Griswold*, a first-party insured is entitled to 12 percent penalty interest if a claim is not timely paid, irrespective of whether the claim is reasonably in dispute. Therefore, the court, in an amended opinion and order, awarded 12 percent interest on $54,500 of the $69,500 judgment on the verdict retroactively beginning on July 13, 2003, which was 60 days after the proof of loss was filed, with the remainder of the award subject to interest accrued from the date of the complaint. The court also granted plaintiffs attorney fees for 43 hours at $150 an hour. Defendant appealed and plaintiffs cross-appealed.

The Court of Appeals *held*:

1. Defendant waived its affirmative statute-of-limitations defense at trial by not seeking a jury finding regarding when the formal denial occurred and by failing to present any evidence at trial that the denial occurred anytime other than on October 14, 2003. This waiver, however, did not waive defendant's right to appeal the denial of its motion for summary disposition. Although defendant waived any complaint of error on the issue at trial, defendant could still argue on appeal that the trial should not have occurred because the trial court improperly denied summary disposition on the issue. Therefore, a proper issue on appeal was whether the trial court correctly held that there was an outstanding question of fact material to the determination of when the formal denial that stopped the tolling under MCL 500.2833(1)(q) occurred.

2. The trial court did not err by determining that there was a question of fact regarding when the formal denial occurred. The court considered an affidavit of plaintiffs' representative stating that, in a meeting on October 10, 2003, defendant's representative indicated that he would consider the claim in light of documents to be submitted and would only make a decision about whether the claim would be denied after he had done so. Although it is reasonable to construe defendant's representative's subsequent letter on October 14, 2003, and his affidavit in response to the affidavit of plaintiffs' representative as evidence of an unbroken denial since June 2003, the affidavit of plaintiffs' representative created an inference that defendant again withdrew its formal denial while it reinvestigated the claim and sent a subsequent denial on October 14, 2003. The trial court properly left it up to the jury to determine whether defendant's representative made the comments attributed to him in the affidavit of plaintiffs' representative and whether those comments constituted a withdrawal of defendant's previous formal denial that was followed by a new formal denial.

3. The trial court's jury instruction regarding the definition of the term "unoccupied," which was not defined in the policy, was proper. While a dictionary defines "occupy" as "to live in," "unoccupied" as "[n]ot occupied," and "vacant" as "[h]olding nothing: empty," the definitions together indicate that "unoccupied" means "not lived in." The instruction properly informed the jury that it had to determine whether the house had not been lived in for more than six consecutive months.

4. Because (1) the *Griswold* Court retroactively applied its decision to the three consolidated cases before it and at least one subsequent panel of the Court of Appeals determined the decision to be retroactive, (2) the law that was overturned in *Griswold* cannot be considered clear and uncontradicted, and (3) the factors for prospective-only application set forth in *Paul v Wayne Co Dept of Pub Serv*, 271 Mich App 617, 621 (2006), weigh in favor of retroactive application, the trial court properly concluded that *Griswold* applied retroactively to this case.

5. The record did not support the trial court's determination that plaintiffs' counsel overbilled his hours by 46 percent. Therefore, the court's reduction based on that calculation was erroneous. Plaintiffs' counsel's billing records were legally sufficient, his testimony supported his claims of the time spent, and no contrary evidence was presented. The trial court abused its discretion in its determination of reasonable attorney fees. The part of the judgment that awarded attorney fees must be reversed and the matter must be remanded for a new award of attorney fees.

Affirmed in part, reversed in part, and remanded.

K. F. KELLY, J., dissenting, stated that there was no question of material fact that defendant formally denied plaintiffs' claim on June 26, 2003. Under the plain and unambiguous language of MCL 500.2833(1)(q), an insured must bring his or her claim within one year after the insurer formally denies liability. The trial court erred by denying defendant's motion for summary disposition because there was no dispute on the record that plaintiffs' claim had been formally denied in June 2003 and plaintiffs did not file their complaint until well after June 2004. The affidavit by plaintiffs' representative did not create a question of fact regarding when defendant formally denied plaintiffs' claim. The parties' further discussions and plaintiffs' submissions of additional information and requests to reconsider the denial did not operate to rescind defendant's June 26, 2003, formal denial. The majority wrongly invoked the doctrine of judicial tolling, which the Supreme Court has explicitly rejected. The judgment and order of the trial court should be reversed.

INSURANCE — PENALTY INTEREST — OPINIONS BY APPELLATE COURTS — RETROACTIVE APPLICATION OF OPINIONS.

The decision in *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551 (2007), which held that a first-party insured is entitled to 12 percent penalty interest if a claim is not timely paid, irrespective of whether the claim is reasonably in dispute, applies retroactively.

Fabian, Sklar & King, P.C. (by *Douglas G. McCray*) (*Donald M. Fulkerson*, of counsel), for plaintiffs.

Hopkins, Yeager & Smith, P.C. (by *Scott E. Pederson* and *E. Frederick Davison*), for defendant.

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

SHAPIRO, J. This insurance-coverage dispute stems from a fire on March 18, 2003, that completely destroyed a farmhouse owned by the Kathleen McNeel Revocable Living Trust (the Trust). Defendant appeals as of right the trial court's order granting plaintiffs the $69,500 jury award, interest of $37,259.78 pursuant to MCL 500.2006, and case-evaluation sanctions of $19,818.34, and plaintiffs cross-appeal. We affirm the part of the judgment based on the jury's verdict, but reverse the part of the judgment regarding attorney fees and remand for entry of an order consistent with this opinion.

I. BACKGROUND AND PROCEEDINGS

The property at issue, located at 10981 W. River Road, Remus, Michigan (the Bundy farmhouse), was purchased by Kathleen McNeel in the 1970s and transferred to the Trust in 1993. Defendant issued an insurance policy to Kathleen McNeel, with the Trust as an additional insured, covering three dwellings and

their contents, including the Bundy farmhouse, which policy was in effect when the Bundy farmhouse was destroyed by arson[1] on March 18, 2003. Defendant investigated the loss and determined that the loss was not covered under the policy because "nobody had lived in the house as a domicile since November 2001." Under the "Increase in Hazard" provision, the policy provided that defendant was not liable for losses occurring "[w]hile a described building, whether intended for occupancy by owner or tenant, is vacant beyond a period of sixty consecutive days or is unoccupied beyond a period of six consecutive months."

In April 2003, plaintiffs hired Stewart Shipper, a public adjuster, to help them with their claim. In an April 17, 2003, letter, Kathy Macdonald, defendant's adjuster, stated that she had spoken with members of the McNeel family and they had indicated that no one had resided in the dwelling for approximately 18 months and that there was no furniture in the dwelling. The letter concluded, "[d]ue to the above we are denying coverage for this claim." Shipper responded with a May 12, 2003, letter stating that members of the family disputed Macdonald's statements regarding residency, and he included a list of personal property that was in the home at the time of the fire. He concluded by stating that "your denial of the claim is wrongful" and asking her to "reconsider your denial and contact me for discussion of an adjustment and payment by Farm Bureau Insurance." In a separate letter of the same date, Shipper also sent in calculations of actual cash value. On May 13, 2003, Shipper submitted a "Sworn Statement in

[1] The cause of the fire was "undetermined" because it could have been accidental or suspicious. It was thought to have been set by a serial arsonist in the area.

Proof of Loss" signed by Wakelin McNeel, trustee of the Kathleen McNeel Revocable Living Trust.

In a letter dated May 22, 2003, Macdonald stated: "In response to your letter of May 12, 2003 we are continuing our investigation into this matter. As soon as we have completed this investigation we will be in contact with you to discuss your client's claim further." On the same date, Macdonald sent another letter, noting that the sworn proof of loss was incomplete and that the insured had to remedy this error within 15 days. The letter stated in bold print, "**This is not a denial of your claim but rather a rejection of the Proof of Loss which was incorrectly completed**." Shipper timely resubmitted the information.

On June 16, 2003, Shipper wrote to Macdonald stating:

> I am following up on the telephone messages that I left you on June 9th, June 13th and most recently, this morning. In your correspondence of May 12, 2003, you indicated that you are continuing your investigation into this matter. Please advise when you will be ready to speak with us to adjust the claim.

On June 26, 2003, Macdonald wrote to Shipper and stated, "After careful review of this matter along with additional investigation, we feel that we are justified in our denial of the above claim." The letter stated that it was "Farm Bureau's position" that the dwelling had been unoccupied for 18 months, as substantiated by relatives of the insured and a neighbor.

The following day, June 27, 2003, Shipper wrote to Jason Babka, Macdonald's claims supervisor. The letter confirmed that Shipper had "contact[ed Babka] to try to correct a wrongful denial of the Insured's claim" and that Shipper had "agreed to provide certain information which reflects on the meaning of vacancy and unoccupancy." The

letter enclosed excerpts from two insurance texts and concluded, "Please review and advise."

On June 30, 2003, Babka wrote back to Shipper. The letter quoted from the definitions of unoccupied in a third source, Fire, Casualty and Surety Bulletins (FC&S), and concluded, "Based on the definitions provided, our investigation, and the policy language under the increase in hazard, we must again respectfully deny the claim for fire damage to 10981 W. River Rd in Remus, Michigan of March 18, 2003."

On July 21, 2003, Shipper faxed a letter to Babka requesting page citations for the cited text and stating that "[y]ou have denied the Insured's claim based on an FC&S reference." On the same date, Babka sent a response stating that the claim was not denied on the basis of an FC&S definition and that "[t]he claim was denied based on the facts of the loss and our investigation, as well as the applicable policy language."

On September 24, 2003, Shipper wrote another letter to Babka, which stated:

> I have reviewed Farm Bureau's claim denial with the Insured. I am writing to ask for an appointment with you to discuss Farm Bureau's refusal to respond to the claim. The attorneys that I have spoken to state that the controlling issue will likely be a determination as to whether the house was abandoned. You may or may not decide to continue to deny the claim, but you should understand the reasons the Insured believes that the house was occupied. We can meet at your office or another agreeable location. I would like to arrange the meeting as soon as possible because, in the face of your denial, I must soon recommend an attorney for the future handling of this matter.

The record does not contain a response, but on October 10, 2003, Shipper and Babka did meet. According to an affidavit signed by Shipper, at the meeting Babka

> requested that I obtain and send him utility bills for the subject property (which would indicate that the power had been on, contrary to what one would expect in a vacant/abandoned property) and evidence of payment of property tax bills (which again would illustrate that the property was not vacant/abandoned). . . . Mr. Babka indicated he would consider the claim in light of the requested documents, once submitted, and would only make a decision as to whether or not the claim would be denied after he had done so. [Underlining in original; paragraph structure altered.]

Defendant filed a responsive affidavit signed by Babka. It stated, "Farm Bureau never contradicted its initial denial of Plaintiff's [sic] claim, that Farm Bureau's position never changed from the initial denial and that I never conveyed to Mr. Shipper otherwise."

Following up from the meeting, Shipper sent a letter and facsimilie on October 14, 2003, attaching utility bills and property tax receipts that he asserted, along with the contractor's remodeling estimates, "are indicative of an intent to continue to operate and occupy the property." Babka responded with a letter of the same date stating:

> I have carefully reviewed the additional documents you have submitted regarding this claim. Our findings still indicate that the house was both vacant and unoccupied, as we have previously outlined in our correspondence of June 30, 2003 and June 26, 2003. Based on this, we must respectfully continue to deny your client's claim.

Plaintiffs filed their complaint against defendant in the Mecosta Circuit Court[2] on October 5, 2004. In April 2005, defendant moved for summary disposition for failure to file within one year of the date the claim was

[2] Although the Bundy farmhouse is actually in Isabella County, halfway through the first day of trial, defendant stipulated that venue was proper in Mecosta County.

formally denied. MCL 500.2833(1)(q).[3] Plaintiffs opposed the motion. At a hearing on June 17, 2005, the trial court denied the motion, noting that there was a factual dispute about when the formal denial occurred and specifically referring to Shipper's and Babka's affidavits.

At trial, defendant abandoned the issue of when the formal denial occurred; defendant presented no evidence on the issue and did not request that the jury make a determination. The jury returned a verdict for plaintiffs, concluding that the farmhouse had not been vacant at least 60 consecutive days before the loss and that it "was occupied at least six consecutive months prior to the loss date . . . ." It awarded $3,000 for furnishings, $7,000 for other personal property, and $15,000 for lost rents. The trial court issued a judgment on the verdict for $69,500, reflecting the $50,000 policy limit on the building, the $10,000 policy limit on lost rents, $3,000 for landlord furnishings, the $2,500 policy limit for other personal property, and $4,000 for the stipulated debris removal.

Plaintiffs moved for case-evaluation sanctions, interest, and costs. With regard to the interest claim, defendant acknowledged this Court's decision in *Griswold*

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[3] MCL 500.2833(1)(q) provides:

> (1) Each fire insurance policy issued or delivered in this state shall contain the following provisions:
>
> * * *
>
> (q) That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. *The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability*. [Emphasis added.]

Props, LLC v Lexington Ins Co, 276 Mich App 551, 554; 741 NW2d 549 (2007), but objected to the interest claim on the basis of the prior caselaw in *Arco Indus Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143; 594 NW2d 74 (1998). The trial court concluded that defendant's denial was reasonable, but also concluded that *Griswold* applied retroactively and awarded 12 percent interest on the $54,500 of the award. On the attorney-fee issue, the trial court ultimately issued an opinion that granted plaintiffs 43 hours at $150 an hour in attorney fees. It assessed 12 percent interest on the $54,500 retroactively beginning on July 13, 2003, with the remainder of the award subject to interest accrued from the date of the complaint. Defendant appealed, and plaintiffs cross-appealed.

II. SUMMARY DISPOSITION

Defendant first argues that the trial court erred by denying its motion for summary disposition because plaintiffs' suit was untimely even with the extension under MCL 500.2833(1)(q). Plaintiffs contend that defendant has waived its right to claim that the complaint was untimely by failing to raise the issue at trial, but that even if the issue was preserved, there was evidence of a genuine issue of material fact regarding when defendant "formally denie[d]" plaintiffs' claim, making the trial court's denial of summary disposition appropriate.

We review de novo motions for summary disposition, taking the facts in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). We review the record and the documentary evidence, but do not make findings of fact or weigh credibility. *Taylor v Lenawee Co Bd of Co Rd Comm'rs*, 216 Mich App 435, 437; 549 NW2d 80 (1996).

We agree with plaintiffs that defendant waived its affirmative statute-of-limitations defense at trial. Defendant did not seek a jury finding regarding when the formal denial occurred and failed to present any evidence at trial that the denial occurred anytime other than October 14, 2003. The defense made a tactical decision not to argue this issue to the jury and focused solely on whether the policy provided coverage. However, this waiver did not waive defendant's right to appeal the trial court's denial of summary disposition. Although defendant waived any complaint of error on this issue at trial, defendant may still argue on appeal that the trial should never have occurred because the trial court improperly denied summary disposition on the issue. Thus, the issue is whether the trial court was correct that there was an outstanding question of fact material to the determination of when the formal denial that stopped the tolling under MCL 500.2833(1)(q) occurred.

Given the language of the letters, we agree with plaintiffs that the April 2003 denial was withdrawn by the May 22, 2003, letters stating that "[t]his is not a denial of your claim" and that "we are continuing our investigation into this matter." (Bold print omitted.) However, we conclude that a second formal denial did occur later. On June 26, 2003, Macdonald wrote to Shipper and stated that "we feel that we are justified in our denial of the above claim." In his letter to Babka, Shipper acknowledged the denial by stating that he was attempting to "correct a wrongful denial . . . ." The subsequent correspondence back and forth between the parties continued to mention a denial: "we must again respectfully deny the claim"; "[y]ou have denied the Insured's claim"; "[t]he claim was denied"; "I have reviewed Farm Bureau's claim denial with the Insured"; and "[y]ou may or may not decide to continue to deny the claim . . . ."

However, we do not believe that the trial court erred by determining that there was a question of fact given Shipper's affidavit stating that he wrote Babka on September 24, 2003, requesting a meeting and that the two of them met on October 10, 2003. According to Shipper's affidavit, "Babka indicated he would consider the claim in light of the requested documents, once submitted, *and would only make a decision as to whether or not the claim would be denied after he had done so.*" (Emphasis added; underlining in original.)

The trial court properly concluded that this evidence created a question of material fact about when the formal denial occurred. Although it is reasonable to construe Babka's letter on October 14, 2003, and his affidavit responding to the Shipper affidavit as evidence of an unbroken denial since June 2003, Shipper's affidavit presents evidence that creates a different inference—that defendant again withdrew its formal denial while it reinvestigated the claim. This inference is even more reasonable considering defendant's prior course of conduct, having once before withdrawn a denial of the claim. Taking this evidence in the light most favorable to plaintiffs, *Dressel*, 468 Mich at 561, Shipper's affidavit and defendant's previous withdrawal of its formal denial provided sufficient evidence to create a question of fact regarding whether Babka's alleged comments at the meeting with Shipper constituted another withdrawal of the denial, with a subsequent denial on October 14, 2003. The trial court properly left it up to a jury to determine whether Babka made the comments attributed to him in Shipper's affidavit and whether those comments constituted a withdrawal of defendant's previous formal denial followed by a new formal denial. Accordingly, we conclude that the trial court properly denied defendant's motion for summary disposition. This question was properly

held for a jury determination, and defendant elected to waive that determination.[4] We find no error.

III. OCCUPANCY

Defendant next argues that the trial court's jury instruction regarding occupancy was erroneous and that the following instruction should have been given: "One must consistently or habitually live there as a customary and usual dwelling place or place of abode or place of habitation. Mere supervision and periodic checking or overnight visitations or storage or furniture is not enough to satisfy an occupancy." However, this

[4] Despite the defense's decision not to submit the issue to the jury, defendant's witnesses and counsel made several statements at trial that seem inconsistent with its claim that the June denial remained in effect. Although these statements are not relevant to our review of the summary disposition ruling because they occurred after that ruling, defendant does appear to have been trying to have it both ways. On the one hand, when it moved for summary disposition, it argued to the court that it was beyond question that the claim had been formally denied before October. On the other hand, defendant sought to gain a tactical advantage at trial by repeatedly telling the jurors, in an apparent appeal to their sense of fair play, that the company had gone so far as to keep the claim open through October.

Defense counsel argued in his opening statement that Babka "kept this claim open . . . for review for a period of April, 2003, to October of 2003" and later reiterated that Babka "kept it open for six months" because he "wanted to be fair." During trial, Macdonald testified that it was her understanding that the claim was kept open until October of 2003. Babka testified that the reserve on the claim was not closed until October 29, 2003, and that when that was done, the denial was a done deal and he was not going back on the denial. Finally, in defendant's closing argument, counsel stated that Babka spent five months, i.e., through October, going over things with Shipper and that after that time "those two agreed to disagree."

We do not conclude that these statements constituted judicial admissions. See *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). However, we do question whether the defense would have taken this position at trial if the jury had in fact been permitted to decide the date of formal denial.

definition was never presented to the trial court. Indeed, the definitions requested by defendant were entirely different. Defendant's trial brief defined "unoccupied" as "**ROUTINELY DEVOID OF HUMAN PRESENCE.**" (Bold print in original.) Defendant's proposed jury instructions stated, "[*u*]*noccupied*: means not routinely characterized by the presence of human beings, or nobody is living there." Obviously, there was no error in the trial court's failure to give an instruction that was never requested. Nevertheless, defendant expressed a general objection to the instruction. The question becomes what standard of review applies to this issue.

MCR 2.516(C) provides, "A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict . . . , stating specifically the matter to which the party objects and the grounds for the objection." Here, the entire objection was "we're going to go with the one jury instruction with respect to occupancy. However, both of us have some misgivings about it and each of us wants to preserve our right to, I guess, contest it after the fact depending on who wins." Because the rule requires the objecting party to specifically state the grounds for the objection on the record, and the record in this case lacks any statement of grounds for the objection, this issue is unpreserved. Accordingly, our review is for plain error affecting defendant's substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

The trial court instructed the jury:

> In determining whether the [Bundy] farmhouse was vacant or unoccupied before the fire loss as alleged in this case, you are instructed to use the following definitions:

> Vacant means the residence was completely empty and was—and has insignificant furnishings or property to support its intended purpose as a rental property.
>
> Unoccupied. Unoccupied means operations or other activities in the building are suspended but contents remain in the building and [sic] is not being lived in for a period of six consecutive months.

Defendant argues on appeal that the definition of "unoccupied" is improper. Because "unoccupied" is a term used in the insurance policy, the question is one of contract interpretation.

"[I]n reviewing an insurance policy dispute we must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction." *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.
>
> While we construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured. The fact that a policy does not define a relevant term does not render the policy ambiguous. Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism. [*Id.* at 354 (citations omitted).]

The contract provision at issue provides that there is no coverage "[w]hile a described building, whether intended for occupancy by owner or tenant, is vacant beyond a period of sixty consecutive days or is unoccupied beyond a period of six consecutive months." The parties agree that "unoccupied" is not defined in the policy. When terms are undefined, it is appropriate for this Court to consult a dictionary for the common definition. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).[5] "Vacant" is defined as "[h]olding nothing: empty." *Webster's New Basic Dictionary* (2007). "Unoccupied" is similarly defined as "[n]ot occupied: empty." *Id.* The most applicable definition of "occupy" would appear to be "[t]o live in." *Id.* Putting those definitions together, "unoccupied" means not lived in.

Using these definitions, we conclude that the trial court's jury instruction was proper. The trial court said that "unoccupied" meant that the building had contents but "is not being lived in . . . ." It gave the appropriate duration from the contract provision of "six consecutive months." Thus, the instruction informed the jury that it had to determine whether the Bundy farmhouse had not been lived in for more than six consecutive months. We find no plain error. *Hilgendorf*, 245 Mich App at 700.

Defendant argues that this Court's opinion in *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513; 773 NW2d 758 (2009), is controlling on this issue. We disagree. First, defendant's contention that *Vushaj* "should have been incorporated into a proper jury instruction" defies logic because it ignores the fact that

[5] Although *Halloran* relates to statutory interpretation, the rules are the same for contract interpretation. See *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82-85; 730 NW2d 682 (2007).

Vushaj was not decided until after this appeal had already begun. More important, the policy language at issue in *Vushaj* is markedly different and distinguishable. The *Vushaj* policy precluded coverage if the house was "vacant or unoccupied beyond a period of 30 consecutive days." *Id.* at 519. The present policy exempted coverage when the house "is vacant beyond a period of sixty consecutive days or is unoccupied beyond a period of six consecutive months." Thus, the present policy clearly separates the terms "vacant" and "unoccupied" into different clauses with distinct time requirements. Such a structure leads to the conclusion that the two terms have different meanings.

> [M]ost authorities have distinguished the terms "vacant" and "unoccupied." The term "vacant" has been construed to mean empty, deprived of contents, and without inanimate objects. It implies entire abandonment, and non-occupancy for any purpose. On the other hand "unoccupied" has been held to mean without animate objects, and implies that no actual use is being made of the premises by anyone corporeally present or in possession. [45 CJS, Insurance, § 1002, p 467.]

See also Garner, *A Dictionary of Modern Legal Usage* (2d ed) ("[V]acant; unoccupied. These words are often used in the context of insurance policies on buildings. They are not synonymous: *vacant* means without inanimate objects, while *unoccupied* means without human occupants."). The necessity that "vacant" and "unoccupied" have different meanings within the instant policy is enhanced by the fact that each term has its own time limit: vacant for 60 days; unoccupied for six consecutive months. *Vushaj* simply had a single period that applied to either term.

Furthermore, it is the definition of "unoccupied," not "occupied," that is at issue. This difference is more than academic. Defendant asserts that "[t]he plain meaning

of the contract requires that someone be living in the house as a legal abode for six months before the loss." Whether intentionally wrong or simply inartfully worded, this is a misinterpretation of the policy language. There is no requirement that the farmhouse be lived in "for six months before the loss." Rather, the house must be *unoccupied* "beyond" (that is, for more than) six consecutive months before a loss for the exclusion to take effect. The house could have been unoccupied for six months, but as long as it became occupied on the next day, the exclusion would never be operative because the house was not unoccupied *for more than* six months. As the policy is currently phrased, even a single day of occupancy will restart the counter on the six consecutive months. This requirement further distinguishes *Vushaj*, because application of *Vushaj*'s definition of "unoccupied" (" 'not routinely characterized by the presence of human beings' ") *Vushaj*, 284 Mich App at 516, quoting Black's Law Dictionary (8th ed), would impermissibly render nugatory the instant policy's requirement that the there be a "consecutive" period of no occupancy. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) ("[C]ourts 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."). Because of the clear differences between the instant policy and the policy that was interpreted in *Vushaj*, we find *Vushaj* inapplicable.

Finally, defendant contends that there was insufficient evidence to create a jury question about occupancy. However, defendant's argument presupposes that the definition given by the trial court was erroneous. Defendant has not argued on appeal that there was insufficient evidence under the definition stated in the jury instructions. Accordingly, our determination that

there was no error in the definition given by the trial court has disposed of this issue.

IV. RETROACTIVITY OF *GRISWOLD*

Defendant's final claim on appeal is that the trial court erred by concluding that this Court's decision in *Griswold*, 276 Mich App 551, applied retroactively. In *Griswold*, this Court held that "a first-party insured is entitled to 12 percent penalty interest if a claim is not timely paid, irrespective of whether the claim is reasonably in dispute." *Id.* at 554. Defendant argues that this rule should be applied prospectively only because it overruled clear and settled caselaw.

Whether a ruling applies retroactively is a question of law that this Court reviews de novo. *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008). "[T]he general rule is that judicial decisions are to be given complete retroactive effect. We have often limited the application of decisions which have overruled prior law or reconstrued statutes. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (citations omitted).

Rules determined in opinions that apply retroactively apply to all cases "still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule[s]." *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 2d 74 (1993). Rules determined in opinions that apply prospectively only, on the other hand, not only do not apply to cases still open on direct review, but do not even apply to the parties in the cases in which the rules are declared. See *Pohutski v City of Allen Park*, 465 Mich 675, 699; 641 NW2d 219 (2002).

With this understanding, it is clear that this Court has already concluded that *Griswold* did not apply prospectively only because it applied its holding to the three cases consolidated in *Griswold* and ruled that the plaintiffs in all three cases were entitled to penalty interest, irrespective of whether the claims were reasonably in dispute. *Griswold*, 276 Mich App at 566-567. However, because there are no published opinions specifically holding that *Griswold* is fully retroactive,[6] we have considered defendant's claims. Nevertheless, we conclude that *Griswold* is fully retroactive.[7]

As previously noted, "[c]omplete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Hyde*, 426 Mich at 240. Here, there was simply nothing "clear and uncontradicted" about the "reasonable dispute" standard, particularly in light of the binding Michigan Supreme Court precedent in *Yaldo v North Pointe Ins Co,* 457 Mich 341, 348-349; 578 NW2d 274 (1998), that had explicitly rejected the "reasonable dispute" standard as contrary to the language of the statute.

Moreover, even assuming that *Griswold* represented a new rule, as opposed to a clarification of a previously ambiguous state of the law, the three-factor test set forth in *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich

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[6] There is an unpublished opinion so holding. *Frans v Harleysville Lake States Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2008 (Docket No. 280173).

[7] We note that, for the purposes of this case, it makes no difference whether *Griswold* has full retroactivity or only limited retroactivity, because full retroactivity makes it applicable to all cases then pending and limited retroactivity applies "in pending cases where the issue had been raised and preserved." *Stein v Southeastern Mich Family Planning Project, Inc*, 432 Mich 198, 201; 438 NW2d 76 (1989). Because the issue was raised and preserved in this case, *Griswold* would apply even under limited retroactivity.

App 617; 722 NW2d 922 (2006), does not weigh in favor of prospective application.

> The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law. If that question is answered in the affirmative, then a court must weigh three factors in deciding whether a judicial decision warrants prospective application: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. [*Id.* at 621.]

There are multiple purposes served by the new rule. First, it clarified an ambiguous state of the law. Second, it was intended to give meaning to the statutory language, which appears designed to deter, and limit the length of, denials of justified claims. The "timely payment" purpose weighs heavily in favor of retroactive application because prospective application removes the incentive of limiting any further delay of payment with regard to justified claims already in litigation when *Griswold* was decided.

The second factor is the extent of reliance on the old rule. It is true that the insurance industry relied heavily on the *Arco* decision to delay payment in claims that were reasonably in dispute. However, when an insurance company truly has a complete defense, i.e., it is ultimately determined that there is no coverage, the company is relieved from any requirement to pay interest. Additionally, given the ambiguous state of the law, it is unclear how reasonable the reliance on *Arco* was, given that it contradicted the Supreme Court's precedent in *Yaldo*. Thus, this factor does not seem to weigh heavily in either direction.

The third factor, the effect of retroactive application on the administration of justice, weighs in favor of

retroactive application. Given the limited number of cases to which this issue applies, applying the *Griswold* decision retroactively will have little effect on the courts and their caseloads.

Given that (1) the *Griswold* Court retroactively applied its decision to the three consolidated cases before it and at least one subsequent panel of this Court determined it to be retroactive, (2) the law that was overturned can hardly be considered "clear and uncontradicted," and (3) the factors for prospective-only application weigh in favor of retroactive application, we conclude that the trial court properly ruled that *Griswold* was to be applied retroactively and, therefore, was applicable to this case.

V. ATTORNEY FEES

Plaintiffs argue in their cross-appeal that the trial court erroneously and arbitrarily reduced their attorney's hours by 46 percent on the basis of a patently erroneous premise that counsel had padded his billing.[8] Although this Court reviews de novo a trial court's decision to grant case-evaluation sanctions, the amount awarded as reasonable attorney fees is reviewed for an abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 235, 239; 770 NW2d 47 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* at 235.

Plaintiffs' counsel originally provided to the trial court a two-page typed time sheet memorializing 115.4 hours that he had spent working on the case after the case evaluation. Defendant objected, indicating that its

[8] Plaintiffs have conceded that the reduction of their counsel's hourly rate from $350 to $150 was within the court's discretion. Accordingly, the issue on appeal is limited solely to the number of hours to which this rate was applied.

counsel "spent only 90.2 hours" for the same period and, after objecting to several entries, stated that "[g]iven these reductions, the total amount of attorney time that could reasonably be awarded would be approximately 90 hours." Defendant also requested an evidentiary hearing "and a more exact accounting" of the time indicated on the billing statement.

During the hearing for case-evaluation sanctions, plaintiffs' counsel justified his time, indicating that he had worked on the case for only five hours from the case evaluation until 10 days before the trial, when it became clear that it was going to go to trial. He further indicated that the case filled three bankers boxes because it was document-intensive and argued against defendant's assertion that it was a simple case:

> It involved technical contract issues, definition of technical terms, occupancy and vacancy, which are not the same thing as they are out there in the real world. When we talked about an insurance contract earlier in the litigation, it involved interpretation and doing battle over MCL 500.2833 regarding limitation issues. It's a very technical case.

Defendant's counsel argued that he still believed that plaintiffs' counsel was only entitled to $9,000 (90 hours times a rate of $100 an hour) and requested an evidentiary hearing. He maintained that it was "a simple case to try, not difficult at all in my mind" and that damages had been agreed to so that the jury only had to decide whether the farmhouse was vacant or unoccupied.

At the evidentiary hearing on attorney fees, plaintiffs' counsel testified regarding his billing records. He testified that he filled out his handwritten record of time spent at the same time that the work was performed. He also justified each of the items about which he was questioned and testified that he had worked the

hours listed. The trial court took issue with the time plaintiffs' counsel indicated for the trial. According to the time records, plaintiffs' counsel billed 46 hours for the trial and trial preparation for July 23 through 26. The trial court used 45 hours as the figure and determined that the time for the trial, including the jury's deliberations, was 17.5 hours. Plaintiffs' counsel indicated that there had been a great deal of trial preparation, but the trial court appeared flippant and told plaintiffs' counsel that the issue whether the house was occupied or unoccupied did not require much time because the trial court "figured that out in about five minutes." Plaintiffs' counsel then argued that it was clear that defendant's counsel had spent approximately as much time on the case as he had. The trial court rejected this argument because plaintiffs' counsel's records were not detailed enough.

The trial court issued its opinion and order, which held, in relevant part:

> Plaintiff's [sic] attorney submitted a hand written record of purported hours spent in preparation and actual time spent at trial. The most objective criteria that the Court has to determine the accuracy of the purported hours is the actual time that the Court observed the Plaintiff's [sic] attorney at trial. Plaintiff's [sic] attorney recorded thirty-six (36) hours that he claims to have been in trial, the Court's records indicate that the actual trial time was nineteen and one-half (19½) hours, an overstatement of sixteen and one-half (16½) hours or forty-six [percent] (46%).
>
> Using the Plaintiff's [sic] attorney records — claiming that trial preparation totaled forty-three and one-half (43½) hours — and using the above forty-six percent (46%) overage, the Court determined the preparation hours to be twenty-three and one-half (23½) hours, which reduces the hours of preparation by twenty (20) hours. Hence the total hours that

> can be charged for attorney fees is forty-three (43) hours (19½ trial hours plus 23½ hours of preparation)[.]

Plaintiffs argue that the basis for the reduction was erroneous and unreasonable.

In determining a reasonable attorney fee, there is no set formula, but multiple factors to consider. *In re Temple Marital Trust*, 278 Mich App 122, 138; 748 NW2d 265 (2008). These factors include:

> (1) the skill, time and labor involved; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and the results achieved; (5) the expense incurred; (6) the time limitation imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the professional standing and experience of the attorney; and (9) whether the fee is fixed or contingent. [*Id.* (citations omitted).]

Here, although the trial court discussed some other factors at the hearing, in its opinion, the trial court relied on a single factor—how much time it believed plaintiffs' counsel had actually spent on the case. However, given the testimony at the hearing and the information on plaintiffs' counsel's time sheet, the trial court's calculation was erroneous. The time sheet indicated, and plaintiffs' counsel testified at the hearing, consistently with the time sheet, that he did more than the trial on the days listed for the trial—he also did preparation for the next day of trial. Accordingly, the trial court's determination of a 46 percent overbilling was inconsistent with the record, making its reduction based on this calculation erroneous.

Further, the contention of defendant and the trial court that the sole matter in dispute was the definitions of "occupancy" and "vacancy" was erroneous because it

ignored several outstanding issues that could have come up at trial, for which plaintiffs' counsel needed to be prepared. There was an outstanding factual question about when defendant could be deemed to have formally denied the claim in order to trigger the statutory one-year deadline. That defendant ultimately failed to address this issue at trial is irrelevant. Plaintiffs still had to prepare to fight this issue and present evidence and testimony relevant to it because they had no way to know before the trial that defendant was not going to address it.

The same is true with regard to the stipulations to which defendant refers. These stipulations were made *during* trial. For example, it was not until the end of the second day of trial that defendant stipulated "a $4,000 debris removal amount" and a $50,000 cash value for the dwelling. Even if the stipulations had been made the morning of trial, it would not have changed the fact that plaintiffs' counsel had to be prepared to present evidence on those issues. Moreover, even with these stipulations, there were still outstanding issues regarding the amount of lost rents, the value of landlord furnishings, and the value of the owner's other personal property that were left to the jury to decide. Additionally, with plaintiffs presenting their case first, they had to put all their evidence regarding the formal denial and the subsequently stipulated values into evidence and assume that defendant was going to counter it during its presentation of the evidence. Again, just because defendant ultimately decided not to address those issues or agreed to stipulate certain amounts did not make the time plaintiffs' counsel was required to prepare for those disputed issues, including the presentation of witnesses and documents at trial, unreasonable or unnecessary.

Both defendant and the trial court made much of the fact that plaintiffs' counsel had not itemized his

time in six-minute increments or used time slips, but instead kept a running handwritten record indicating clumps of time spent. Plaintiffs' counsel testified that he filled out his handwritten record contemporaneously with when the work was completed and that it was not more detailed because he had a contingent-fee arrangement with his clients. We conclude that under Michigan law, the billing records submitted by plaintiffs' counsel were sufficient. Indeed, this Court has held that descriptions such as "trial prep" and "trial" in billing records are self-explanatory:

> [I]n order for the trial court to arrive at a reasonable attorney fee award, it must determine what services were actually rendered. Although a detailed bill of costs is not required, some documentation is needed to enable the trial court to determine the proper amount to award. . . .
>
> Although plaintiff's counsel did not list exactly what she was doing with regard to her "trial" and "trial prep" submissions, . . . lawyers generally know what other lawyers do during "trial" and "trial prep"—review the pleadings, review discovery responses, read depositions, prepare experts, prepare lay witnesses, prepare for cross-examinations, prepare opening and closing arguments, prepare exhibits, attend the trial, and so forth. The list is quite extensive but well known, i.e., there are no surprises. . . . It would be unreasonable to force lawyers, who do not even know if they will be entitled to case evaluation sanctions at the time they are preparing for and attending the trial, to record exactly what they were doing at every "billable" moment. And, it is unnecessary. The trial court can certainly consider the type of case, the length of the trial, the difficulty of the case, the numbers and types of witnesses, as well as other relevant factors, and determine what services were necessitated by the rejection of the case evaluation. We refuse to require an exhaustive and detailed list of the precise service provided at every moment. [*Young v Nandi*, 276 Mich App 67, 88-89; 740 NW2d 508 (2007), vacated in part on other grounds 482 Mich 1007 (2008) (citation omitted).]

In sum, plaintiffs' counsel's billing records were legally sufficient, his testimony supported his claims of time spent, and no contrary evidence was presented. Although the trial court took issue with his time claimed for the trial, plaintiffs' counsel stated that the listed time was not *solely* time spent in trial, but included preparation for the next day's presentation. There is simply nothing in the record to support the trial court's application of a 46 percent reduction in hours billed to come up with a "reasonable" fee. The trial court gave only mild consideration to the complexity of the case, and even when it did so, it disregarded the fact that plaintiffs had to be prepared to argue all the issues, even if defendant ultimately waived or stipulated with regard to them. Accordingly, the trial court abused its discretion in its determination of a reasonable attorney fee.

We therefore reverse the trial court's assessment of attorney fees and remand the issue back to the trial court. On remand, the trial court should examine the appropriate factors listed earlier in this opinion in view of the evidence obtained at the previous hearing. However, given the repeated representations of defendant's counsel that 90 hours was reasonable (indeed, he spent that many hours working on the case after the case evaluation), we hold that the minimum to which plaintiffs are entitled is $13,500 (the trial court's rate of $150 an hour times 90 hours).

Affirmed in part, reversed in part, and remanded for additional proceedings consistent with this opinion. Plaintiffs are entitled to costs under MCR 7.219. We do not retain jurisdiction.

M. J. KELLY, P.J., concurred.

K. F. KELLY, J. (*dissenting*). I respectfully dissent. In my view, plaintiffs' claim is time-barred under MCL 500.2833(1)(q), and the trial court erred by denying defendant's motion for summary disposition. Further, the majority's conclusion that a question of fact exists regarding when the formal denial occurred is erroneous because (1) it fails to apply the plain language of MCL 500.2833(1)(q), (2) it applies the long-discredited judicial tolling doctrine, and (3) it implicitly applies the doctrine of equitable estoppel in the absence of facts supporting its application. I would reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs' property was destroyed by fire on March 18, 2003. Defendant's policy provided coverage to the property and its contents. Plaintiffs promptly notified defendant of the loss.

On April 17, 2003, by certified mail, defendant's senior claims representative, Kathy Macdonald, wrote to plaintiffs' adjuster, Stewart Shipper of Associated Adjusters, Inc., denying coverage for the claim, stating, in relevant part:

> Enclosed please find a copy of our Farm Bureau Mutual Farmowners Policy with regards to the above claim. Please note on page 10 #31 Increase in Hazard. Unless otherwise provided in writing, we will not be liable for loss occurring: b. while a described building, whether intended for occupancy by owner or tenant, is vacant beyond a period of sixty consecutive days or is unoccupied beyond a period of six consecutive months.
>
> In speaking with Maria McNeel and Wakelin McNeel both indicated that no one has actually resided in the dwelling for approximately 18 months. There was no furniture in the dwelling to constitute occupancy.

> *Due to the above we are denying coverage for this claim.* [Emphasis added.]

On May 12, 2003, Shipper wrote defendant, acknowledging receipt of defendant's denial of plaintiffs' claim on the basis of "Increase in Hazard" but contesting its conclusion that the property was unoccupied or vacant. In addition, Shipper submitted a list of personal property lost in the fire, as well as the cash value of the listed property. In conclusion, he requested defendant to "reconsider [its] denial[.]"

On May 22, 2003, Macdonald wrote to Shipper, stating: "In response to your letter of May 12, 2003 we are continuing our investigation into this matter. As soon as we have completed this investigation we will be in contact with you to discuss your client's claim further." Also on May 22, 2003, by certified mail, defendant rejected plaintiffs' "Sworn Statement in Proof of Loss"[1] and provided plaintiffs with an additional 15 days to resubmit the statement. Defendant also specifically notified plaintiffs that "[t]his is not a denial of your claim but rather a rejection of the Proof of Loss which was incorrectly completed." (Bold print omitted.)

After additional investigation, defendant wrote to Shipper on June 26, 2003, and denied plaintiffs' claim:

> After careful review of this matter along with additional investigation, we feel that we are justified in our denial of the above claim.
>
> It is [defendant's] position that the dwelling located at 10981 W. River Rd., Remus, MI was vacant and unoccupied at the time of the loss and for approximately

[1] Presumably, the "Sworn Statement in Proof of Loss" referred to Shipper's earlier submission of the list of personal property lost in the fire.

> 1 1/2 years prior to this fire. This was substantiated to us by relatives of the named insured along with neighbor's [sic] of this dwelling.
>
> *Due to these facts we cannot honor the above claim.* [Emphasis added.]

The following day, Shipper requested further reconsideration of defendant's denial of plaintiffs' claim, continuing to contend that it was "wrongful." This request did not raise any factual dispute about the fire or its cause, but was based solely on the interpretation of the policy terms "vacant" and "unoccupied." Of particular note, Shipper's letter specifically recognized defendant's denial of the claim.

Three days later, on June 30, 2003, defendant reaffirmed its earlier denial of plaintiffs' claim:

> [Defendant has] also reviewed your documentation regarding the definition of vacant. . . . Our investigation indicates that the home did not sustain sufficient furnishings to maintain it as a residence.
>
> Based upon the definitions provided, our investigation, and the policy language under the increase in hazard, *we must again respectfully deny* the claim for fire damage to 10981 W. River Rd in Remus, Michigan of March 18, 2003. [Emphasis added.]

On July 21, 2003, Shipper once again acknowledged defendant's denial "based on an FC&S[2]reference" but requested information on how to locate the reference. On the same day, defendant responded to the request, stating:

> This letter is in response to [y]our correspondence of July 21, 2003. Your letter is incorrect in stating that we have denied the insured's claim based on a FC&S refer-

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[2] FC&S stands for "Fire, Casualty and Surety Bulletins."

> ence. *The claim was denied based on the facts of the loss and our investigation, as well as the applicable policy language.*

On September 24, 2003, Shipper again wrote defendant requesting further consideration. Notably, Shipper once again acknowledged and recognized that the claim had been denied, that defendant could continue to deny the claim, and that the time limit to initiate litigation was approaching:

> I have reviewed Farm Bureau's claim denial with the Insured.
>
> I am writing to ask for an appointment with you to discuss Farm Bureau's refusal to respond to the claim.
>
> The attorneys that I have spoken to state that the controlling issue will likely be a determination as to whether the house was abandoned.
>
> You may or may not decide to continue to deny the claim, but you should understand the reasons the Insured believes that the house was occupied.
>
> We can meet at your office or another agreeable location.
>
> I would like to arrange the meeting as soon as possible because, *in the face of your denial, I must soon recommend an attorney for the further handling of this matter*. [Emphasis added.]

On October 14, 2003, defendant *again* wrote Shipper that it would continue to deny plaintiffs' claim.

Plaintiffs filed their complaint against defendant on October 5, 2004. In April 2005, defendant moved for summary disposition for failure to file within one year from the date of defendant's denial of the claim. Plaintiffs argued that no formal denial of the claim pursuant to MCL 500.2833(1)(q) had occurred before October 14, 2003, and that the complaint had therefore been timely filed. Plaintiffs further argued that defendant waived

any right it had to rely on purported denials before that date because of defendant's inconsistent conduct.

The trial court denied the motion, concluding that there was a genuine issue of material fact regarding when the denial occurred.

II. STANDARDS OF REVIEW

"Whether a period of limitations applies to preclude a party's pursuit of an action constitutes a question of law that we review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003). We also review de novo a trial court's ruling on a motion for summary disposition. *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 414; 745 NW2d 174 (2007). In reviewing a motion under MCR 2.116(C)(7), we must accept the plaintiff's well-pleaded allegations as true, and we must "look to the pleadings, affidavits, or other documentary evidence to see if there is a genuine issue of material fact." *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 376-377; 532 NW2d 541 (1995). If no question of fact exists, whether the plaintiff's claim is barred by a statute of limitations is a question for the court. *Id*. at 377. "However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate." *Id*. Further, this case also presents a question of statutory construction, which this Court reviews de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

III. SUMMARY DISPOSITION WAS IMPROPERLY DENIED

Defendant argues that the trial court erred by denying its motion for summary disposition. I agree. In my view, when the plain language of MCL 500.2833(1)(q) is

applied to the facts of this case, the necessary conclusion is that plaintiffs' claim was untimely filed as a matter of law and the case should have been dismissed under MCR 2.116(C)(7).

A. THE MEANING OF MCL 500.2833(1)(q)

Because it is my view that the majority fails to apply the language of MCL 500.2833(1)(q), an explanation of its meaning is necessary to understand the rule that must be applied to the facts of this matter. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). Nothing will be read into a clear statute that is not within the manifest intent of the Legislature as derived from the language of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002), citing *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

MCL 500.2833(1)(q) provides:

> (1) Each fire insurance policy issued or delivered in this state shall contain the following provisions:
>
> * * *
>
> (q) That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. *The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability*. [Emphasis added.]

In other words, it is the rule in Michigan, under the clear language of this provision, that fire insurance policies provide a "mandatory limitation period [for filing a lawsuit] of at least one year, with tolling, unless a longer period is specifically set forth in the insurance policy." *Randolph v State Farm Fire & Cas Co*, 229 Mich App 102, 106-107; 580 NW2d 903 (1998). Consistently with common sense, the statute makes the centerpiece for determining when the limitations period begins to run the point at which an insurer has formally denied liability. It is not surprising that the receipt of a formal denial will "unequivocally impress[] upon the insured that the extraordinary step of pursuing relief in court must be taken," *Lewis v Detroit Auto Inter-Ins Exch*, 426 Mich 93, 101; 393 NW2d 167 (1986), and the statute, accordingly, embodies this concept.

Because the focus of the present dispute is when the insurer formally denied liability, the relevant phrase of the statute for purposes of this litigation is "until the insurer formally denies liability." "Until" means "[u]p to the time of" and "[b]efore a specified time."[3] *The American Heritage Dictionary*, *New College Edition* (1976). Black's Law Dictionary (5th ed) defines "until" as follows: "Up to time of. A word of limitation, used ordinarily to restrict that which precedes to what immediately follows it, and its office is *to fix some point of time* or some event upon the arrival or occurrence of which what precedes will cease to exist." (Emphasis added; citation omitted.) Thus, under the statute, the one-year period is tolled " 'from the date of a specific claim for benefits to the date of a formal denial of

[3] While it should go without saying what the meaning of the word "until" is, I offer the dictionary definition of the word here. This Court may consult a dictionary to discern a word's common meaning. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

liability.' " *Hudick v Hastings Mut Ins Co*, 247 Mich App 602, 607; 637 NW2d 521 (2001), quoting *Lewis*, 426 Mich at 101.

Our appellate courts have already parsed the meaning of the term "formal denial." "A denial of liability need not be in writing to be formal, but it must be explicit." *Mt Carmel Mercy Hosp v Allstate Ins Co*, 194 Mich App 580, 587; 487 NW2d 849 (1992) (citation omitted). Although the best formal notice is a writing, notice may be sufficiently direct to qualify as formal without being put into writing. *Mousa v State Auto Ins Cos*, 185 Mich App 293, 295; 460 NW2d 310 (1990). Accordingly, under this state's jurisprudence, a "formal denial" must be explicit and direct.

B. PLAINTIFFS' CLAIM IS TIME-BARRED

Here, it is undisputed that the loss occurred on March 18, 2003. It is undisputed that defendant received the proof of loss on March 19, 2003. And, as the majority agrees, it cannot be disputed that defendant formally denied liability on June 26, 2003.[4] On that date, defendant informed plaintiffs in a letter that "we are justified in our denial of [your] claim" and "we cannot honor [your] claim." At that point, pursuant to the clear and unambiguous terms of MCL 500.2833(1)(q), the one-year limitations period for bringing suit was no longer tolled and the limitations period began to run.

Yet despite this formal denial, plaintiffs continually attempted to have defendant reopen their case rather than filing suit. Defendant, however, continued to refer back to its previous formal denial. In its written statements, defendant made the following explicit reassertions of its denial:

[4] In his affidavit filed in the trial court, Shipper also admits that on "June 26, 2003 . . . Farm Bureau denied the claim."

June 30, 2003: "[W]e must *again* respectfully deny the claim . . . ."

July 21, 2003: "The claim *was denied* based on the facts . . . ."

Oct 14, 2003: "[W]e . . . *continue to deny* your client's claim." (Emphasis added.)

Importantly, after each reiteration of defendant's decision to deny plaintiffs' claim, Shipper specifically and unequivocally *acknowledged* that defendant had earlier denied the claim. He repeatedly recognized the June 26, 2003, denial as early as June 27, 2003, and as late as September 24, 2003, and even wrote to defendant: "[I]n the face of your denial, I must soon recommend an attorney for the further handling of this matter." Clearly, plaintiffs knew at this point that "the extraordinary step of pursuing relief in court must be taken." *Lewis*, 426 Mich at 101.

Thus, it is undisputed on the record that plaintiffs failed to file suit within one year of defendant's June 26, 2003, formal denial of liability. Consequently, their claim is time-barred, and summary disposition should have been granted in defendant's favor. The trial court had before it all the written documentation affecting the instant claim and, thus, the question presented was merely a question of law. "[W]here written documents are unambiguous and unequivocal, their construction is for the Court to decide *as a matter of law*." *Mt Carmel*, 194 Mich App at 588 (emphasis added);[5] see also *Huron*

[5] In *Mt Carmel*, this Court held that the following letter from the defendant insurance company constituted a formal denial of defendant Naima Nafso's claim for personal injury protection (PIP) benefits:

> "Pursuant to our recent phone conversation, Mr. Amer Nafso and Akram P. Najor live at 19214 Bauman; Detroit, MI 48203; and are insured with State Farm, policy No. 532736261422.

Tool, 209 Mich App at 377. And, as these documents plainly and obviously showed, plaintiffs' complaint, filed more than a year after the formal denial, was untimely filed under the statute. The trial court erred by failing to properly apply the plain language of MCL 500.2833(1)(q) in the present matter. Summary disposition in defendant's favor should have been granted.

C. SHIPPER'S AFFADAVIT DOES NOT CREATE A QUESTION OF FACT

The majority, however, contends that a question of fact exists about when defendant formally denied plaintiffs' claim because further discussions ensued between the parties regarding the claim after the June 26, 2003, denial letter. The majority relies on the affidavit of Shipper, who attested that defendant's agent allegedly agreed to meet with him in September 2003 and "indicated he would consider the claim in light of the requested documents . . . and would only make a decision as to whether or not the claim would be denied after he had done so." At the outset, assuming without conceding that the affidavit is even relevant, it must be noted that the statements of the claim adjuster are unsubstantiated in the record, are internally inconsistent, are merely self-serving allegations, and are even

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> "Therefore, a PIP claim for Naima Nafso must be filed with that company.
>
> "We are in receipt of Mr. Nafso's application for benefits. We must know if, if [sic] anyone is taking Mr. Nafso's place in his store; and is the store suffering a loss due to Mr. Nafso's injuries?
>
> "Please forward a copy of Mr. Nafso's policy with Continental Life Insurance Company." [*Mount Carmel*, 194 Mich App at 587 (emphasis omitted).]

This Court held that the "language of denial in the letter was unambiguous" and that the letter constituted a formal denial "*as a matter of law*." *Id.* at 588 (emphasis added).

contradicted by Shipper's own contemporaneous writings to defendant. There simply is no substantiating evidence in the record that defendant indicated in September 2003 that it formally rescinded its denial[6] and would only deny the claim after it had reviewed certain requested documents other than plaintiffs' claim adjuster's unsubstantiated statements. Such bald allegations, which are arguably also inadmissible hearsay, without other support in the record, are insufficient to create a genuine issue of material fact. See *Town v Mich Bell Tel Co*, 455 Mich 688, 712 n 10; 568 NW2d 64 (1997) (RILEY, J., concurring); MCR 2.116(G)(4). Rather, the affidavit merely reflected a desire on Shipper's part to persuade defendant to settle the matter without a lawsuit. In hindsight, this desire turned out to be wishful thinking, and plaintiffs simply failed to assert their rights in a timely manner as required by MCL 500.2833(1)(q). While plaintiffs may very well have a cause of action against Shipper or their attorneys, or both, for failing to file the instant matter within the limitations period, the failure to file certainly cannot be attributed to defendant.

Further, even if the affidavit created a factual dispute in regard to the parties' correspondence, which it does not, it would nonetheless be irrelevant given that defendant formally denied plaintiffs' claim in June 2003 and defendant never made any direct, explicit formal rescission of that denial. The clear and unambiguous language of MCL 500.2833(1)(q) directs that the limitations period be tolled "until the insurer

[6] As set forth in part I of this opinion, defendant first formally denied plaintiffs' claim on April 17, 2003, but expressly and completely rescinded that denial in writing on May 22, 2003. The difference between the first formal denial of liability on April 17 and the denial of liability on June 26, 2003, is that defendant never directly and unequivocally withdrew or rescinded the June 26 denial.

formally denies liability." Shipper's ongoing attempts to settle the case without litigation were immaterial and should not be a consideration under the plain language of MCL 500.2833(1)(q). As previously noted, that provision plainly states, in relevant part: "An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss *until* the insurer formally denies liability." MCL 500.2833(1)(q) (emphasis added). Absolutely nothing in the plain language of this provision permits a court to create a question of fact out of one party's subsequent attempts to settle if it is clear on the record that a formal denial had been made; the express language of the statute makes no exception for such behaviors or conduct. Nothing in the provision provides for any type of further tolling after the formal denial. Thus, the parties' further discussions and plaintiffs' continual unilateral submissions of additional information and requests to reconsider the denial did not operate, and could not have operated, to rescind defendant's formal denial of liability. The majority's conclusion that a question of fact exists regarding when the formal denial occurred based on events that happened after the formal denial, *which it admits occurred* on June 26, 2003, ignores the statute's plain and unambiguous language in order to avoid the statute's effect.

IV. THE MAJORITY WRONGLY INVOKES JUDICIAL TOLLING

In support of its position that a question of fact is presented, the majority invokes the doctrine of judicial tolling, thereby enabling litigants to evade the limita-

tions period of MCL 500.2833(1)(q).[7] Litigants may now easily avoid the consequences of a statutorily mandated limitations period. Litigants can simply create "questions of fact" by continually initiating further discussions and submitting the same or additional documentation regarding the claim to insurers even after the claim is formally denied. Our Supreme Court has explicitly rejected these sorts of judicially created tolling mechanisms that are contrary to the plain language of a statute or contract. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005); *McDonald v Farm Bureau Ins Co*, 480 Mich 191; 747 NW2d 811 (2008). In doing so, the Court noted, "Statutory . . . language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court." *Devillers*, 473 Mich at 582. To do so is to "legislate[] from the bench" and to act outside the constitutional authority vested in the courts of this state. *Id*. However, despite the Legislature's clear directive and obvious intent that a claimant must bring his or her claim within one year of a formal denial, the majority's contrary decision amends the statute, eviscerates the Legislature's intent, and fails to honor preexisting law.

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[7] Ironically, even under the majority's interpretation of MCL 500.2833(1)(q), plaintiffs' claim would still be barred. For example, the limitations period began to run on June 26, 2003, when defendant formally denied the claim, as the majority concedes. Even assuming that the October 10, 2003, meeting resulted in a further tolling of the one-year time limitation, 106 days had already passed during which the period was not tolled. If the period again began to run on October 14, 2003, there only remained 259 days in which to file suit. Thus, even under the majority's reasoning, plaintiffs would still have had to file by June 25, 2004—259 days from October 14, 2003, in order to be timely. Plaintiffs, however, ultimately filed suit in October 2004.

V. THE MAJORITY IMPLICITLY APPLIES EQUITABLE ESTOPPEL

Finally, although it is unclear from the majority's analysis, it appears that it may also be invoking the doctrine of equitable estoppel to justify its desire to toll the limitations period. By doing so, the majority is simply interpreting plaintiffs' actions after the June 26, 2003, denial letter in a way that alleviates the *effect* of the formal denial of liability. "[E]quitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption. It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar." *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). "Equitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position." *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998). It requires proof of "conduct clearly designed to induce 'the plaintiff to refrain from bringing action within the period fixed by statute.' " *Lothian v Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982), quoting *Renackowsky v Detroit Bd of Water Comm'rs*, 122 Mich 613, 616; 81 NW 581 (1900). To invoke the doctrine, the plaintiff must establish three elements: "(1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party." *Cincinnati Ins Co*, 454 Mich at 270. Thus, in the context of insurance claims, the plaintiff must show that the defendant concealed a

cause of action, misrepresented the time in which an action must be brought, or induced the plaintiff to refrain from bringing an action. *Compton v Mich Millers Mut Ins Co*, 150 Mich App 454, 458; 389 NW2d 111 (1986). None of these necessary elements are present here and, thus, the doctrine of estoppel is inapplicable.

VI. CONCLUSION

To conclude, there is and was no question of material fact that defendant formally denied plaintiffs' claim on June 26, 2003. There is and was no question that defendant did not intend to pay on plaintiffs' claim. Under the plain and unambiguous language of MCL 500.2833(1)(q), an insured must bring his or her claim within one year after the insurer formally denies liability. The trial court erred by denying defendant's motion for summary disposition when there was no dispute on the record that plaintiffs' claim had been formally denied in June 2003 and plaintiffs had not filed their complaint until well after June 2004. The majority's decision compounds this error by reinvigorating the doctrine of judicial tolling that our Supreme Court has explicitly rejected and that will now only serve to invite uncertainty for future litigants.

For these reasons, I dissent and would reverse the judgment of the trial court.

VANDERPOOL v PINEVIEW ESTATES LC

Docket No. 289359. Submitted May 5, 2010, at Detroit. Decided June 29, 2010, at 9:10 a.m.

Karen Vanderpool obtained a judgment against Martin Krause. On July 14, 2007, she served Pineview Estates, L.C., and MKT Leasing & Financing, L.L.C., with a wage garnishment petition seeking payment of the judgment debt. On August 3, 2007, Krause filed for bankruptcy in federal court. Pineview Estates and MKT Leasing failed to respond to the writ of garnishment within the 14-day period provided by MCR 3.101(H). Vanderpool filed a motion to show cause in the 67th District Court why Pineview Estates and MKT Leasing had failed to respond and why they should not be held responsible for Krause's entire judgment debt. When Pineview Estates and MKT Leasing failed to appear at the show cause hearing, the district court, David J. Goggins, J., granted judgment in favor of Vanderpool for the entire amount of Krause's judgment debt. Pineview Estates and MKT Leasing moved to set aside the judgment, arguing that Vanderpool's actions violated an automatic stay issued by the bankruptcy court. The district court agreed, declared its earlier judgment void, and set aside the writ of garnishment against Pineview Estates and MKT Leasing that had been issued on the basis of that judgment. Vanderpool appealed in the Genesee Circuit Court. The circuit court, Judith A. Fullerton, J., set aside the district court's order that had set aside the judgment against Pineview Estates and MKT Leasing, citing their failure to disclose under the 14-day rule in MCR 3.101(H) and their failure to appear at the show cause hearing. Pineview Estates and MKT Leasing appealed by leave granted.

The Court of Appeals *held*:

1. The notice requirements of MCR 2.603 related to default judgments were inapplicable because there was no entry of a default and the judgment against Pineview Estates and MKT Leasing was not styled as a default judgment.

2. By reinstating the district court's original judgment, the circuit court implicitly found that Pineview Estates and MKT Leasing were in criminal contempt. Under MCR 3.101, a contempt

judgment against a garnishee is inextricably linked to enforcement of the prior judgment against the debtor in light of the fact that satisfaction of the judgment against the garnishee constitutes satisfaction of the judgment against the debtor under MCR 3.101(O)(7). Vanderpool's actions to obtain a judgment against Pineview Estates and MKT Leasing after Krause's bankruptcy petition was filed were aimed at collecting on Krause's prepetition debt. Thus, satisfaction of the contempt judgment would have violated the automatic stay issued by the bankruptcy court. While Pineview Estates and MKT Leasing may have been properly found in contempt of court, the district court erred by entering a judgment against them in favor of Vanderpool for the amount of Krause's debt. The circuit court erred by later reinstating that judgment.

Circuit court order vacated and case remanded to the district court.

GARNISHMENT — WRITS OF GARNISHMENT — FAILURE TO RESPOND — CRIMINAL CONTEMPT — BANKRUPTCY — EFFECT OF BANKRUPTCY PETITION BY A DEBTOR.

A criminal contempt judgment against a garnishee is inextricably linked to enforcement of the prior judgment against the debtor; after the debtor has filed a bankruptcy petition, a court may not enter a contempt judgment against a garnishee in favor of the creditor for the amount of the debtor's judgment debt because doing so would violate the automatic stay issued by the bankruptcy court (11 USC 362; MCR 3.101).

Charles A. Grossmann for Karen Vanderpool.

Charles A. Forrest, Jr., for Pineview Estates, L.C., and MKT Leasing & Financing, L.L.C.

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

PER CURIAM. Garnishee defendants, Pineview Estates, L.C., and MKT Leasing and Financing, L.L.C., appeal by leave granted the Genesee Circuit Court's order reversing a district court order that had set aside a judgment against garnishee defendants and directing reinstatement of the judgment against garnishee defen-

dants. We vacate the circuit court's order and remand this case to the district court for further proceedings.

Garnishee defendants first argue that the district court should not have entered a default judgment against them because plaintiff did not comply with the procedural requirements pertaining to defaults and default judgments. Garnishee defendants' assertion in this regard is inapposite because there was no default judgment in this case. Plaintiff originally served garnishee defendants with a wage garnishment petition on July 14, 2007, for payment of a judgment debt owed by defendant, Martin Krause. After garnishee defendants failed to respond to that writ of garnishment within the 14-day period set by MCR 3.101(H),[1] plaintiff filed a motion to show cause why garnishee defendants had failed to respond and why garnishee defendants should not be responsible for defendant's entire judgment debt. When garnishee defendants failed to appear at the

[1] MCR 3.101(H) provides, in relevant part:

> The garnishee shall mail or deliver to the court, the plaintiff, and the defendant, a verified disclosure within 14 days after being served with the writ.
>
> * * *
>
> (2) Periodic Garnishments.
>
> (a) If not obligated to make periodic payments to the defendant, the disclosure shall so indicate, and the garnishment shall be considered to have expired.
>
> (b) If obligated to make periodic payments to the defendant, the disclosure shall indicate the nature and frequency of the garnishee's obligation. The information must be disclosed even if money is not owing at the time of the service of the writ.
>
> (c) If a writ or order with a higher priority is in effect, in the disclosure the garnishee shall specify the court that issued the writ or order, the file number of the case in which it was issued, the date it was issued, and the date it was served.

hearing on the motion to show cause on March 18, 2008, the district court granted judgment in favor of plaintiff for the amount of defendant's judgment debt, $10,997.05.

MCR 2.603(A)(2) requires notice of the entry of a default to the defaulted party. It is undisputed that there was no entry of a default in this case and, accordingly, no notice of such an entry. Further, MCR 2.603(B)(1)(a)(ii) requires that notice of a request for entry of a default judgment be given at least seven days before entry of the default judgment if the relief sought differs in kind or amount from that stated in the pleadings. Plaintiff sought periodic garnishment payments in her writ of garnishment, but sought a lump-sum judgment from garnishee defendants in her motion to show cause. However, the judgment against garnishee defendants was entered on the same day as the hearing on the motion to show cause. The requirements of MCR 2.603 were not followed because they did not apply, and the judgment against garnishee defendants was not styled as a default judgment. Because there was no default judgment, garnishee defendants' first claim of error fails.

Garnishee defendants next argue that the circuit court erred by reinstating the judgment after the district court set it aside because, as the district court had concluded in setting aside that judgment, defendant's bankruptcy filing automatically stayed all efforts to collect his debts, including garnishment payments. We agree. We review for an abuse of discretion a court's issuance of a contempt order. *Porter v Porter*, 285 Mich App 450, 454; 776 NW2d 377 (2009). To the extent that garnishee defendants' argument involves the construction, interpretation, and application of the court rules, we review those issues de novo as questions of law. *ISB*

Sales Co v Dave's Cakes, 258 Mich App 520, 526; 672 NW2d 181 (2003); *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

Defendant filed for bankruptcy on August 3, 2007. That filing resulted in an automatic stay preventing the enforcement, against defendant or against property of his estate, of a prior judgment. 11 USC 362. Nevertheless, the district court's March 18, 2008, judgment against garnishee defendants followed. The judgment was entered on several grounds, including (1) that garnishee defendants violated a court order by "not paying to plaintiff" the sum of $10,997.05 pursuant to an earlier garnishee disclosure from January 2007 and (2) that garnishee defendants were served with a request for periodic garnishments and a garnishee disclosure to which garnishee defendants "failed, neglected, or otherwise refused to respond." Even though the district court later vacated this judgment against garnishee defendants, rejecting the first ground for the judgment because garnishee defendants were powerless to make garnishment payments following the stay, the circuit court reinstated the judgment on appeal because garnishee defendants "did not disclose" under the 14-day rule in MCR 3.101(H) and "ignored the show cause issued."

By reinstating the judgment, the circuit court implicitly found that garnishee defendants were in criminal contempt. "[W]hen a court exercises its criminal contempt power it is not attempting to force the contemnor to comply with an order, but is simply punishing the contemnor for past misconduct that was an affront to the court's dignity." *Porter*, 285 Mich App at 455. Some courts have concluded that a default judgment or contempt finding against a garnishee defendant does not relate to the defendant or the property of the defen-

dant's estate, but instead creates an independent and personal liability against the garnishee defendant, so the default judgment or contempt finding does not violate the automatic stay under 11 USC 362. *In re Sowers*, 164 BR 256 (ED Va, 1994); *In re Gray*, 97 BR 930, 935-937 (ND Ill, 1989).[2]

However, under MCR 3.101, a judgment against a garnishee for contempt is inextricably linked to enforcement of the prior judgment against the defendant or his or her estate. Under MCR 3.101(S)(2), "[i]f the garnishee fails to comply with the court order, the garnishee may be adjudged in contempt of court." MCR 3.101(O)(7) provides, "Satisfaction of all or part of the judgment against the garnishee constitutes satisfaction of a judgment to the same extent against the defendant." Reading these subrules together, if garnishee defendants had satisfied the $10,997.05 contempt judgment, the same amount of defendant's outstanding judgment debt would have been satisfied, thereby violating the automatic stay under 11 USC 362.

We find persuasive and adopt the bankruptcy court's analysis of MCR 3.101 in *In re Feldman,* 303 BR 137 (ED Mich, 2003). In that case, the creditor obtained a default judgment against the debtor. *Id.* at 138. The creditor subsequently served a writ of garnishment on the debtor's employer, who responded that the debtor "worked for tips only so there was no way to garnish his wages." *Id.* In response, the creditor filed a motion to review the employer's business records. *Id.* Thereafter, the debtor filed for bankruptcy in federal court. *Id.* Meanwhile, the employer failed to appear at the state court hearing to review its business records, and a

[2] Lower federal court decisions are not binding on state courts, but may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

judgment was entered against the employer "for its failure to comply with Michigan's garnishment laws and procedures." *Id.* The bankruptcy court concluded that the creditor's postpetition actions to obtain a judgment against the employer violated the stay because the actions were aimed at collecting on the debtor's prepetition debt. *Id.* at 139-140. The court reasoned that "there would be no garnishment judgment against the employer absent the underlying debt." *Id.* at 139. The court further reasoned that satisfaction of all or part of the judgment against the employer would satisfy the same amount of the prepetition judgment against the defendant, and the defendant would then owe the employer on the claim under MCR 3.101(O)(2). *Id.* at 140; see also MCR 3.101(O)(7).

In light of our conclusions, though the district court may have properly found garnishee defendants to be in contempt of court, the district court erred by entering a judgment in favor of plaintiff for the amount of defendant's judgment debt. Therefore, we vacate the circuit court's order reinstating the judgment against garnishee defendants and we remand this case to the district court for further proceedings. We decline to address garnishee defendants' last argument challenging the amount of the contempt judgment. We do not retain jurisdiction.

Garnishee defendants, being the prevailing parties, may tax costs pursuant to MCL 7.219.

PEOPLE v WIGGINS

Docket No. 290017. Submitted May 12, 2010, at Lansing. Decided May 20, 2010. Approved for publication July 6, 2010, at 9:00 a.m.

Dale J. Wiggins pleaded no contest in the Gratiot Circuit Court to a charge of attempting to arrange for child sexually abusive activity. At sentencing, Wiggins asserted that the court should only assess 10 points for offense variable (OV) 12 (contemporaneous felonious criminal acts), MCL 777.42, when calculating the recommended minimum sentence range under the sentencing guidelines because only one of the three additional charges initially brought against him was classified in the guidelines as a crime against a person. The court, Michelle M. Rick, J., examining the substance of the charges, disagreed. Reasoning that all three of the additional charges involved other persons, the court assessed 25 points for OV 12. Defendant filed a delayed application for leave to appeal. The Court of Appeals denied the application. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted of whether OV 12 was properly scored. 485 Mich 875 (2009).

The Court of Appeals *held*:

The sentencing court erred by considering the substance of the crimes charged rather than the offense category definitions set forth in the guidelines to determine whether the additional charges initially brought against defendant involved crimes against a person. "Crimes against a person" is a technical term as used in the guidelines. Under MCL 777.5 and MCL 777.6, only crimes with the offense category designated as "person" under MCL 777.11 to MCL 777.18 can be considered crimes against a person for purposes of scoring OV 12 and OV 13 (continuing pattern of criminal behavior), MCL 777.43. Accordingly, only 10 points should have been assessed for OV 12. Defendant is entitled to resentencing because the scoring error altered the appropriate guidelines range and defendant's minimum sentence was outside that range.

Sentence vacated and case remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES 12 AND 13 — OFFENSE CATEGORY DESIGNATIONS — CRIMES AGAINST A PERSON.

"Crimes against a person" is a technical term as used in the sentencing guidelines; only crimes with the offense category designated as "person" in the sentencing guidelines can be considered crimes against a person for purposes of scoring offense variable 12 (contemporaneous felonious criminal acts) and offense variable 13 (continuing pattern of criminal behavior) (MCL 777.5; MCL 777.6; MCL 777.42; MCL 777.43).

Ronald D. Ambrose and *Michael A. Faraone P.C.* (by *Michael A. Faraone*) for defendant.

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

PER CURIAM. This case has been remanded for consideration as on leave granted.[1] Defendant challenges the sentence imposed for his conviction of attempting to arrange for child sexually abusive activity, MCL 750.145c(2), based on a plea of no contest. We vacate defendant's sentence and remand for resentencing. This appeal has been decided without oral argument. MCR 7.214(E).

During sentencing, defendant argued that only 10 points should be assessed for offense variable (OV) 12 (contemporaneous felonious criminal acts) rather than 25 points. MCL 777.42. Defendant argued that OV 12 had been misscored because only one of the other three initial charges against him, specifically an additional charge of attempting to arrange for child sexually abusive activity, is designated as a crime against a person in the sentencing guidelines, while the other charges of disseminating sexually explicit matter to a minor are designated as crimes against public order. The trial court disagreed, finding that all three of the

[1] *People v Wiggins*, 485 Mich 875 (2009).

additional charges were crimes involving other persons, namely the minor children involved. Defendant now challenges that decision.

When calculating the appropriate guidelines minimum sentence range, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence." *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991); see also *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). We review sentencing guidelines scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Any statutory interpretation concerning the application of the sentencing guidelines presents a question of law subject to review de novo on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

The primary goal of statutory interpretation is to ascertain and effectuate the intent of the Legislature. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). When construing a statute, we first examine the language of the statute. *Id*. Where the language of the statute is clear and unambiguous, further construction is unnecessary and unwarranted and the statute will be applied as written. *Id.* If the statute defines a term, that definition controls. *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001). In addition, provisions must be read in the context of the entire statute so as to produce a harmonious whole, *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008), and identical language in various provisions of the same act should be

construed identically, *People ex rel Simmons v Munising Twp*, 213 Mich 629, 633; 182 NW 118 (1921).

To calculate the appropriate guidelines range, a court must determine the offense category and which offense variables apply, score the offense variables, total the points to determine the offender's offense variable level, and then assess points for the prior record variables to determine the offender's prior record variable level. MCL 777.21(1)(a) and (b); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). The court must then use the resultant offense variable level and prior record variable level with the applicable sentencing grid to determine the recommended minimum sentence range. MCL 777.21(1)(c); *Morson*, 471 Mich at 255.

MCL 777.5 provides:

> The offense categories are designated in [MCL 777.11 *et seq*.] as follows:
>
> (a) Crimes against a person are designated "person".
>
> (b) Crimes against property are designated "property".
>
> (c) Crimes involving a controlled substance are designated "CS".
>
> (d) Crimes against public order are designated "pub ord".
>
> (e) Crimes against public trust are designated "pub trst".
>
> (f) Crimes against public safety are designated "pub saf".

MCL 777.6 provides, "The offense descriptions in [MCL 777.11 *et seq*.] are for assistance only *and the statutes listed govern application of the sentencing guidelines*." (Emphasis added.)[2] MCL 777.42(1) provides in pertinent part:

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[2] The "offense descriptions" are contained in a column separate from the offense category designations in MCL 777.11 through MCL 777.18.

> Offense variable 12 is contemporaneous felonious criminal acts. Score offense variable 12 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) Three or more contemporaneous felonious criminal acts involving crimes against a person were committed ..... 25 points
>
> * * *
>
> (c) Three or more contemporaneous felonious criminal acts involving other crimes were committed ..... 10 points

Pursuant to MCL 777.15g, two of the crimes used to score OV 12 in this case, those involving disseminating sexually explicit matter to a minor, MCL 722.675, are specifically designated as "[c]rimes against public order." MCL 777.5(d). Under the plain statutory language, the trial court should not have used those crimes as concurrent offenses involving "[c]rimes against a person" when scoring OV 12. The trial court erred when it found that it was free to look at the substance of the crime rather than the offense category designations under the guidelines themselves because the Legislature used the term "involving crimes against a person" instead of the phrase "categorized as crimes against a person" in MCL 777.42. The trial court essentially read MCL 777.42 as requiring the assessment of 25 points for three contemporaneous "criminal acts involving a person" or "criminal acts against a person" and not, as the statute states, "criminal acts involving crimes against a person." "Crimes against a person" is a technical term, at least as used in the guidelines, and MCL 777.5 is essentially a definitional section. In addition, under MCL 777.6, the statutes listed in MCL 777.11 to MCL 777.18 govern the application of the sentencing guidelines, including MCL

777.42. Given that identical language in various provisions of the same act must be construed identically, *Simmons*, 213 Mich at 633, we conclude that only crimes with the offense category designated as "person" under MCL 777.11 to MCL 777.18 can be considered "crimes against a person" for purposes of scoring OV 12[3] pursuant to MCL 777.5 and MCL 777.6. In light of the relevant statutory language, the trial court erred when it assessed 25 points for OV 12. Only 10 points should have been assessed for OV 12, using defendant's three other "crimes."

The trial court's calculations placed defendant in the C-V cell on the sentencing grid for his class B offense, with a corresponding minimum sentence range of 51 to 85 months. With only 10 points assessed for OV 12, defendant's total OV score of 40 points places him in the C-IV cell on the sentencing grid, with a recommended minimum sentence range of 45 to 75 months. MCL 777.63. Accordingly, defendant must be resentenced because the scoring error altered the appropriate guidelines range, and defendant's minimum sentence of 85 months in prison lies outside that range. See *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

We vacate defendant's sentence and remanded for resentencing. We do not retain jurisdiction.

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[3] We note that the same reasoning applies to scoring OV 13 (continuing pattern of criminal behavior), MCL 777.43, although that offense variable is not at issue in this case.

PACKOWSKI v UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951

Docket No. 282419. Submitted June 1, 2009, at Grand Rapids. Decided July 8, 2010, at 9:00 a.m.

Mark Packowski brought an action in the Kent Circuit Court against United Food and Commercial Workers Local 951, where he had worked as a business agent and organizer, claiming that he was wrongfully terminated in violation of Michigan public policy and the union's policy requiring just cause for discharging employees. The court, Paul J. Sullivan, J., granted summary disposition under MCR 2.116(C)(10) in favor of the union on Packowski's claim that he was wrongfully discharged in violation of public policy. In a subsequent opinion and order, the court granted summary disposition under MCR 2.116(C)(4) in favor of the union on Packowski's claim that he was wrongfully discharged in violation of the union's just-cause policy, concluding that it lacked subject-matter jurisdiction because the claim was preempted by the Labor-Management Reporting and Disclosure Act (LMRDA), 29 USC 401 *et seq*. Packowski moved for reconsideration, which the court denied. Packowski appealed.

The Court of Appeals *held*:

There are three types of federal preemption: express preemption, conflict preemption, and field preemption. In this case, conflict preemption precluded Packowski's claim that he was discharged in violation of the union's just-cause policy. Under the doctrine of conflict preemption, federal law preempts state law to the extent that the state law conflicts with federal law or the purposes and objectives of Congress. One of the purposes of the LMRDA is to ensure union democracy. Wrongful-discharge claims brought by discharged union employees who were in policymaking or policy-implementing positions would undermine the LMRDA's purpose and goal of protecting democratic processes in union leadership because such claims would infringe on the elected-union leadership's ability to implement the policies on which they were elected. The circuit court correctly granted summary disposition in favor of the union under MCR 2.116(C)(4).

Affirmed.

BECKERING, P.J., dissenting, would have held that Packowski's wrongful-discharge claim was not preempted by the LMRDA and would vacate the circuit court's orders granting summary disposition in favor of the union on that basis and denying Packowski's motion for reconsideration. Enforcing a union's just-cause policy does not conflict with the LMRDA's objective of ensuring union democracy because it was the choice of the elected-union leadership to offer a just-cause employment contract. The majority's contrary holding will permit unions to offer employment contracts with just-cause provisions that the employees have no ability to enforce in state court, rendering such provisions virtually meaningless.

ACTIONS — EMPLOYMENT LAW — WRONGFUL DISCHARGE — JUST-CAUSE REQUIREMENT FOR DISCHARGE FROM EMPLOYMENT — FEDERAL PREEMPTION — CONFLICT PREEMPTION — LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT.

Under the doctrine of conflict preemption, federal law preempts state law to the extent that the state law conflicts with the purposes and objectives of Congress; the Labor-Management Reporting and Disclosure Act (LMRDA) preempts state-law wrongful-discharge claims brought by discharged union employees who were in policymaking or policy-implementing positions because those claims would undermine the LMRDA's purpose of ensuring union democracy by infringing on the elected-union leadership's ability to implement the policies on which they were elected (29 USC 401 *et seq.*).

Farr Oosterhouse & Krissoff (by *Joel E. Krissoff*) for plaintiff.

The Karmel Law Firm (by *Jonathan D. Karmel*) and *Keller, Vincent & Almassian, PLC* (by *Michael D. Almassian*), for defendant.

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

WILDER, J. Plaintiff, Mark Packowski, appeals by right the circuit court's order granting summary disposition for defendant, United Food and Commercial Workers Local 951, under MCR 2.116(C)(4), and an order denying plaintiff's motion for reconsideration. Because we

agree with the circuit court that federal preemption applies to plaintiff's remaining claim, we affirm.

I

Defendant employed plaintiff as a business agent and, later, as an organizer. In his complaint, plaintiff alleged that he was demoted from business agent to organizer in 1999 after he assisted in a federal Department of Labor investigation of defendant's election activities. Plaintiff further alleged that he was treated differently and excluded from staff events, such as training, because he refused to contribute to defendant's legal defense fund. Plaintiff alleged that, for these reasons, defendant subsequently terminated him against public policy. In an amended complaint, plaintiff also alleged that his termination violated defendant's just-cause policy, which prohibited defendant from discharging employees except for just cause. The sole issue before us on appeal is plaintiff's claim that he was terminated without just cause.

Plaintiff's complaint alleged that he had worked for defendant since 1995. According to the complaint, plaintiff took a medical leave from work from September 10, 2001, to September 14, 2001. Plaintiff alleged that he had returned to work for a half-day on September 14, but then a flareup of his health condition forced him to leave work.

Defendant asserted below that it discharged plaintiff on September 27, 2001, for being absent from work without authorization. Defendant also asserted that it terminated plaintiff for falsifying records, including his daily itinerary and mileage records for September 14, 2001. Defendant admitted that it had an employment policy that employees, including plaintiff, could only be

terminated for just cause, but defendant denied that its termination of plaintiff violated that policy.

Defendant also had employment policies and standards that governed automobile use and business mileage reporting. The policies prohibited reimbursement for personal miles and required a monthly report specifying business and personal miles. The policies required accurate recordkeeping to ensure that defendant complied with the law. Departmental staff who had organizing duties, such as plaintiff, were also required to contact defendant by 9:00 a.m. every day to report their itineraries to a supervisor and to promptly contact a supervisor if any changes in itinerary occurred.

Defendant argued below that on or about September 9, 2001, plaintiff informed defendant by a voicemail message of a flareup in his health condition, but he did not communicate with defendant again regarding his condition or his resulting inability to work until September 14, 2001, when he faxed a note from his doctor indicating that he would be absent from September 10 to September 14. Defendant asserted that plaintiff reported that he was going to work the second shift at the Wal-Mart store in St. John's, Michigan, on September 14. Defendant later determined that plaintiff had not worked the full shift, because he left to referee a football game, and that plaintiff had failed to report a change in his itinerary. Defendant also asserted that plaintiff claimed that he had intended to stop at the Wal-Mart stores in Alma and Mt. Pleasant, Michigan, after the game, but had not informed defendant of this change in his itinerary, and, regardless, defendant contended that plaintiff went home after the game rather than to work as he had stated he would. Defendant further maintained that plaintiff falsified his mileage report for September 14, 2001, by overstating his business miles.

II

After plaintiff filed this action, defendant filed several motions for summary disposition. This appeal involves defendant's summary disposition motion regarding plaintiff's cause of action for wrongful termination in violation of defendant's just-cause policy. Defendant contended below that this claim was preempted by the Labor-Management Reporting and Disclosure Act (LMRDA), 29 USC 401 *et seq*. Defendant argued that, under *Finnegan v Leu*, 456 US 431; 102 S Ct 1867; 72 L Ed 2d 239 (1982), the primary purpose of the LMRDA is to ensure union democracy. Thus, a union president, elected by the rank-and-file members, may terminate policymaking and policy-implementing employees without violating the LMRDA because the LMRDA does not restrict an elected union official's freedom to choose staff whose views reflect his or her own (which would be the views on the basis of which he or she was elected). Further, defendant argued that courts from other jurisdictions, relying on *Finnegan*, have held that the LMRDA preempts state-law wrongful-discharge claims by policymaking and policy-implementing employees, because such claims would interfere with the elected union leader's ability to implement the policy upon which the union members elected the leader.

Defendant also argued that plaintiff claimed that he was terminated because he cooperated with the Department of Labor's investigation of defendant's election activities and that this claim directly implicated the LMRDA's regulatory scheme because 29 USC 521(a)[1]

[1] 29 USC 521(a) provides:

> The Secretary [of Labor] shall have power when he believes it necessary in order to determine whether any person has violated

authorizes such an investigation and 29 USC 412[2] provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor. Thus, defendant argued, plaintiff's exclusive remedy was to file a retaliation claim under the LMRDA in federal court, and his state-law claim interfered with and was preempted by federal law. In response, plaintiff argued that his claim was not preempted by the LMRDA, that the LMRDA did not prohibit defendant from adopting a policy barring termination without just cause, and that he was not a management-level employee to which the LMRDA and caselaw interpreting the LMRDA would apply.

The circuit court granted defendant's motion. The circuit court concluded that plaintiff was a policy-implementing employee of defendant and that, as such, his state-law wrongful-termination claim, to the extent that it relied on defendant's just-cause policy, was preempted by the LMRDA because it would interfere with the union president's authority to choose his own

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or is about to violate any provision of this chapter (except subchapter II of this chapter) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this chapter and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

[2] 29 USC 412 provides:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

staff and would thereby jeopardize union democracy. The circuit court denied plaintiff's subsequent request for reconsideration, determining that plaintiff had merely reiterated the same arguments addressed in the summary disposition motion and clarifying that summary disposition of plaintiff's claim had been granted under the substantive-preemption doctrine, not the jurisdictional-preemption doctrine.

III

Plaintiff argues on appeal that the circuit court erred by granting defendant's motion for summary disposition and by holding that his claim of wrongful discharge in violation of defendant's just-cause policy was preempted by the LMRDA. We disagree.

A

We review de novo a circuit court's summary disposition decision. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Issues of law, such as federal preemption of state law, are reviewed de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). Whether a court has subject-matter jurisdiction is also an issue of law, reviewed de novo. *Fisher v Belcher*, 269 Mich App 247, 252-253; 713 NW2d 6 (2005). We review the circuit court's denial of plaintiff's motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Defendant moved for summary disposition under MCR 2.116(C)(4), (8), and (10). The circuit court decided the motion under subrule (C)(4). Summary disposition is appropriate when the trial court "lacks jurisdiction of the subject matter." MCR 2.116(C)(4). For

jurisdictional questions under MCR 2.116(C)(4), this Court " 'determine[s] whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction.' " *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007) (citations omitted).

B

The Supremacy Clause of the United States Constitution gives Congress the authority to preempt state laws. *Ambassador Bridge*, 481 Mich at 35-36. The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*. [US Const, art VI, cl 2 (emphasis added).]

Under the Supremacy Clause, then, this Court is bound by federal statutes, despite any state law to the contrary. In other words, this Court is bound to find preemption when it exists because federal law is the supreme law of the land. See *Ambassador Bridge*, 481 Mich at 36.

Whether a federal statute preempts a state-law claim is a question of federal law. *Allis-Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). When such questions of federal law are involved, we are bound to follow the prevailing opinions of the United States Supreme Court. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994). If a state-law proceeding is preempted by federal law, the

state court lacks subject-matter jurisdiction to hear the state-law cause of action. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), overruled in part on other grounds by *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002).

"Preemption occurs when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ambassador Bridge*, 481 Mich at 36 (quotation marks and citation omitted). Preemption can also occur when a state or local regulation prevents a private entity from performing a function that Congress has tasked it with performing. *Id.*

There are three types of federal preemption: express preemption, conflict preemption, and field preemption. *X v Peterson*, 240 Mich App 287, 289; 611 NW2d 566 (2000). Express preemption occurs when a federal statute clearly states an intent to preempt state law or that intent is implied in a federal law's purpose and structure. *Ryan*, 454 Mich at 28. Under conflict preemption, a federal law preempts state law to the extent that the state law directly conflicts with federal law or with the purposes and objectives of Congress. *Id.*, citing *Cipollone v Liggett Group, Inc*, 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992). Field preemption acts to preempt state law when federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it. *Ryan*, 454 Mich at 28.

A few of our sister states have considered analogous situations, and analogous state-law claims, and have found that the LMRDA conflict-preempted those claims. While we are not bound by those decisions, we may follow them if we find them persuasive. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008).

One closely analogous case is *Screen Extras Guild, Inc v Superior Court*, 51 Cal 3d 1017, 1024-1032; 275 Cal Rptr 395; 800 P2d 873 (1990), in which it was held that California common law, which implied a covenant of good faith and fair dealing in some employment relationships, conflicted with the LMRDA and was preempted. The plaintiff in *Screen Extras* was employed by the union as a business agent and was discharged for alleged dishonesty and insubordination. The plaintiff sued for wrongful discharge, among other claims, and alleged that the union breached a state-law covenant of good faith and fair dealing. *Id.* at 1027. Analyzing whether the plaintiff's state-law cause of action conflicted with the LMRDA's policy, the court relied on *Finnegan* in holding that in order to ensure union democracy, "Congress must have intended that elected union officials would retain *unrestricted freedom to select business agents, or, conversely, to discharge business agents* with whom they felt unable to work or who were not in accord with their policies." *Id.* at 1025 (emphasis added).

The plaintiff in *Screen Extras* argued that her claims for wrongful discharge in breach of contract, negligent and intentional infliction of emotional distress, and defamation were not preempted because she was terminated as a result of her alleged incompetence and dishonesty, not because of a policy disagreement with the union's elected officials. *Id.* at 1027. The court found this distinction between a termination for policy reasons and a "garden-variety" termination not implicating policy unpersuasive because it was unworkable in the real world and involved highly subjective determinations. *Id.* at 1027-1028. "If a business agent, for example, were discharged for failing to efficiently adopt a new set of procedures for prioritizing routine tasks which had been endorsed by elected officials, should

that be characterized as a termination to facilitate policy, or as a 'garden-variety' termination for inefficiency?" *Id*. at 1028. The court in *Screen Extras* noted that it would be impossible to develop an objective test to distinguish the two, and "every wrongful discharge claim brought against a union by a business agent will be cast in 'garden-variety' terms if that is all it takes to survive preemption." *Id*. Relying on *Finnegan,* the court held that the plaintiff's claim was preempted because it conflicted with the LMRDA:

> To allow a state claim for wrongful discharge to proceed from the termination of a union business agent by elected union officials would interfere with the ability of such officials to implement the will of the union members they represent. This would frustrate full realization of the goal of union democracy embodied by the LMRDA, in contravention of the supremacy clause. Consequently, the LMRDA and the supremacy clause preempt wrongful discharge claims brought against labor unions or their officials by former policymaking or confidential employees. [*Id.* at 1031 (citations omitted).]

See also *Tyra v Kearney*, 153 Cal App 3d 921, 925-927; 200 Cal Rptr 716 (1984) (relying on *Finnegan,* 456 US at 441, to hold that the plaintiff's claim for wrongful discharge, following termination from her *position as a business agent* for a union after she had run against the winning candidate, was preempted by the LMRDA's purpose of ensuring democratically governed unions and union officials' concomitant authority to select business agents).

Also analogous is *Vitullo v Int'l Brotherhood of Electrical Workers, Local 206*, 317 Mont 142; 75 P3d 1250 (2003), in which the plaintiff was a former assistant business manager for a union local. The business manager fired the plaintiff after the plaintiff had accepted a nomination to run against the business manager in the

next union election. *Id*. at 144. The plaintiff brought a claim under Montana's Wrongful Discharge From Employment Act, which created a just-cause-for-termination requirement and a probationary period. See Mont Code 39-2-901 *et seq*. The court held that the statutory claim conflicted with the LMRDA and *Finnegan* and was therefore conflict-preempted. *Vitullo*, 317 Mont 145-152. See also *Smith v Int'l Brotherhood of Electrical Workers, Local Union 11*, 109 Cal App 4th 1637, 1648; 1 Cal Rptr 3d 374 (2003) (holding that the plaintiff, a union organizer employee who was discharged and brought a breach of contract claim against the union, was a policymaking employee and that his breach-of-contract claim was preempted by the LMRDA).

In another case finding preemption, *Dzwonar v McDevitt*, 348 NJ Super 164, 167; 791 A2d 1020 (2002), the plaintiff was discharged from her position as a union arbitration officer for inappropriate behavior at an arbitration proceeding and for involvement in disputes with other union members. The plaintiff brought an action under New Jersey's Conscientious Employee Protection Act, arguing that she was fired in retaliation for objecting to a union official's acts that allegedly violated the LMRDA. *Id*. at 167-169. Although the LMRDA contains no express provision limiting a state's right to protect union employees from retaliation in the plaintiff's circumstances, the court held that "such a limitation may be inferred from" the LMRDA's scope. *Id*. at 170. Although the court adopted a preemption exception for claims based on an employee's unwillingness to aid in the violation of a criminal statute, citing *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F2d 1356, 1360-1362 (CA 9, 1986) (discussed further later in this opinion), the court held that the plaintiff's claim was preempted because it

was not based on an allegation that the union official's acts were criminal. *Dzwonar*, 348 NJ Super at 173-174. "Rather, this case involves, at most, the federal regulatory scheme and the union's own internal operating policies." *Id*. at 173.

We conclude that the reasoning in *Screen Extras, Tyra*, *Vitullo*, *Smith*, and *Dzwonar* is persuasive. We adopt that reasoning and apply it to this case. Conflict preemption applies to preclude plaintiff's state-law action. The democratic purposes of the LMRDA would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge.

We decline to follow *Young v Int'l Brotherhood of Locomotive Engineers*, 114 Ohio App 3d 499; 683 NE2d 420 (1996), a case in which the court concluded that preemption was not applicable. The plaintiff in *Young* was fired from her position as a union employee for allegedly being insubordinate and uncooperative and making derogatory remarks about the union president. *Id*. at 503. Denying these allegations, the plaintiff brought a breach-of-contract action based on her alleged 10-year contract with the union. *Id.* at 502-503. The trial court granted summary judgment, and the Ohio Court of Appeals reversed and remanded for trial, which resulted in a judgment for the plaintiff and an appeal by the union. *Id.* at 502. In the second appeal, the court held that whether the plaintiff's claim was preempted by the LMRDA depended on whether the plaintiff was a policymaking employee, which was an issue of fact for the jury to resolve. *Id*. at 504-506.

Unlike the parties in *Young*, plaintiff and defendant do not dispute the circuit court's finding that plaintiff was a policy-implementing employee. Therefore, *Young* is distinguishable from the instant case. We also find *Young* unpersuasive in that it concludes that the ques-

tion of preemption is a jury question, despite the fact that whether state law conflicts with federal law is more properly characterized as a question of law. *Ambassador Bridge*, 481 Mich at 35.

Other cases finding no conflict preemption are also more easily distinguished from the instant case than those cases finding preemption. In *Bloom*, 783 F2d at 1359-1360, the plaintiff was a union business manager who sued the union for, among other claims, wrongful discharge after he was terminated, allegedly because *he refused to falsify the union's minutes to cover up an unapproved expenditure*. The plaintiff argued that his claim was not preempted because he was an at-will employee and because there was no federal statute directly covering his employment. *Id.* at 1360. The court held that the state had a strong interest in preventing criminal actions such as embezzlement and that the LMRDA supported the plaintiff's position because it expressly "saves both state criminal actions and state-imposed responsibilities of union officers" in 29 USC 523(a) and 29 USC 524. *Id.* at 1361. The court stated that there was an exception to preemption when "a union employee bases a wrongful discharge action on *allegations that he was fired for refusing to violate state law* . . . ." *Id*. at 1362 (emphasis added). The court further determined that, because the plaintiff alleged that he was fired for refusing to illegally alter minutes and not for political reasons, the federal interest in union democracy recognized in *Finnegan* was not implicated and the state cause of action would not interfere with that statutory purpose. *Id.* at 1362.

Similarly, in *Montoya v Local Union III of the Int'l Brotherhood of Electrical Workers*, 755 P2d 1221, 1223 (Colo App, 1988), the plaintiff claimed that he was discharged from his position as a union business man-

ager for uncovering illegal union practices and refusing to vote for the candidate that the business manager favored. Because the court concluded that the business manager could hire and fire his representatives and assistants at any time and discharge would not affect the plaintiff's union membership, the plaintiff's wrongful discharge claims generally conflicted with LMRDA and were preempted. *Id.* at 1223-1224. However, the court held that the doctrine of preemption did not bar the plaintiff's wrongful discharge claim "insofar as he allege[d] that he was discharged because he refused to aid [the business manager] in his alleged criminal misuse of union funds." *Id*. at 1224.

Whereas *Bloom* and *Montoya* involved discharges for the plaintiffs' alleged refusal to commit or aid in committing a crime, plaintiff here was terminated for failing to abide by legitimate policies, such as itinerary and mileage recording, designed to *comply* with the law.[3]

Finally, we consider the decision in *Ardingo v Local 951, United Food & Commercial Workers Union*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued May 29, 2009 (Docket No. 08-1078). In *Ardingo*, the Sixth Circuit held that the LMRDA did not preempt a wrongful-termination claim almost identical to the claim at issue in this case. For the reasons stated below, we do not follow *Ardingo*.[4]

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[3] We note that to the extent that plaintiff has a claim of being demoted or fired in retaliation for participating in a Department of Labor investigation, he has an action for that claim in federal court. 29 USC 412 provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor.

[4] Although *Ardingo* did address a question of federal law, i.e. federal preemption, we are not required to follow decisions of a United States court of appeals. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d

The plaintiff in *Ardingo* was a business agent for the same union that employed plaintiff in this case. The same policy requiring that employees be terminated only for just cause was in force. *Id*. at 2. After rumors circulated that Ardingo might mount a campaign against the union's president, the union president insinuated that Ardingo was a "pipeline to the Department of Labor." *Id*. Thereafter, Ardingo cooperated with a Department of Labor investigation concerning financial irregularities in the union and then testified before a grand jury concerning the same issues. *Id*. at 2-3. Ardingo was then reassigned in rapid succession to jobs in other states, ostensibly to assist with union organizing campaigns. *Id*. at 3. But the union was also experiencing substantial declines in revenue. *Id*. Later, Ardingo, who earned $100,000 a year and had less seniority than other similarly situated employees, was one of 10 employees who were discharged. *Id*. The union president testified that the discharge of Ardingo was for economic and other reasons. Ardingo argued that the economic reasons were not the real reason for his discharge, but a mere pretext, and that his discharge was retaliatory and in violation of the just-cause policy. *Id*. at 3-4.

The Sixth Circuit held that the LMRDA did not preempt Ardingo's state-law claim of discharge in violation of the just-cause policy. *Ardingo*, unpub op at 5-11. The court reasoned that "[t]he fact that the LMRDA does not provide a cause of action to union employees who have been fired for political reasons does not mean that state law could never restrict a union leader's discretion to terminate a union employee." *Id*. at 10, citing *Bloom*, 783 F2d at 1360-1362. The court

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325 (2004). In addition, *Ardingo* is unpublished, and was not recommended for full-text publication. *Ardingo*, unpub op at 1.

further reasoned that "[s]uch a question was not even before the *Finnegan* Court. Therefore, it would be wrong to say that *Finnegan* stands for the proposition that the LMRDA gives union officials unlimited discretion in employment matters." *Ardingo*, unpub op at 11.

We disagree with *Ardingo*'s reasoning and decline to follow it. While *Finnegan* did not absolutely decide the question whether this exact claim is preempted by the LMRDA, *Finnegan* was clear that at least one of the purposes of the LMRDA is to promote union democracy and ensure that the representatives whom union members have elected are able to carry out the policies on which they were elected. See *Finnegan*, 456 US at 442 ("[I]n enacting Title I of the Act, Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy . . . ."). Preemption applies when a state-law claim conflicts with the purposes of federal law. *Ambassador Bridge*, 481 Mich at 36. We believe that, in this case, plaintiff's claim would conflict with the efforts of elected union officials to implement the policies on which they were elected and, in that way, interfere with one of the purposes of the LMRDA.

IV

In sum, the cases finding preemption under similar circumstances are more numerous, more factually analogous, and more persuasive than the cases finding no preemption by the LMRDA of similar wrongful-discharge claims. The cases finding preemption of state common-law claims by the LMRDA illustrate that wrongful-discharge claims brought by discharged or demoted union employees who were in policymaking or

policy-implementing positions would undermine one of the purposes and goals of the LMRDA, namely, the purpose and goal of protecting democratic processes in union leadership. If union members cannot choose their leaders, or if the chosen leaders cannot implement the policies they were elected to implement, then the rights of union members (as represented by their elected leaders) would be thwarted, or at least diminished. Accordingly, the circuit court correctly held that the LMRDA preempts plaintiff's claim of wrongful discharge in violation of the union's just-cause policy and, because of federal preemption, the circuit court correctly held that it lacked subject-matter jurisdiction to hear that claim. *Ryan*, 454 Mich at 27.[5]

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

DAVIS, J., concurred.

BECKERING, P.J. (*dissenting*). Plaintiff claims that his employment was terminated in violation of defendant's just-cause policy. I write separately because I respectfully disagree with the majority's conclusion that plaintiff's wrongful-discharge claim is preempted by the Labor-Management Reporting and Disclosure Act (LMRDA), 29 USC 401 *et seq*. I would vacate the trial court's orders granting summary disposition to defendant and denying plaintiff's motion for reconsideration.

The trial court granted defendant summary disposition under MCR 2.116(C)(4), concluding that it lacked subject-matter jurisdiction. As indicated by the majority, this Court reviews de novo a trial court's decision on

[5] Because the circuit court correctly granted summary disposition, its denial of plaintiff's motion for reconsideration was not an abuse of discretion.

a motion for summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), and reviews for an abuse of discretion its decision on a motion for reconsideration, *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Whether a trial court has subject-matter jurisdiction is a question of law, which this Court reviews de novo. *Fisher v Belcher*, 269 Mich App 247, 252-253; 713 NW2d 6 (2005).

"Where the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), overruled in part on other grounds *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002). In the absence of express preemption, federal preemption may be implied in the form of conflict or field preemption. *Ryan*, 454 Mich at 28. The majority concludes here that plaintiff's wrongful-discharge claim under state law conflicts with the LMRDA and is, therefore, "conflict-preempted." "Conflict preemption acts to preempt state law to the extent that it is in direct conflict with federal law or with the purposes and objectives of Congress." *Id*.

In *Finnegan v Leu*, 456 US 431, 441; 102 S Ct 1867; 72 L Ed 2d 239 (1982), the United States Supreme Court stated that when the LMRDA was enacted, its "overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." The Court further stated that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id*. According to the majority in this case, allowing plaintiff's state claim for wrongful discharge to proceed would conflict with the LMRDA's purpose of

ensuring union democracy and elected union officials' authority to select staff members.

In *Ardingo v Local 951, United Food & Commercial Workers Union*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued May 29, 2009 (Docket No. 08-1078), p 7, however, the court concluded that "[t]here is no danger that [the LMRDA's] objective will be interfered with by a lawsuit that seeks to vindicate an employee's rights under a just-cause employment contract." Although this Court is not required to follow decisions of a United States court of appeals, *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), and *Ardingo* is unpublished, I find the *Ardingo* court's reasoning persuasive. See *id*. at 607. Like *Ardingo*, this case presents a unique set of facts in that plaintiff is suing to enforce his contractual rights under his just-cause employment contract with defendant. None of the out-of-state cases relied on by the majority involve a just-cause contract provision. As noted by the *Ardingo* court, "when a union chooses to offer a just-cause employment contract to an employee, there is nothing in *Finnegan* or the LMRDA that would prevent that contract from being enforced." *Ardingo*, unpub op at 10. *Finnegan* does not stand for the proposition "that state law could never restrict a union leader's discretion to terminate a union employee." *Id*., citing *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F2d 1356, 1360-1362 (CA 9, 1986) (holding that a wrongful-discharge claim was not preempted by the LMRDA when a business agent claimed to have been discharged for refusing to violate state law). While the majority is correct that the LMRDA was enacted to ensure that unions are democratically governed and that elected union officials have the ability to select staff members, and, in that way, respond "to the mandate of the union

election," *Finnegan*, 456 US at 441, democratically elected union officials may choose to offer an employee a just-cause employment contract, omit a just-cause provision from an employment contract, or tailor such a provision by, for example, defining the term "just cause" in the contract. Thus, enforcing a union's just-cause policy does not conflict with the LMRDA's objective of ensuring union democracy. To hold otherwise would permit unions to offer employment contracts with just-cause provisions that the employees have no ability to enforce, at least in state court, rendering the provisions virtually meaningless.[1]

I would hold that plaintiff's wrongful-discharge claim is not preempted by the LMRDA because his claim does not directly conflict with the act or with any of its purposes or objectives, see *Ryan*, 454 Mich at 28, and would vacate the trial court's orders granting summary disposition to defendant on the basis of preemption and denying plaintiff's motion for reconsideration.[2]

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[1] In footnote 3 of its opinion, the majority states that plaintiff may bring a civil action in federal court under 29 USC 412 if he was discharged in retaliation for participating in a Department of Labor investigation. I note, however, that in general the LMRDA protects the rights afforded union *members* because of their status as members, not the rights afforded appointed union *employees* because of their status as employees. See *Finnegan*, 456 US at 436-437.

[2] Defendant claims on appeal that the just-cause provision of plaintiff's employment contract could only be enforced through arbitration. I will not address this claim, as it is irrelevant to the question of preemption.

LaMEAU v CITY OF ROYAL OAK

Docket Nos. 290059 and 292006. Submitted May 4, 2010, at Detroit. Decided July 13, 2010, at 9:00 a.m.

Thomas LaMeau, personal representative of the estate of John M. Crnkovich, deceased, brought an action in the Oakland Circuit Court against the city of Royal Oak and two of its employees (Elden Danielson and Bryan Warju), the Detroit Edison Company, and Gaglio PR Cement Corporation, seeking damages resulting from the wrongful death of Crnkovich. Crnkovich had died from injuries received while operating a motor scooter on a city sidewalk that had been constructed by Gaglio under the direction of Danielson and Warju. Crnkovich had hit a guy wire strung across the path of the sidewalk from a Detroit Edison utility pole to an anchor in the ground. The guy wire and anchor had been in place before the sidewalk was constructed, and the anchor had been embedded in an asphalt section of the sidewalk during the construction. The city and Gaglio filed motions for summary disposition in October 2008. Danielson and Warju moved for summary disposition in December 2008. On January 5, 2009, the court, Colleen A. O'Brien, J., granted the motions by the city and Gaglio with regard to the nuisance claims against them, but denied their motions with regard to the individual negligence claims against them. On January 7, 2009, the city again moved for summary disposition, as did Danielson and Warju. On January 26, 2009, the city appealed as of right the denial of its October 2008 motion for summary disposition with regard to the city's claim that it was entitled to governmental immunity (Docket No. 290059). Because the city's appeal automatically stayed the proceedings below, the city filed a motion on February 10, 2009, seeking an order remanding the matter to the trial court to conduct a hearing on pending motions for rehearing and summary disposition. The Court of Appeals entered an unpublished order to remand in Docket No. 290059 on March 31, 2009. On April 29, 2009, the trial court entered an opinion and order denying Danielson and Warju's December 2008 motion for summary disposition, which had alleged that the claims against them were barred by governmental immunity. The trial court also entered an opinion and order that denied a motion for reconsideration filed by the city, Danielson, and Warju. On May 11, 2009, Danielson and Warju appealed the denial of their

motion for summary disposition (Docket No. 292006). The Court of Appeals then granted Gaglio leave to appeal the denial of its October 2008 motion for summary disposition (Docket No. 289947) and consolidated that appeal with the appeal in Docket No. 290059. Unpublished order of the Court of Appeals, entered May 12, 2009 (Docket No. 289947). The Court of Appeals consolidated all three appeals in an unpublished order, entered May 28, 2009 (Docket Nos. 289947, 290059, and 292006). On April 29, 2010, the Court of Appeals entered an unpublished order that closed without prejudice the appeal in Docket No. 289947 and deconsolidated that appeal from the other two appeals.

The Court of Appeals *held*:

1. The highway exception to governmental immunity, MCL 691.1402(1), imposes a duty on municipalities to maintain highways under their jurisdiction in reasonable repair. MCL 691.1401(e) defines "highway" to mean a public highway, road, or street that is open for public travel, and the definition includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway, but excludes alleys, trees, and utility poles. The fact that a municipality does not have a duty to maintain utility poles in reasonable repair, however, does not relieve the municipality of its duty to maintain its sidewalks in reasonable repair even when a utility pole causes a sidewalk's state of disrepair. The city had a duty to make reasonable repairs to its sidewalk that were occasioned by the anchor and guy wire.

2. Once the city decided to construct the sidewalk in such a way as to incorporate the guy wire and anchor into the sidewalk, the guy wire and anchor were part of the sidewalk. MCL 691.1402(1) imposes liability on municipalities for defects in sidewalks, even defects occasioned by the presence of structures that municipalities would normally not have a duty to maintain in reasonable repair. The city had jurisdiction over the sidewalk, and it necessarily acquired jurisdiction over the anchor and guy wire to the extent that they were a part of the sidewalk.

3. Under the totality of the circumstances, whether the city had closed the sidewalk to the public was a question of fact.

4. The undisputed evidence showed that not only was the city aware of the defective condition of the sidewalk for a period of 30 days or longer before the injury occurred, its employees actually created the defective condition. There was no dispute that the city had adequate notice of the defect for purposes of the notice requirement of MCL 691.1403.

5. The trial court did not err when it denied the city's motion for summary disposition that alleged that the city was immune from suit. The city had a duty under the highway exception to rectify the defect that it created.

6. The evidence suggested that Danielson and Warju were indifferent to the magnitude of the danger being created by ordering that the sidewalk be paved before the anchor and guy wire were moved. A reasonable jury could conclude that the decision to incorporate the anchor and guy wire into the sidewalk demonstrated a substantial lack of concern for whether an injury would result. There was evidence from which a reasonable fact-finder could conclude that Danielson's and Warju's efforts to have the anchor and guy wire relocated were grossly deficient and that their efforts to safeguard the public were inadequate. There was a clear question of fact about whether Danielson and Warju were grossly negligent and thus, under MCL 691.1407(2) and (7)(a), not entitled to governmental immunity.

7. There was evidence from which a reasonable jury could conclude that Crnkovich's conduct was "the" proximate cause of his injuries, that is, the one most immediate, efficient, and direct cause of his injuries. However, there was also evidence from which a reasonable jury could conclude that the conduct of Danielson and Warju in creating the hazard and then failing to rectify or mitigate the hazard constituted the one most immediate, efficient, and direct cause of Crnkovich's injuries. There was also evidence from which a reasonable jury could conclude that the failure to have barricades in place was attributable to the conduct of Danielson and Warju or was not a significant cause of Crnkovich's injuries. The trial court did not err when it denied Danielson and Warju's motion for summary disposition that was based on their claim of governmental immunity.

Affirmed.

Talbot, P.J., dissenting, stated that in order to show that a governmental agency failed to maintain a highway in reasonable repair, a plaintiff must demonstrate that a defect existed in the highway itself. The trial court erred by declining to award summary disposition to the city because a question of fact did not exist regarding whether the guy wire constituted a defect. MCL 691.1401(e) specifically excludes utility poles from the term "highway," and it should not be suggested that any appendage extending from a utility pole should be treated as an entity separate or distinguishable from the utility pole. The majority's effort to expand the term "defect" to encompass the guy wire is contrary to the plain meaning of the term and Michigan Supreme Court caselaw that has explicitly restricted sidewalk defects to imperfections occurring in the sidewalk itself. In addition, the highway exception to governmental immunity does not include a duty to design or to correct defects arising from the original design or construction of highways. Although a question of fact may have existed regarding whether the

conduct of Danielson and Warju rose to the level of gross negligence, liability was precluded because it could not be reasonably concluded that their conduct was "the" proximate cause of the injuries or damage. Although the conduct attributable to these defendants could be construed as having comprised "a" proximate cause of Crnkovich's injuries, their conduct was not "the" proximate cause. Crnkovich's own behavior, combined with that of Detroit Edison, comprised a more direct and immediate cause of the injuries incurred than the conduct attributable to Danielson and Warju. Therefore, any negligence on their part was too remote to overcome the grant of immunity afforded by MCL 691.1407. The trial court's denial of defendants' motions for summary disposition that were based on their assertion of governmental immunity should be reversed.

1. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — SIDEWALKS — UTILITY POLES.

A municipality must maintain its public highways, roads, and streets, including the bridges, sidewalks, trailways, crosswalks, and culverts on the highway, in reasonable repair; a municipality does not have a duty to maintain in reasonable repair alleys, trees, and utility poles; the fact that a municipality does not have a duty to maintain utility poles in reasonable repair does not relieve the municipality of its duty to maintain its sidewalks in reasonable repair even when a utility pole causes a sidewalk's state of disrepair (MCL 691.1401[e], 691.1402[1]).

2. GOVERNMENTAL IMMUNITY — SIDEWALKS.

The governmental tort liability act imposes liability on municipalities for injuries caused by defects in sidewalks over which they have jurisdiction even if the defects are occasioned by the presence of a structure that the municipality would normally not have a duty to maintain in reasonable repair (MCL 691.1401[e], 691.1402[1]).

3. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — GROSS NEGLIGENCE — MOTIONS AND ORDERS — SUMMARY DISPOSITION.

A plaintiff must present evidence sufficient for a reasonable finder of fact to conclude that a governmental employee was grossly negligent in order to survive a motion for summary disposition premised on the immunity afforded to governmental employees; the court may decide the question as a matter of law if there is no question of fact about whether the allegedly negligent conduct rises to the level of gross negligence; evidence of ordinary negligence does not create a material question of fact concerning gross negligence; to find gross negligence, there must be evidence that

the governmental employee engaged in conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result (MCL 691.1407[2][c], [7][a]).

4. Governmental Immunity — Governmental Employees — Gross Negligence — Proximate Cause of Injury or Damage.

A governmental employee is immune from tort liability if the employee is acting (or reasonably believes that he or she is acting) within the scope of the employee's authority and if the governmental agency is engaged in the exercise or discharge of a governmental function unless the employee's conduct amounted to gross negligence and that gross negligence was the proximate cause of the injury or damage, that is, the one most immediate, efficient, and direct cause of the injury or damage (MCL 691.1407[2][c]).

Wigod, Falzon, McNeely & Unwin, P.C. (by *Lawrence C. Falzon* and *Kevin A. McNeely*), for Thomas LaMeau.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Marcia L. Howe* and *Michael E. Rosati*), for the city of Royal Oak, Elden Danielson, and Bryan Warju.

Before: Talbot, P.J., and Fitzgerald and M. J. Kelly, JJ.

M. J. Kelly, J. In this suit to recover damages for wrongful death allegedly caused by a defective sidewalk, defendants city of Royal Oak, Elden Danielson, and Bryan Warju appeal as of right the trial court's denial of their motions for summary disposition premised on governmental immunity. Because the trial court correctly determined that Royal Oak, Danielson, and Warju were not entitled to governmental immunity, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE SIDEWALK AND ACCIDENT AT ISSUE

Bryan Warju testified at his deposition that he was an engineering assistant under the supervision of Royal Oak's city engineer, Elden Danielson. Warju stated that

he served as the field manager for Royal Oak's sidewalk-improvement project in the summer of 2005. Warju said that he walked the area on the south side of Normandy Street where a new sidewalk was to be constructed and noticed a telephone pole's guy wire that crossed the path of the proposed sidewalk.

Skylan McBeth, who is a service planner with the Detroit Edison Company, testified that a guy wire is a steel cable that runs from a telephone pole to an anchor in the ground. The wire pulls the pole in the direction opposite the weight on the pole. McBeth said that a "down guy" is a guy wire that runs in a direct line from the pole to the ground. However, a "sidewalk guy" is a wire that runs along a three-inch steel bar that juts out from the telephone pole and then proceeds straight down from the end of the bar to the anchor in the ground.

In May 2005, Warju informed various parties, including defendants Gaglio PR Cement Corporation (Gaglio Cement) and Detroit Edison, about a preconstruction conference to discuss the details of the 2005 summer sidewalk-construction project. The letter indicated that the conference would include a discussion concerning any conflicts with utilities. Danielson averred that Detroit Edison did not send a representative to this meeting, and Warju stated in his affidavit that he would have discussed the existence of the guy wire with the representative from Detroit Edison had a representative gone to the meeting. Danielson also averred that he spoke with various persons from Detroit Edison and orally requested them to move the guy wire to a safe location. However, no one from Detroit Edison came to move the wire.

Rosalino Gaglio (Rosalino) testified that he was a foreman with Gaglio Cement and that he visited the site on Normandy Street where the sidewalk was to be constructed. He stated that he saw the wire at issue and

told Warju that the wire needed to be moved. Rosalino said that Warju told him that he would contact Detroit Edison and have it moved.

Salvatore Gaglio (Salvatore) testified that he was a foreman with Gaglio Cement and that he had worked on the project to pour a new sidewalk on Normandy Street in 2005. He stated that Royal Oak had set out the path of the new sidewalk using stakes and paint. As they approached the guy wire, he notified Royal Oak's inspector about the need to move the wire. He said that Warju told them to just block it off, but Salvatore responded that they should either block it off further back or stop the project until the guy wire could be moved. Rosalino stated that he wanted to leave 10 flags—which are 5-foot by 5-foot slabs of concrete—open on either side of the guy wire. Thus, there would have been 50 feet of unpaved land on either side of the guy wire. However, Warju disagreed with this approach: "[H]e made us form it to the guy wire. He told me not to form it like that. He told me go right up to the guy wire and just leave one flag out." Rosalino said that he did as Warju asked, but warned that it was not a good idea because "people could get hurt over here, with this wire being here." Salvatore also said that he warned Warju many times about the hazard of cementing up to the wire. At his deposition, Warju explained that he ordered Salvatore to pave up to the guy wire because he was on a schedule: "Well, we are on a schedule to do the sidewalk. We are coming down that street. We are not going to stop and wait for nine months in this case for Detroit Edison to relocate their wire along with other objects which are in the way."

Salvatore said that they had prepared the area around the guy wire for cementing, but left it unpaved. Later Warju instructed them to fill with asphalt the gap left at the point where the guy wire was anchored to the ground.

Salvatore said that he protested that the "wire still [hadn't] been moved," but Warju replied, "[J]ust put it there, and then next year when you guys come back, you guys can fill it in with the concrete." Salvatore said that he warned Warju that if they put asphalt in there, people were going to just "kick over our barricades and walk through." He said that Warju told him not to "worry about it, we'll just keep an eye on it." Danielson testified that the city does not have a policy that construction should be halted because of a conflict with a utility; rather, the proper procedure is to barricade the area.

According to an inspection report, Gaglio Cement paved the area between the cement portions of the sidewalk with asphalt on July 22, 2005. Photographs of the anchor for the guy wire show that the anchor was actually in the asphalt and the wire crossed the path of the sidewalk at an angle to the telephone pole.

Rosalino said that Warju made them surround the area with barricades. He placed the barricades in such a way that the sidewalk "wasn't useable in between that area." Unfortunately, people kept taking the barricades and throwing them. For that reason, he reemphasized that Warju had to move the wire because the barricades "are missing every day." He said that Royal Oak even sent others to barricade the location. Rosalino said that the problem persisted even after they completed working for the summer and returned in the spring of 2006: "And I told Bryan [Warju], it's like that wire's still there, it's been eight months now. I was like why is that wire still there. I was like you gotta move that wire, 'cause they're taking the barricades and we just put more barricades there."

Douglas Burg testified at his deposition that he was a lineman with Detroit Edison and that he was dispatched to Normandy Street on April 24, 2006, regarding a report of a bicyclist who had struck a guy wire. When he arrived there were no emergency personnel and no injured person, but he noticed that the plastic guard for the guy wire was on the ground some feet from the guy wire. He reattached the guy wire guard after tightening some of the lines. After this, he called his dispatch center and instructed them to have a service planner schedule a project to move the guy wire as soon as possible. He wrote a note that stated: "At the lead south of Normandy, 10 poles east of Crooks a guy ran into the down guy on his bike. We looked at it and it does need a sidewalk guy to stop decapitating pedestrians. Needs service planning." Burg said that he was so concerned about the wire that, if he had had the right crew with him, he would have asked for permission to move the wire immediately.

McBeth testified that he received a memo about a potential problem with a guy wire on Normandy Street. He acknowledged that the memo had stated that the area needed a sidewalk guy in order for the guy wire to stop decapitating pedestrians. McBeth said that he got the memo on May 4, 2006, and went to the site the same day. He said that he was concerned about the guy wire and let his supervisor know that the guy wire needed to be moved as soon as possible. Indeed, McBeth said that he turned the job package in the same day and told his supervisor that he had short-dated it, meaning that it should be done in two weeks rather than the normal six weeks, which he thought was warranted by the seriousness of the situation.

David Colling testified at his deposition that his daughter Lara fell and injured herself while riding her bicycle by the area of the guy wire at issue. He stated that Lara had her accident in May 2006 before the accident at issue here and that the accident happened around four or five o'clock in the afternoon.

At approximately 11:00 p.m. on May 24, 2006, John Crnkovich rode a small scooter equipped with a gas motor down the sidewalk on the south side of Normandy Street. A bicyclist stated that he had ridden past Crnkovich, who he thought was moving at a high rate of speed given the high-pitched sound of the engine, on the sidewalk going in the opposite direction. The bicyclist said that when he got to the driveway of the adjacent school, he heard a crash. He turned around and went back, where he saw that Crnkovich had hit the guy wire. He said that Crnkovich was bleeding from his neck and was unresponsive. The bicyclist stated that a motorist stopped and called for help. Crnkovich died from his injuries.

The pathologist who conducted the autopsy indicated that Crnkovich, who was 35 years old and 253 pounds at the time, had died from blunt-force trauma to his neck and head. The pathologist specifically noted that Crnkovich had "[s]eparation of C3 from C4 with transection of the spinal cord." The pathologist also noted that Crnkovich had been under the influence of alcohol and marijuana at the time of his death. According to a toxicology report, Crnkovich had 0.13 g/dl of ethyl alcohol in a blood sample from his femoral artery and 4 ng/ml of delta-9-tetrahydrocannabinol and 13 ng/ml of delta-9-carboxy-tetrahydrocannabinol in a blood sample from his heart.

B. PROCEDURAL HISTORY

In June 2007, Thomas LaMeau, the personal representative of Crnkovich's estate, sued Royal Oak and Detroit Edison for damages arising out of Crnkovich's death. LaMeau amended the complaint to state new claims and eventually to state claims against Gaglio Cement, Danielson, and Warju. For the first count of his third amended complaint, LaMeau alleged that Detroit Edison had negligently placed, maintained, and failed to move its utility pole and guy wire and that this negligence caused Crnkovich's death. In the second count, LaMeau alleged that Royal Oak had a duty to maintain its sidewalks in reasonable repair and that it had breached that duty by embedding the guy wire anchor in the sidewalk, which breach caused Crnkovich's death. LaMeau alleged in the third count that Gaglio Cement had breached its duty to perform its contract with Royal Oak in a proper and workmanlike manner by building an unsafe sidewalk that ultimately caused Crnkovich's death. LaMeau also alleged various nuisance claims in counts 4 through 9. In counts 10 and 11,

respectively, LaMeau alleged that Danielson and Warju had been grossly negligent in planning and constructing the sidewalk at issue and that their gross negligence caused Crnkovich's death.

Royal Oak moved for summary disposition of LaMeau's claims in October 2008. Royal Oak argued that it was entitled to summary disposition because LaMeau had failed to plead claims in avoidance of governmental immunity. Specifically, Royal Oak argued that the guy wire and anchor were part of the telephone pole and, therefore, were expressly excluded from the definition of a highway for purposes of the highway exception to governmental immunity.

Gaglio Cement also moved for summary disposition in October 2008. Gaglio Cement argued that LaMeau had failed to allege that it breached a duty owed to Crnkovich beyond the duty arising under its contract with Royal Oak. It also argued that LaMeau's claims were barred because Crnkovich had been more than 50 percent at fault and had been under the influence of alcohol and marijuana.

In December 2008, Danielson and Warju moved for summary disposition, in part, on the ground that LaMeau's claims against them were barred by governmental immunity. Specifically, they argued that their actions with regard to the construction of the sidewalk did not rise to the level of gross negligence and were not "the" proximate cause of Crnkovich's injuries.

On January 5, 2009, the trial court signed an opinion and order in which it addressed the motions by Royal Oak and Gaglio Cement. The trial court granted the motions with regard to the nuisance claims, but denied the motions with regard to the individual negligence claims against Royal Oak and Gaglio Cement.

On January 7, 2009, Royal Oak again moved for summary disposition, along with Danielson and Warju. In this motion, Royal Oak and its employees argued that LaMeau had failed to establish that the sidewalk itself caused Crnkovich's injuries. Rather, they argued, Crnkovich's own reckless behavior was the cause of his injuries. They also argued that there were superseding intervening causes that precluded LaMeau's claims against them:

> 1) [Crnkovich's] careless and illegal behavior; 2) [Detroit Edison's] failure to respond to [Royal Oak's] request to relocate the wire . . . ; 3) The unknown person(s) removing the barricades, barrels, and yellow safety tape and/or sleeve; and, 4) Gaglio's alleged failure to determine if the barrels were in place on May 24, 2006.

Finally, Royal Oak, Danielson, and Warju argued that Crnkovich's wrongful conduct and intoxication barred LaMeau from recovering as a matter of law.

Royal Oak appealed as of right the trial court's denial of its motion for summary disposition founded on governmental immunity on January 26, 2009. This Court assigned that appeal Docket No. 290059.[1] Royal Oak's appeal automatically stayed the proceedings below. See MCR 2.614(D). On February 10, 2009, Royal Oak filed a motion asking this Court to permit the trial court to conduct a hearing on pending motions for rehearing and summary disposition. This Court entered an order for remand on March 31, 2009.[2]

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[1] This Court granted Gaglio Cement leave to appeal the trial court's decision to deny its motion for summary disposition and consolidated that appeal with the appeal in Docket No. 290059. *LaMeau v Royal Oak*, unpublished order of the Court of Appeals, entered May 12, 2009 (Docket No. 289947).

[2] *LaMeau v Royal Oak*, unpublished order of the Court of Appeals, entered March 31, 2009 (Docket No. 290059).

On April 29, 2009, the trial court entered an opinion and order denying Danielson and Warju's motion for summary disposition premised on governmental immunity. In a separate opinion and order entered on the same day, the trial court denied a motion for reconsideration filed by Royal Oak, Danielson, and Warju.

Danielson and Warju appealed the trial court's decision to deny their motion for summary disposition on May 11, 2009. This Court assigned that appeal Docket No. 292006.[3]

II. GOVERNMENTAL IMMUNITY

A. STANDARDS OF REVIEW

On appeal, Royal Oak, Danielson, and Warju primarily argue that the trial court erred when it determined that LaMeau's claims against them were not barred by governmental immunity and, for that reason, denied their motions for summary disposition under MCR 2.116(C)(7), (8), and (10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes. *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

A trial court properly grants summary disposition under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. A party may support or defend a motion under MCR 2.116(C)(7) by affidavits,

[3] This Court consolidated the appeals in Docket Nos. 289947, 290059, and 292006 in an unpublished order, entered May 28, 2009, but on April 29, 2010, entered an unpublished order that closed without prejudice the appeal in Docket No. 289947 and deconsolidated that appeal from the other appeals.

depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court reviews the evidence in the light most favorable to the nonmovant to determine whether a plaintiff's claim is barred by immunity. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). If the submissions demonstrate that there is a factual dispute as to whether immunity applies, summary disposition is not appropriate. *Id.*

A motion for summary disposition brought under MCR 2.116(C)(8) tests the "legal sufficiency of the complaint on the allegations of the pleadings alone." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When reviewing a motion under MCR 2.116(C)(8), this Court accepts all well-pleaded allegations as true and construes them in a light most favorable to the nonmovant. *Maiden*, 461 Mich at 119. Summary disposition under MCR 2.116(C)(8) is appropriate only when the claims alleged are so clearly unenforceable that no factual development could justify recovery. *Maiden,* 461 Mich at 119.

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 120. A party may be entitled to summary disposition under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact . . . ." This Court reviews a motion brought under this subsection by considering the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion to determine whether there are genuine issues of material fact. *Maiden*, 461 Mich at 120.

B. THE HIGHWAY EXCEPTION

Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., a governmental agency is "im-

mune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). It is undisputed that Royal Oak is a governmental agency, see MCL 691.1401(b) and (d), and that its construction of the sidewalk at issue constituted the exercise of a governmental function. Thus, unless one of the statutory exceptions to immunity applies to this case, Royal Oak is immune from tort liability arising from its construction of the sidewalk.

One exception to the immunity provided by MCL 691.1407(1) is the highway exception to governmental immunity. Under MCL 691.1402(1), every "governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." Further, a person

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

The Legislature provided that "highway" means "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e). Hence, Royal Oak may be liable if it breached its duty under MCL 691.1402(1) to keep the sidewalk in reasonable repair.

Although Royal Oak concedes that it had a duty to maintain the sidewalk at issue in reasonable repair, it argues that the sidewalk itself was not defective. Rather, the problem was with the placement of the anchor for the guy wire and the guy wire that supported

a nearby telephone pole. Because the guy wire and its anchor are by definition not part of the highway, Royal Oak argues that it cannot be held liable for the dangerous placement of the anchor and guy wire. Royal Oak relies on MCL 691.1401(e) to support its contention that the improper placement of the anchor and guy wire at issue cannot give rise to liability because those structures are never part of a highway.

1. DEFINITION OF "HIGHWAY"

MCL 691.1401(e) defines the term "highway" to broadly include public highways, roads, and streets that are "open for public travel . . . ." It also clarifies that certain structures that are "on the highway" are included within the definition: "bridges, sidewalks, trailways, crosswalks, and culverts . . . ." *Id.* It also defines highway as not including one type of thoroughfare—"alleys"—and as not including "trees" and "utility poles," even though trees and utility poles will often be located within the right-of-way of a highway. *Id.*

In this case, Crnkovich died when he struck a guy wire that was strung across Royal Oak's sidewalk and connected to an anchor embedded in the sidewalk at one end and a utility pole at the other end. Thus, the question becomes whether the exclusion of utility poles from the definition of "highway" insulates Royal Oak from liability for paving the sidewalk through the anchor and under the guy wire with insufficient clearance for persons using the sidewalk.

The definition of the term "highway" has no operative effect outside the substantive provisions of the GTLA—that is, the definition must be interpreted in light of the provisions of the statute that impose liability. MCL 691.1402(1) imposes a duty on municipalities to maintain their highways "in reasonable repair . . . ."

Therefore, the definition of a highway is integral to understanding what the municipality must maintain in reasonable repair; it must maintain its public highways, roads, and streets in reasonable repair, and it must maintain the bridges, sidewalks, trailways, crosswalks, and culverts that are associated with those highways in reasonable repair. In contrast, a municipality does not have a duty to maintain alleys in reasonable repair and does not have a duty to maintain in reasonable repair trees and utility poles that may be within the highway right-of-way. However, the fact that a municipality does not have a duty to maintain utility poles in reasonable repair does not relieve the municipality of its duty to maintain its sidewalks in reasonable repair even when a utility pole causes the sidewalk's state of disrepair. Thus, assuming—without actually deciding—that the anchor and guy wire constitute "utility poles" within the meaning of MCL 691.1401(e), Royal Oak nevertheless had a duty to make reasonable repairs to its sidewalk that were occasioned by the anchor and guy wire.[4]

Under these facts,[5] the anchor and guy wire were part of the sidewalk. This case does not involve conditions that are external to the sidewalk, such as snow, ice, or an oil spill. See *Buckner Estate v City of Lansing*, 480 Mich 1243, 1244 (2008) (explaining that "the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a 'defect' in the sidewalk"). This case involves a physical structure

[4] For example, if a utility pole fell and seriously damaged a sidewalk, the fact that the defect in the sidewalk was caused by a utility pole would not relieve the municipality of any liability arising from its failure to remedy the defect.

[5] At oral argument, the parties acknowledged that this case involved unique facts and an issue of first impression.

in the sidewalk itself. Further, the structure is not a fixture that was attached to the sidewalk after the sidewalk's construction. See *Ali v Detroit*, 218 Mich App 581, 589; 554 NW2d 384 (1996) (holding that the definition of "highway" does not include fixtures, such as a bus passenger shelter, that are "linked with the sidewalk solely by its placement"). Rather, the anchor and guy wire were in place *before* the construction of the sidewalk. And Royal Oak decided to construct the sidewalk in such a way as to incorporate the guy wire and its anchor into the sidewalk. Once Royal Oak decided to pave through the guy wire and anchor, the fact that the anchor and guy wire were also attached to a utility pole become irrelevant because the anchor and guy wire were, at that point, part of the sidewalk.[6]

For these reasons, we reject Royal Oak's argument that MCL 691.1402(1) must be narrowly construed to exclude the defect at issue. Although this Court must construe the exceptions to governmental immunity narrowly, *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000), this Court is not at liberty to ignore the plain language of the statute under the guise of interpreting it narrowly, see *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005), and MCL 691.1402(1) plainly and unequivocally imposes liability on municipalities for defects in sidewalks—even if the defect in the sidewalk is occasioned by the presence of a structure that the municipality would normally not have a duty to maintain in reasonable repair.

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[6] By way of example, if Royal Oak's contractors had left a work boot in a freshly poured concrete slab with one half submerged and the other half protruding above the level of the concrete, the boot would be part of the sidewalk, so that Royal Oak would be liable for harms caused by the failure to remedy the defect.

2. JURISDICTION

Royal Oak also argues that it did not have jurisdiction over the anchor and guy wire at issue. However, Royal Oak admitted that it had jurisdiction over the sidewalk and, once it chose to incorporate the anchor and guy wire into its sidewalk, it necessarily acquired jurisdiction over the anchor and guy wire to the extent that they were part of the sidewalk. See MCL 691.1401(e); MCL 691.1402(1). Moreover, the fact that Royal Oak did not have the equipment or expertise to relocate the anchor and guy wire did not relieve it of its duty to rectify the defective condition; had Royal Oak wanted to avoid responsibility for the anchor and guy wire, it could simply have elected not to incorporate those structures into its sidewalk. Indeed, if Royal Oak had followed the advice of its own contractor and left several flags on either side of the anchor and guy wire unpaved—or even left the flag at issue unpaved—Royal Oak would have had no duty with regard to the anchor and guy wire. See MCL 691.1401(e).

3. OPEN TO THE PUBLIC

Contrary to Royal Oak's contention, the evidence did not demonstrate that the sidewalk at issue was closed to the public. See *Pusakulich v Ironwood*, 247 Mich App 80, 85-86; 635 NW2d 323 (2001) (noting that a governmental agency can suspend its duty to keep a highway in good repair by closing it to public traffic). Royal Oak presented evidence that it had Gaglio Cement barricade the flag at issue to prevent the general public from using the sidewalk at the point where it crossed under the guy wire. However, the evidence also showed that the remainder of the new sidewalk was open to the public and that Royal Oak ordered Gaglio Cement to pave the missing sidewalk flag with asphalt. Likewise,

the evidence showed that the barricades were routinely moved or stolen from the location, and there was evidence from which reasonable persons could conclude that there were no barriers in place on the date at issue. Under the totality of the circumstances, whether Royal Oak had closed the sidewalk to the public is a question of fact.

4. THE TWO-INCH RULE

Royal Oak also argues that LaMeau's claims are barred under MCL 691.1402a. However, our Supreme Court recently explained that the limitations stated under MCL 691.1402a(2) apply only to sidewalks that are adjacent to a county highway. *Robinson v City of Lansing*, 486 Mich 1, 21-22; 782 NW2d 171 (2010). In this case, there was no evidence that the sidewalk at issue was adjacent to a county highway. Therefore, MCL 691.1402a(2) does not apply to the street at issue. Further, even if MCL 691.1402a(2) could be said to apply under the facts of this case, the rebuttable inference provided under that statute applies only to "a discontinuity defect" in a sidewalk. Because this case does not involve a discontinuity defect, that presumption does not apply.

5. NOTICE

Finally, Royal Oak argues that LaMeau's claims are barred under MCL 691.1403 because it did not have the required 30-day notice of the defect. Specifically, Royal Oak contends that LaMeau had to show that Royal Oak had notice that the barricades were missing before the accident at issue. Royal Oak's argument that it had to have notice that the barricades were missing is unpersuasive. MCL 691.1403 requires notice of a defect in the highway—not the absence of barricades warding trav-

elers from the defect. The undisputed evidence in this case showed that Royal Oak was not only aware of the defective condition, its employees actually *created* the defective condition. See *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 149; 687 NW2d 380 (2004) (noting that a governmental agency's employee's knowledge of a defect will be imputed to the agency). Further, knowledge of the defect is "conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place." MCL 691.1403. The evidence in this case showed that the extreme danger posed by the defective condition of the sidewalk—that is, the anchor and guy wire—was "readily apparent" for the requisite 30 days. And, in any event, there was evidence that even after Royal Oak created the defective condition, its contractor repeatedly warned it about the continuing hazard from the anchor and guy wire. Finally, there was clear evidence that Royal Oak had notice that a bicyclist had fallen after encountering the guy wire over the sidewalk. Accordingly, there is no dispute that Royal Oak had adequate notice of the defect for purposes of MCL 691.1403.

6. CONCLUSION

Royal Oak had a duty under the highway exception to rectify the defect that it created in the sidewalk after it decided to pave the sidewalk through the anchor and, thereby, incorporate the anchor and guy wire into the sidewalk. MCL 691.1402(1). Therefore, the trial court did not err when it denied Royal Oak's motion for summary disposition that alleged that Royal Oak was immune from suit. Given the conclusion that Royal Oak could be liable under MCL 691.1402(1) for the actual defect at issue, the anchor and guy wire incorporated

into the sidewalk, we decline to consider whether Royal Oak could be liable under a failure-to-warn or negligent-design theory.

C. IMMUNITY FOR GOVERNMENTAL EMPLOYEES

On appeal, Danielson and Warju argue that the trial court also erred when it refused to dismiss LaMeau's claims against them on the ground that they were entitled to governmental immunity. Under MCL 691.1407(2), certain classes of persons working for governmental agencies are immune from tort liability if all the following are true:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

The first two criteria are not at issue. Rather, Danielson and Warju only argue that their actions did not amount to gross negligence and, even if they did, their actions did not amount to "the" proximate cause of Crnkovich's injuries.

1. GROSS NEGLIGENCE

In order to survive a motion for summary disposition premised on the immunity afforded to governmental employees, the plaintiff must present evidence sufficient for a reasonable finder of fact to conclude that the employee was grossly negligent. If there is no question of fact about whether the allegedly negligent conduct rises to the level of gross negligence, the court may

decide the question as a matter of law. Evidence of ordinary negligence will not be sufficient to survive a motion for summary disposition. *Maiden*, 461 Mich 122-123 ("[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence."); see also *Costa v Community Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006) (noting that the gross-negligence exception applies to situations "in which the contested conduct was substantially more than negligent"). Rather, there must be evidence that the employee engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); see also *Maiden*, 461 Mich at 123.

On appeal, Danielson and Warju frame the issue in terms of their conduct after the construction of the sidewalk at issue. That is, they argue that the evidence concerning the steps that they took to barricade the sidewalk and to get Detroit Edison to move the anchor and guy wire did not show that their conduct rose to the level of gross negligence; instead, they contend that "[i]f such a minor level of negligence is sufficient to avoid immunity, immunity for individuals based upon gross negligence would be undermined, if not abrogated." However, the proper focus is not solely on the evidence concerning the steps they took *after* creating the defect in the sidewalk. Rather, the totality of their conduct—including their actions leading to the creation of the defect in the sidewalk as well as the steps they took to remediate the defect—must be evaluated when determining whether their actions could be found to amount to gross negligence. Indeed, if the defect had not been created in the first instance, then there would have been no need to remediate it.

Although the sidewalk project called for the placement of the sidewalk through the area occupied by the

anchor and guy wire, the decision to place the sidewalk along this path was not inherently negligent—let alone grossly negligent—given that the anchor and guy wire could have been relocated.[7] Indeed, there was evidence that another utility was able to timely move its own anchor and guy wire. However, once Gaglio Cement began to prepare the area and pour concrete flags, both Rosalino and Salvatore Gaglio noticed that the anchor and guy wire had not been relocated and informed Warju of the need to move it. Nevertheless, Warju ordered them to proceed with the project and told them to just block the area off. Rosalino disagreed with this course and urged Warju to leave a substantial distance—50 feet in either direction—unpaved for safety purposes. Despite Rosalino's protestation that people would get hurt, Warju told them to pave right up to the anchor and guy wire and leave just one flag unpaved.

Sometime later, Warju asked Salvatore to fill the missing flag with asphalt. Salvatore again warned Warju against paving the area before the guy wire was relocated, but Warju said, "[J]ust put it there, and then next year when you guys come back, you guys can fill it in with the concrete." Salvatore said that he also warned Warju that if they put asphalt in there, people were just going to "kick over our barricades and walk through." He said that Warju told him not to "worry about it, we'll just keep an eye on it."

When asked whether Warju could have halted the project to await the relocation of the anchor, Danielson

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[7] By pointing out this fact, we do not mean to imply that the negligent design of a highway or sidewalk might be actionable—it is now settled that design defects are not actionable. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502-504; 638 NW2d 396 (2002). As already noted, this case involves a physical defect in the surface of the sidewalk occasioned by the incorporation of the anchor and guy wire into the sidewalk during construction; it does not involve a defect in the design or layout of the sidewalk.

admitted that he could have done so, but explained that there was no policy requiring that. Instead, he said the proper procedure is to complete the project and barricade the hazard area. Similarly, when asked to explain why he did not leave the area unpaved, Warju explained: "Well, we are on a schedule to do the sidewalk. We are coming down that street. We are not going to stop and wait for nine months in this case for Detroit Edison to relocate their wire along with other objects which are in the way."

The testimony concerning the events leading up to the creation of the hazard strongly suggested that Danielson and Warju were indifferent to the magnitude of the danger being created. The anchor and guy wire posed a clear danger even to pedestrians traversing the paved portion of the sidewalk. Yet the danger increased dramatically for persons moving at any speed greater than a walk—the location of the fence on one side and of wires and poles on the other made it difficult for any person moving at such a speed to avoid the hazard, and the height of the guy wire rendered anyone who failed to avoid it in danger of sustaining a head or neck injury. Given this evidence, Danielson and Warju should have realized the seriousness of the hazard they were creating by ordering that the sidewalk be paved before moving the anchor and guy wire. On the basis of this evidence, a reasonable jury could conclude that the decision to incorporate the anchor and guy wire into the sidewalk demonstrated "a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Maiden*, 461 Mich at 122-123 (stating that, in order to survive a motion for summary disposition premised on governmental immunity for governmental employees, a plaintiff must adduce proof of conduct so reckless that it demonstrates a substantial lack of concern for whether an injury will result). Even if Danielson and Warju did

not fully appreciate the danger, the evidence also showed that they were repeatedly warned about the danger posed by paving up to the anchor and guy wire, yet ordered Gaglio Cement to proceed anyway.

Further, although there was evidence that Danielson and Warju contacted Detroit Edison about moving the anchor and guy wire, the evidence also suggested that Danielson's and Warju's efforts in this regard were deficient. Neither Danielson nor Warju ever formally requested Detroit Edison to relocate the anchor and guy wire. Warju did send a letter to Detroit Edison advising it of a meeting concerning the project, and in the letter he noted that any conflicts with utilities would be discussed at the meeting, but he addressed the letter to a person who was not located at the office to which the letter was addressed and who was not responsible for resolving utility conflicts. Likewise, although Danielson testified that he contacted various Detroit Edison personnel about moving the anchor and guy wire, he admitted that the requests were oral, and the evidence showed that some of these communications occurred during discussions about other projects. In addition, there was evidence from which one could conclude that Detroit Edison did not receive any requests—oral or otherwise—to move the anchor and guy wire. Thus, there was evidence from which a reasonable fact-finder could conclude that the efforts to have the anchor and guy wire relocated were not just deficient, but grossly deficient.

The evidence also showed that Danielson's and Warju's efforts to safeguard the public from the hazard they created were inadequate. Although there was evidence that the sidewalk was barricaded at the point of the hazard, there was also evidence that the barricades were repeatedly moved or stolen. Rosalino testified that he warned Warju over and over again about the problem

with the barricades and told him that the guy wire had to be moved; he even expressed exasperation over the fact that the guy wire had not been moved after eight months. Moreover, the photographs from the accident at issue showed no sign of any barricade within the vicinity of the anchor and guy wire. There was also evidence that the general public was using the sidewalk before the accident at issue. The evidence showed that two bicyclists were injured while encountering the hazard and that Royal Oak clearly had notice of one of those accidents because its fire department responded and generated a report about the guy wire at issue.

When the totality of the evidence and the testimony concerning the events at issue is viewed in a light most favorable to LaMeau, there is a clear question of fact about whether Danielson and Warju were grossly negligent. The evidence showed that Danielson and Warju created the hazard at issue by paving a path right up to and including the anchor and guy wire notwithstanding the evident serious danger. The evidence also showed that their efforts to have the anchor and guy wire moved were deficient and untimely, and that they ignored the fact that the barricades were inadequate and that the general public was using the sidewalk. Taken together, this conduct could be found to be "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Accordingly, the trial court did not err when it concluded that there was evidence from which a finder of fact could conclude that Danielson and Warju were grossly negligent.

2. "THE" PROXIMATE CAUSE

Danielson and Warju also argue that, even assuming that there is a question of fact about whether their

conduct rose to the level of gross negligence, they are nevertheless entitled to immunity because there is no question of fact regarding whether their conduct was "the" proximate cause of Crnkovich's injuries. The Legislature has provided that a governmental employee is immune from tort liability unless his or her conduct amounted "to gross negligence" and that gross negligence was "*the* proximate cause of the injury or damage." MCL 691.1407(2)(c) (emphasis added). Our Supreme Court has held that the Legislature's reference to "the proximate cause"—as opposed to "a proximate cause"—means that the employee's gross negligence must be more than just a proximate cause of the injury in order to meet the requirements of the exception to the governmental employee's immunity. See *Robinson v Detroit*, 462 Mich 439, 461-463; 613 NW2d 307 (2000). Instead, a governmental employee is immune from tort liability unless his or her conduct amounted to gross negligence that was "the one most immediate, efficient, and direct cause of the injury or damage . . . ." *Id.* at 462.

On appeal, Danielson and Warju argue that Detroit Edison negligently failed to move the anchor and guy wire after Warju and Danielson requested removal and after receiving notice of the accident involving the bicyclist. They also argue that Crnkovich himself was largely at fault for his own accident. Specifically, they note that Crnkovich illegally rode the motor scooter on the sidewalk and that he did so at night, without appropriate safety equipment, at a high rate of speed, and while under the influence of alcohol and marijuana. They also fault Gaglio Cement for not taking better steps to ensure that the area was properly barricaded and fault unknown persons for removing the barricades. On the basis of this evidence, Danielson and Warju contend that—even if their conduct were deemed

grossly negligent—their conduct was clearly not the one most immediate, efficient, and direct cause of Crnkovich's injuries.

In the present case, there was evidence from which a reasonable jury could conclude that Crnkovich's conduct was the one most immediate, efficient, and direct cause of his injuries. He elected to ride the motor scooter at night, without protective gear, and after having ingested alcohol and marijuana at some prior point. However, there was also evidence from which a reasonable jury could conclude that the conduct of Danielson and Warju in creating the hazard at issue and then failing to rectify or mitigate the hazard constituted the one most immediate, efficient, and direct cause of Crnkovich's injuries. Danielson and Warju were responsible for the decision to pave the sidewalk directly up to and including the anchor and guy wire. And a reasonable jury could conclude that, had Warju halted the project or followed Rosalino's advice to leave 50 feet of land unpaved on either side of the anchor and guy wire, Crnkovich could not have operated his small motor scooter on the unpaved land or that, if he had traversed the unpaved land, he could not have had a catastrophic collision with the anchor and guy wire. In addition, a reasonable jury could conclude that it was Danielson's and Warju's failure to formally request the relocation of the anchor and guy wire that caused Detroit Edison to be unable to move the anchor and guy wire in time to prevent the accident. Indeed, the evidence supported an inference that Detroit Edison was not aware of the changed circumstances involving the anchor and guy wire—namely, that Danielson and Warju had paved through the anchor and under the guy wire and, thereby, created a far more hazardous condition than previously existed, a condition that only then urgently required Detroit Edison's intervention. As for Gaglio Cement's alleged failure to properly barricade the site, the evidence showed that Gaglio Ce-

ment contracted with Royal Oak under the supervision of Danielson and Warju. There was also evidence that Salvatore warned Warju that barricading the site would not prevent injuries and that the barricades would likely be removed. Rosalino also informed Warju about the problem with the barricades and urged him to ensure that the guy wire got relocated. From this, a reasonable jury could conclude that the failure to have barricades in place was attributable to the conduct of Danielson and Warju or was not a significant cause of Crnkovich's injuries.

In light of the evidence before the trial court, a question of fact clearly existed regarding the one most immediate, efficient, and direct cause of Crnkovich's injuries.

3. CONCLUSION

Considering the evidence presented to the trial court, a reasonable jury could conclude that the acts of Danielson and Warju in ordering the paving of the area up to and including the anchor and guy wire, as well as their failure to have the anchor and guy wire relocated and properly barricaded, amounted to gross negligence. Likewise, a reasonable jury could conclude that the one most immediate, efficient, and direct cause of the injuries at issue was Danielson's and Warju's grossly negligent conduct. MCL 691.1407(2)(c); MCL 691.1407(7)(a); *Robinson*, 462 Mich at 462. Accordingly, the trial court did not err when it denied Danielson and Warju's motion for summary disposition premised on governmental immunity.

III. GENERAL CONCLUSION

The trial court correctly determined that Royal Oak, Danielson, and Warju were not entitled to governmental immunity under the facts of this case. For that

reason, it did not err when it denied their motions for summary disposition on that basis.

Affirmed.

FITZGERALD, J., concurred.

TALBOT, P.J. (*dissenting*). I respectfully dissent from the majority's opinion and would reverse the trial court's denial of defendants' motions for summary disposition based on their assertion of governmental immunity.

This lawsuit arises from an accident that occurred on May 24, 2006, at 11:00 p.m., on a sidewalk of defendant city of Royal Oak (the City). At that time, plaintiff Thomas LaMeau's decedent, John M. Crnkovich, died of blunt-force head and neck trauma after striking a guy[1] wire that was strung at an angle from a utility pole of defendant Detroit Edison Company (DTE) across the sidewalk and anchored on the opposite side of the sidewalk. It is undisputed that, at the time of the accident, the decedent was riding a motorized scooter, without benefit of lights or a helmet, and had a blood alcohol level of 0.13 g/dl in addition to the presence of cannabinoids in his system. Defendant Gaglio PR Cement Corporation (Gaglio)[2] had a contract with the City for installation of the sidewalk where this accident occurred. Defendants Elden Danielson and Bryan Warju are engineers employed by the City, involved in the design, placement, and oversight of the construction project for the sidewalk.

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[1] The parties and the record alternatively referred to this as a "guy wire" or "guide wire."

[2] Gaglio filed an appeal in this matter (Docket No. 289947), which has been closed without prejudice pending bankruptcy proceedings. *LaMeau v Royal Oak*, unpublished order of the Court of Appeals, entered April 29, 2010 (Docket Nos. 289947, 290059, and 292006).

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) serves to test the factual sufficiency of the claims. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In accordance with MCR 2.116(C)(10), the moving party is entitled to a grant of summary disposition upon a successful demonstration that no genuine issue of material fact exists. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). 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). A motion for summary disposition brought in accordance with MCR 2.116(C)(8) tests the legal sufficiency of the allegations claimed in the pleadings. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). In contrast, when deciding a motion under MCR 2.116(C)(7), a court must consider the pleadings, admissions, affidavits, and other documentary evidence within the record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists, which would necessitate the conduct of a trial. See *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999).

The issues raised by defendants concern the applicability of governmental immunity. In general, governmental agencies are deemed to be immune from tort liability for actions taken in furtherance of their governmental functions. MCL 691.1407(1). "[T]he immunity conferred upon governmental agencies is *broad,* and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). A "governmental function" has been defined to encompass "an activity . . . expressly or impliedly mandated or authorized

by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). The fact that the City's construction of a sidewalk comprises a governmental function is not in dispute.

The City is immune from liability while engaged in a governmental function, unless a statutory exception is found to be applicable. The only exception alleged to be at issue under the circumstances of this case is the highway exception, MCL 691.1402(1), which provides, in relevant part:

> Except as otherwise provided in [MCL 691.1402a], each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

Of particular relevance is the term "highway," defined in MCL 691.1401(e) as follows: "[A] public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles."

As discussed by our Supreme Court in *Buckner Estate v City of Lansing*, 480 Mich 1243, 1244 (2008): "The term 'highway' includes 'sidewalks.' MCL 691.1401(e). In order to show that a governmental agency failed to 'maintain [a] highway in reasonable repair,' a plaintiff must demonstrate that a 'defect' exists in the highway." (Citations omitted.)[3] Because the parties do not dispute jurisdic-

[3] "We treat the Supreme Court's order as binding precedent . . . ." *Gonzalez v St John Hosp & Med Ctr* (*On Reconsideration*), 275 Mich App 290, 304 n 3; 739 NW2d 392 (2007).

tion in this matter, the issue that must be resolved is whether the guy wire strung across the sidewalk comprises a "defect," as contemplated by the statute. Plaintiff contends that the guy wire was anchored into the sidewalk and thus is part of its construction and constitutes a defect. In contrast, the City argues that the guy wire is part of the utility pole owned by and under the jurisdiction of DTE, which is specifically excluded from the definition of the term "highway," pursuant to MCL 691.1401(e). As such, neither the pole nor the wire that extends from it is part of the sidewalk and, therefore, comprises an exception for purposes of immunity. In addition, the City cites MCL 691.1402a, which provides, in relevant part:

> (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.
>
> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.
>
> (2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.

Specifically, the City contends that any "defect" must be in the materials or construction actually comprising the sidewalk, which plaintiff cannot demonstrate and has not alleged. See MCL 691.1402a(2). Plaintiff responds that MCL 691.1402a(2) is not applicable because a "discontinuity defect" is not at issue. However, plaintiff contends that MCL 691.1402a(1) does impose liability.

The initial matter to be resolved is whether the term "defect" encompasses the current factual situation. Contrary to the majority's conclusion, I would find that the trial court erred by declining to award summary disposition to the City because a question of fact does not exist regarding whether the guy wire constituted a "defect." As argued by the City, the fact that pursuant to MCL 691.1401(e) "[t]he term highway does not include alleys, trees, and utility poles" leads to an implication in favor of the grant of summary disposition. "The goal of statutory interpretation is to discern and give effect to the intent of the Legislature from the statute's plain language." *Houdek v Centerville Twp*, 276 Mich App 568, 581; 741 NW2d 587 (2007). "[I]f the language of the statute is clear and unambiguous, no interpretation is necessary and the court must follow the clear wording of the statute." *American Alternative Ins Co, Inc v York*, 470 Mich 28, 30; 679 NW2d 306 (2004). The relevant statutory language specifically excludes utility poles, and it is disingenuous to suggest that any appendage extending from a utility pole should be treated as a separate or distinguishable entity.

Further, in Black's Law Dictionary (8th ed), the word "defect" is defined as "[a]n imperfection or shortcoming, esp. in a part that is essential to the operation or safety of a product." In applying this definition, our Supreme Court has explicitly restricted sidewalk defects to imperfections occurring in the walkway itself.

In *Buckner Estate*, 480 Mich at 1244, the Court stated: "Because the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a 'defect' in the sidewalk, plaintiffs have not shown that defendant violated its duty to 'maintain' the sidewalk in 'reasonable repair.' " Further buttressing the restrictive use of the term "defect" is the Court's emphasis on the meaning of the words "repair" and "maintain." Specifically:

> "Maintain" and "repair" are not technical legal terms. In common usage, "maintain" means "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." *Webster's Third New International Dictionary,* Unabridged Edition (1966), p 1362. Similarly, "repair" means "to restore to a good or sound condition after decay or damage; mend." *Random House Webster's College Dictionary* (2000), p 1119. [*Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502; 638 NW2d 396 (2002).]

This is consistent with our Supreme Court's instruction in *Nawrocki* that statutory exceptions to governmental immunity "are to be *narrowly* construed." *Nawrocki*, 463 Mich at 158. Thus, the majority's effort to expand the term "defect" to encompass the guy wire is contrary to both its plain meaning and prior caselaw.

Interpretation by our Supreme Court of the language comprising MCL 691.1402 precludes an alternative level of analysis. Specifically, MCL 691.1402(1) provides, in relevant part:

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

> *recover the damages* suffered by him or her from the governmental agency. [Emphasis added.]

Although the phrase "and in a condition reasonably safe and fit for travel" indicates the potential for the imposition of liability, our Supreme Court has determined that this phrase cannot be read or applied separately from the phrase "maintain the highway in reasonable repair." As discussed in *Nawrocki*:

> The first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state, having jurisdiction over any highway: "[to] maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." This sentence establishes the duty to keep the highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" refers to the duty to maintain and repair. The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." [*Nawrocki*, 463 Mich at 160 (citation omitted).]

Because plaintiff failed to demonstrate the existence of a "defect," as that term is defined and applied, the trial court erred by determining that a question of fact existed because both the statutory language and caselaw preclude such a determination.

The majority also implies that immunity is not available as a result of the City's decision to construct the sidewalk in the path of the guy wire, resulting in a defective design. However, this Court has recently addressed design defects and the applicability of the highway exception, noting, in relevant part:

> With respect to design defects, the Supreme Court in *Hanson v Mecosta Co Rd Comm'rs* [465 Mich at 502] held that "the highway exception does not include a duty to design,

> or to correct defects arising from the original design or construction of highways." The Court explained, "Nowhere in the statutory language is there a duty to *install*, to *construct* or to correct what may be perceived as a dangerous or defective '*design*.' [*Plunkett v Dep't of Transp*, 286 Mich App 168, 183-184; 779 NW2d 263 (2009) (citation omitted).]

Specifically:

> "[T]he focus of the highway exception is on *maintaining* what has already been built in a state of reasonable repair so as to be reasonably safe and fit for public . . . travel." The plain language of the highway exception to governmental immunity provides that the road commission has a duty to repair and maintain, *not a duty to design or redesign*. [*Id.* at 184 (citation omitted).]

Hence, the majority's implication that construction of the sidewalk in the path of the guy wire comprised a design defect precluding the applicability of governmental immunity is inconsistent with previous rulings of this Court and our Supreme Court.[4] As discussed in *Hanson*:

> What the plaintiff sought in this case was to create a duty to design, or redesign, the roadway to make it safer by eliminating points of special danger or hazard. However, there is no such design duty included in the statute. Nowhere in the statutory language are there phrases such as "known points of hazard" or "points of special danger." We emphasized in *Nawrocki* that the highway exception does not permit claims based on conditions arising from such points of hazard, and that the only permissible claims are those arising from a defect in the actual roadbed itself. [*Hanson*, 465 Mich at 503.]

Therefore, the majority's attempt to broaden the meaning of the statutory language is misplaced, given the Court's indication that a hazard is not the equivalent of a defect.

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[4] I would further contend that any distinctions between the factual circumstances of this case and *Plunkett* regarding a sidewalk versus a roadbed do not necessitate a different ruling.

With reference to the claims pertaining to Danielson and Warju, MCL 691.1407(2) delineates the circumstances permitting the invocation of governmental immunity by employees and provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

This appeal concerns the applicability of MCL 691.1407(2)(c), regarding plaintiff's assertions that the actions of Danielson and Warju constituted gross negligence and were the proximate cause of the injury, thereby establishing liability.

In determining the applicability of immunity, gross negligence is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); see, also, *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). "Simply alleging that an actor could have done more is insufficient [to establish gross negligence] under Michigan

law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Rather, gross negligence implies the existence of "a willful disregard of precautions" to address "safety and a singular disregard of substantial risks." *Id.*

Again, I cannot concur with the majority's reasoning and conclusion on this issue. While a question of fact may exist regarding whether the conduct of these defendants rose to the level of gross negligence, liability is precluded, because it cannot be reasonably concluded that their conduct could be construed as "the proximate cause of the injury or damage." Consistently with the governmental tort liability act, government employees may be held liable for grossly negligent conduct only if the alleged conduct is "the" proximate cause of the injury sustained. MCL 691.1407(2)(c). "[T]he proximate cause" is defined as "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Consequently, it is insufficient if defendants' actions comprised simply "a" proximate cause. *Tarlea*, 263 Mich App at 92. Summary disposition may be granted pursuant to MCR 2.116(C)(7) only if reasonable jurors could not find that the governmental employees were "the" proximate cause of the injuries. *Robinson*, 462 Mich at 463 (citation omitted).

Applying *Robinson* to the factual circumstances in this case, the trial court erred by failing to grant summary disposition in favor of Danielson and Warju. It cannot reasonably be disputed that their actions in designing and constructing the sidewalk to cross the guy wire and their failure to ensure movement of the obstruction in a timely manner by DTE arguably

contributed to, and initiated, a chain of events that led to the decedent's injury. Consequently, the conduct attributable to these defendants could easily be construed as having comprised "a" proximate cause of the decedent's injuries. However, their actions were not "the" proximate cause of the decedent's injuries as that phrase has been interpreted in *Robinson*. Despite Danielson's and Warju's initial actions, the decedent did not incur injury until he was traveling at night without lights or a helmet at a potentially unsafe speed while drunk and struck the guy wire, which DTE had failed to relocate, despite the utility's acknowledgement that movement of the guy wire comprised a "rush job." Hence, the decedent's own behavior, combined with that of DTE, comprised a more "direct" and "immediate" cause of the injuries incurred than the actions attributed to Danielson and Warju. Consequently, any negligence on the part of Danielson and Warju was simply too remote to overcome the grant of immunity afforded by MCL 691.1407.

CUNNINGHAM v CUNNINGHAM

Docket No. 285541. Submitted November 9, 2009, at Lansing. Decided July 13, 2010, at 9:05 a.m.

Rosemarie Cunningham brought an action in the Livingston Circuit Court seeking a divorce from James T. Cunningham. Before the parties were married, defendant had been severely injured while employed in construction work and sought benefits under the Worker's Disability Compensation Act, MCL 418.101 *et seq*. Defendant's workers' compensation claim was not resolved for many years, and the parties were married while the claim was pending. The claim was ultimately resolved five years after the parties had married. Defendant received a lifetime award of benefits and a lump-sum payment of $150,000 retroactive to the date of his injury. Defendant placed the award into the parties' joint savings account. The same year that defendant received the retroactive award, the parties purchased their second marital home using $90,000 from the retroactive award, $25,000 from the sale of their first home, and $20,000 from plaintiff's premarital retirement savings account. The remaining $60,000 of defendant's retroactive award was spent over the remaining course of the parties' marriage. In the divorce action, the parties mediated the distribution of marital property except with regard to distribution of the equity in the marital home. The court, Carol S. Reader, J., concluded that the $90,000 used from defendant's retroactive award to purchase the marital home was defendant's separate property and not subject to distribution as part of the marital estate. Plaintiff appealed.

The Court of Appeals *held*:

1. Workers' compensation benefits are marital property to the extent that they compensate for wages lost during the marriage, i.e., between the beginning and the end of the marriage. The trial court erred by failing to calculate what portion of defendant's retroactive award was marital property in light of the fact that the award included benefits for the first five years of the parties' marriage. Only that portion of defendant's retroactive award that compensated for wages lost dur-

ing the years before the parties were married could properly have been characterized as separate property.

2. Separate assets may lose their character as separate property and transform into marital property, and thus become subject to equitable division, if they are commingled with marital assets and treated by the parties as marital property. Defendant took no steps to maintain that portion of the retroactive award that was his separate property when it was awarded as separate property. Rather, he deposited the award into a joint savings account and then further commingled $90,000 of the award with some of plaintiff's funds and other joint funds in order to purchase a home with plaintiff. As a result, the $90,000 lost any separate character that it may have had, and the trial court erred by failing to include the $90,000 in the marital estate.

Reversed and remanded.

DIVORCE — PROPERTY DIVISIONS — WORKERS' COMPENSATION BENEFITS — MARITAL ASSETS — SEPARATE ASSETS — RETROACTIVE AWARDS OF WORKERS' COMPENSATION BENEFITS DURING THE MARRIAGE FOR PREMARITAL INJURIES.

Worker's compensation benefits are marital property to the extent that they compensate for wages lost during the marriage, i.e., between the beginning and the end of the marriage (MCL 552.19).

Halm, Christian & Prine, *P.C.* (by *David E. Prine*), for Rosemarie Cunningham.

Trost & Wolfer, *P.C.* (by *Richard M. Trost*), for James T. Cunningham.

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

K. F. KELLY, J. In this divorce action, we must decide whether, and to what extent, workers' compensation benefits received during a marriage are to be considered marital property. We hold that such benefits are marital property only to the extent that they compensate for wages lost during the marriage. We further conclude that the trial court erroneously awarded

defendant, as his separate property, that portion of his workers' compensation award used as part of the down payment on the parties' second marital home. We reverse and remand.

I. BASIC FACTS

The parties were married in October 1982. In November 2007, plaintiff filed for divorce. The parties mediated the distribution of marital property, except with regard to distribution of the equity in the marital home. The home, the parties' second, was purchased in part with a portion of defendant's workers' compensation award received five years into the marriage.

A. THE WORKERS' COMPENSATION AWARD

When defendant was 16, he suffered a severe and permanently disabling injury while employed in construction work. He broke his spine and became a residual paraplegic. Although his physical abilities were limited, he was able to return to work for a period of time.[1] After the injury, defendant filed a claim for benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Litigation related to the compensation claim was lengthy and, while the claim was pending, defendant married plaintiff in 1982.

The claim was ultimately resolved in 1987. Defendant received a lifetime award of benefits, paid on a monthly basis. At the time of divorce, defendant was receiving $2,850 a month. The parties used the monthly benefits to defray ongoing marital expenses. He was also awarded a lump-sum payment of $150,000 retroactive to the date of

[1] Defendant stopped working in 1998 or 1999 because his condition worsened over time.

injury (hereinafter the "retroactive award").[2] The entireretroactive award was put into the parties' joint savings account.

B. THE MARITAL HOME

The same year defendant received the retroactive award, the parties purchased the marital home that is the subject of the present litigation. The home was purchased with $90,000 from defendant's retroactive award; $25,000 in proceeds from the sale of the parties' first home, which they had purchased together when they married; and approximately $20,000 from plaintiff's premarital 401K.[3] The remaining $60,000 of the retroactive award remained in the parties' joint savings account and was spent during the rest of their 25-year marriage. At the time of the divorce proceedings, the home was valued at $252,000 and had an outstanding mortgage of approximately $56,000.

C. THE TRIAL

At trial, defendant requested that the $90,000 he contributed from the retroactive award to purchase the marital home be awarded to him as his separate property and not be included in the marital estate. Plaintiff

[2] The exact contours of the award defendant received are unclear from the record. Counsel for both parties referred to the award throughout the record as a "redemption" and, alternatively, as a retroactive award. However, whether defendant truly received a "redemption" award, as that term is used in MCL 418.835 of the WDCA, is unclear. See *Ellison v Detroit*, 196 Mich App 722, 723; 493 NW2d 523 (1992) (stating that "[r]edemption is a method of settling a case without necessarily admitting liability"). Nonetheless, it appears to be undisputed that defendant received a lump-sum award retroactive to the date of injury after years of litigation. For this reason, we simply refer to this lump-sum award as the retroactive award.

[3] Plaintiff's contribution of her premarital 401(k) to the down payment on the home is not at issue in this appeal.

countered that the entire retroactive award was properly included within the marital estate and asserted, in particular, that because $90,000 of the retroactive award had been commingled with other funds to purchase the martial home, it was part of the marital estate and subject to distribution.

At the close of the parties' proofs, the trial court awarded the marital home to defendant and ordered that he pay plaintiff $53,000.[4] It found that $90,000 of the retroactive award was defendant's separate property and not subject to distribution as part of the marital estate. The court reasoned as follows:

> [T]he injury happened when he was 16 years old. It took over ten years of litigation to get any money. It only came into the marriage, because it happened that that's when the lawsuit was settled. It has nothing to do when [sic] the injury was or anything else and it was given to him for his life, um, and for him to rely on that for life compensation.
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> * * *
>
> Well, he can spend the money however he chooses and he chose to use it for housing, okay. And she got the benefit of having the house as well. But when the money was awarded, in this case it seems, that there is a difference in the fact that he wasn't married when the incident happened at age 16 and only because it took so long in the courts did he get an award while he was married.
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[4] It is somewhat unclear how the court arrived at this figure. However, it appears the trial court subtracted the remaining mortgage amount from the total value of the marital home, then subtracted defendant's retroactive award contribution, and divided that number by two:

$252,000 - $56,000 = $196,000.

$196,000 - $90,000 = $106,000.

$106,000/2 = $53,000.

> It wasn't given to him for himself and dependents at that time, unless you can show a judgment that shows that. But I think that's a big difference in this case, because most of the ones that I read have to do with a person having compensation for themselves and their dependents and it's like that, but I don't see that in this case . . . .

This appeal followed.

II. STANDARDS OF REVIEW

In a divorce action, we review for clear error a trial court's factual findings related to the division of marital property. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005). We address questions of law de novo. *Id*.

III. WORKERS' COMPENSATION BENEFITS AND DIVORCE PROCEEDINGS

Plaintiff first argues that defendant's entire retroactive workers' compensation award is marital property subject to equitable division because it was received during the marriage. We disagree. A spouse's workers' compensation award received during the marriage is not necessarily marital property; rather, a benefit received during marriage is marital property only if it compensates for wages lost between the beginning and the end of the marriage.

A. SEPARATE VERSUS MARITAL PROPERTY

In any divorce action, a trial court must divide marital property between the parties and, in doing so, it must first determine what property is marital and what property is separate. *Reeves v Reeves*, 226 Mich App

490, 493-494; 575 NW2d 1 (1997). Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage. MCL 552.19. Once a court has determined what property is marital, the whole of which constitutes the marital estate, only then may it apportion the marital estate between the parties in a manner that is equitable in light of all the circumstances. See *Byington v Byington*, 224 Mich App 103, 110, 112-113; 568 NW2d 141 (1997). As a general principle, when the marital estate is divided "each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Reeves*, 226 Mich App at 494.

The categorization of property as marital or separate, however, is not always easily achieved. While income earned by one spouse during the duration of the marriage is generally presumed to be marital property, *Byington*, 224 Mich App at 112, there are occasions when property earned or acquired during the marriage may be deemed separate property. For example, an inheritance received by one spouse during the marriage and kept separate from marital property is separate property. *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). Similarly, proceeds received by one spouse in a personal injury lawsuit meant to compensate for pain and suffering, as opposed to lost wages, are generally considered separate property. *Washington v Washington*, 283 Mich App 667, 674; 770 NW2d 908 (2009); *Pickering*, 268 Mich App at 10. Moreover, separate assets may lose their character as separate property and transform into marital property if they are commingled with marital assets and "treated by the parties as marital property." *Pickering*, 268 Mich App at 10-12, citing *Wilson v Wilson*, 179 Mich App 519, 521, 524; 446 NW2d 496 (1989). The mere fact that property

may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital. See *Korth v Korth*, 256 Mich App 286, 292-293; 662 NW2d 111 (2003); *Reeves*, 226 Mich App at 495-496.

B. WORKERS' COMPENSATION BENEFITS AS MARITAL PROPERTY

The pertinent question in this appeal is whether, and to what extent, defendant's workers' compensation benefits are marital property, subject to division. While the distinction between separate and marital property has been well established, see *Charlton v Charlton*, 397 Mich 84, 93-94; 243 NW2d 261 (1976), the law regarding the division of a workers' compensation award in divorce actions when the injury occurred before the marriage has not been addressed.

"[T]he purpose of the WDCA is to compensate employees for work-related injuries." *Sweatt v Dep't of Corrections*, 468 Mich 172, 189; 661 NW2d 201 (2003) (opinion by MARKMAN, J.). As our Supreme Court has stated:

> The act was originally adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, not only the expense of the hospital and medical bills of the injured employee, but place upon it the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of time he is incapacitated from work. This was the express intent of the legislature in adopting this law. [*Lahti v Fosterling*, 357 Mich 578, 585; 99 NW2d 490 (1959).]

See also *Totten v Detroit Aluminum & Brass Corp*, 344 Mich 414, 418; 73 NW2d 882 (1955) (construing the act as " 'providing that as against the employer[,] the injured employee and his dependents have no rights

and can enforce no liability except those provided in the act' ") (citation omitted); *Evans v Evans*, 98 Mich App 328, 330; 296 NW2d 248 (1980) (construing the act as benefiting both employees and their dependents). Thus, under the act, a disabled worker is entitled to receive 80 percent of his or her after-tax average weekly wage. MCL 418.351(1); *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 469; 673 NW2d 95 (2003). In effect, this benefit provides a disabled worker with earnings that substitute for the earnings the worker would have made had he or she not been disabled. Significantly, the WDCA does not explicitly exempt these "substitute" earnings from being considered marital property subject to division in a divorce proceeding.

Using the rationale that the WDCA is meant to assist the worker and the worker's dependents, this Court has previously held that workers' compensation benefits received during the marriage are to be considered marital assets. This Court first addressed the issue in *Evans*. In that case, two months after the plaintiff filed for divorce, he was injured at his employment. Several years later, but before the divorce was finalized, he received a workers' compensation award of accrued benefits. *Evans*, 98 Mich App at 329. The trial court determined that the award was marital property and awarded the plaintiff a 1/2 interest in the benefits. *Id*. This Court affirmed, holding that "[s]ince the Worker's Disability Compensation Act was enacted to assist both the worker and his dependents, *i.e*., his spouse, we conclude that such benefits received during the course of the marriage should be considered a marital asset." *Id*. at 330.

Two years after *Evans* was decided, this Court addressed the question whether a workers' compensation claim is properly characterized as a marital asset in

Smith v Smith, 113 Mich App 148, 150-151; 317 NW2d 324 (1982). In *Smith*, the plaintiff's work-related injury occurred during the marriage. *Id.* at 151. The employer made a redemption offer, also during the marriage, but the plaintiff rejected it as too low. *Id*. The divorce was finalized before the plaintiff was granted an award. *Id*. The trial court classified the plaintiff's workers' compensation claim as a marital asset, and this Court affirmed, again reasoning that "[s]ince the Worker's Disability Compensation Act was promulgated to assist both the worker and her spouse, the trial court did not err when it included the compensation as part of the marital assets." *Id*. at 151. The Court noted that should the workers' compensation award be less than anticipated, the plaintiff could move to modify the divorce settlement. *Id*. at 151 n 1. In effect, the *Smith* Court concluded that a prospective award for an injury that occurred during the marriage could be classified as marital property.

No cases since *Evans* and *Smith* have substantively addressed the classification of workers' compensation benefits in divorce proceedings.[5] While we agree with the holdings of these cases in light of their particular facts, they fail to resolve the question in this case in which the injury occurred before the marriage but a

[5] A more recent decision of this Court, *Lee v Lee*, 191 Mich App 73, 78-79; 477 NW2d 429 (1991), indicated that the trial court properly characterized a workers' compensation benefit received during the marriage as marital property. There, the plaintiff's injury and her receipt of the workers' compensation award both occurred during the marriage. The central holding of *Lee*, however, was that the length of the parties' marriage does not relieve a trial court of its duty to classify property as separate or marital property. *Id*. at 78. Thus, no substantive analysis was devoted to the issue of characterizing workers' compensation benefits; rather, the *Lee* Court, citing *Smith*, 113 Mich App at 150-151, as support, merely indicated that the trial court did not err by categorizing the award as marital property.

retroactive award was received during the marriage. However, we find these cases' rationales for concluding that workers' compensation benefits are marital property to be persuasive and adopt the same reasoning here. "It would indeed be a [strange] inversion of statutory construction to hold that an act passed for the benefit of a workman *and his dependents* places the amounts paid under an award of the commission beyond the reach of the dependents it is supposed to help support." *Petrie v Petrie*, 41 Mich App 80, 83; 199 NW2d 673 (1972).

Moreover, we believe an additional consideration, separate from the purpose of the WDCA, supports the conclusion that workers' compensation awards may be classified as marital property: Workers' compensation benefits received by a spouse are synonymous with a spouse's earnings, and a spouse's earnings accrued during the course of a marriage are presumed to be marital property. See *Byington*, 224 Mich App at 112. This rationale recognizes that the authority to equitably divide marital property, and to classify property as separate or marital, derives not from the WDCA, but from the statutes controlling divorce proceedings. MCL 552.1 *et seq*.; see *Charlton*, 397 Mich at 92. Given the fact that workers' compensation benefits are akin to earnings, there can be no question that an award of benefits may be considered marital property under certain circumstances. Indeed, the statute directs that "[t]he trial court should include all property that came 'to either party by reason of the marriage' as part of the marital estate." *Pickering*, 268 Mich App at 12, citing MCL 552.19.

Absent from the jurisprudence on the issue is whether a workers' compensation award that is retroactive to the date of an injury that preceded the

marriage but was received during the marriage is properly classified as a marital asset. Because a spouse's earnings are classified as marital property only between the beginning and end of the marriage, see *Bone v Bone*, 148 Mich App 834, 837-838; 385 NW2d 706 (1986), we hold that workers' compensation benefits are to be considered marital property only to the extent that they compensate for wages lost *during* the marriage, i.e., between the beginning and the end of the marriage. Any workers' compensation benefits awarded for periods before the marriage or after its dissolution are akin to a party's individual earnings and are to be considered separate property because those earnings fall outside the beginning and the end of the marriage. It is not difficult to imagine factual circumstances in which a spouse would receive workers' compensation benefits during the marriage covering a period before the marriage. Such benefits would not be classified as marital property, but as separate property. A court could, however, invade that property in appropriate circumstances. See MCL 552.23 and MCL 552.401.

C. DEFENDANT'S RETROACTIVE BENEFIT AWARD

In this case, the trial court erred by finding that the retroactive award was defendant's separate property. It never calculated what portion of the award would have theoretically been defendant's separate property. Instead, it found that the entire retroactive award constituted defendant's property, despite the fact that the award included benefits for the first five years of the parties' marriage. Because a workers' compensation award for lost wages is marital property if it compensates for wages lost *during* the marriage, only that portion of defendant's retroactive award that compensated for wages lost *before* the marriage, i.e., from 1976

to October 1982, was properly characterized as separate property. Accordingly, when defendant received the $150,000 retroactive award five years into the marriage, only the portion of it compensating for wages lost before the parties' marriage could have potentially been considered his separate property.

IV. MARITAL HOME

Plaintiff next argues that the trial court erred by finding that the portion of the retroactive award used to purchase the marital home was defendant's separate property. In particular, plaintiff asserts that the $90,000 portion of the retroactive award lost its character as separate property when it was deposited in a joint account and used, along with other marital funds, to purchase the marital home.[6] We agree.

Five years after the parties married, defendant received a lifetime workers' compensation award, as well as a $150,000 lump-sum award retroactive to the date of injury. At that point, the portion of the funds that compensated defendant for wages lost before the marriage was defendant's separate property. However, defendant took no steps to maintain those funds as his individual property. Rather, he deposited those funds in a joint account in which both parties regularly deposited funds from their own earnings. Thereafter, he commingled $90,000 of the retroactive award with funds from plaintiff's premarital retirement account, as well as with the proceeds from the sale of the parties' previous marital home, which had been purchased with both parties' savings. These monies were used to jointly purchase the marital home, which the parties continued

[6] The parties do not dispute that the remaining $60,000 of the retroactive award used for various expenses over the course of the marriage cannot be returned to defendant.

to live in for the duration of their marriage, approximately 20 years. Although the award of workers' compensation benefits derived from litigation predating the parties' marriage, and a portion of it is theoretically traceable as defendant's separate property, defendant's actions after receiving the funds established that he intended to contribute $90,000 of those funds to the marital purpose of acquiring a new home.

Defendant relies on *Reeves* to argue that separate property that has been commingled to purchase property is properly considered a separate asset and must be returned to a party upon divorce. His reliance is misplaced. In *Reeves*, the defendant had purchased numerous properties using his own funds before the parties' marriage and, after the parties married, he continued to make all payments on those properties using his own funds. *Reeves*, 226 Mich App at 492. After three years of marriage the parties divorced. On appeal, this Court determined that the individual funds defendant used to purchase the properties before the marriage were his separate property not to be included in the marital estate. *Id*. at 492-493, 495-497.

In this case, unlike in *Reeves*, defendant and plaintiff jointly purchased the marital home by combining their separate funds (assuming a portion of the $90,000 from the retroactive award consisted of defendant's premarital lost wages) as well as some of their joint funds, for the down payment. Moreover, and perhaps most significantly, defendant, unlike the defendant in *Reeves*, did not purchase the marital home individually and with solely his own funds *before* the parties' marriage. Nor was the entire down payment on the home provided solely from defendant. Rather, the parties in the instant case were already married at the time of purchase, purchased the home from their combined resources,

and continued to live in the marital home for nearly 20 years. The fact that the monies defendant used derived from litigation predating the marriage is irrelevant. The bottom line remains that defendant, during his marriage to plaintiff, commingled his theoretically separate funds with marital funds and some of plaintiff's separate funds to jointly accomplish the marital goal of purchasing a home. The actions and course of conduct taken by the parties are the clearest indicia of whether property is treated or considered as marital, rather than separate, property. On this record, there is no evidence from which to conclude that defendant considered the funds his separate property or that it retained its separate character. Thus, *Reeves* does not dictate the conclusion that the $90,000 should be excluded from the marital estate. Rather, because defendant commingled those monies with marital funds and with plaintiff's separate funds to purchase the marital home, it lost any separate character it may have had and should have been included in the marital estate. See *Pickering*, 268 Mich App at 12-13. The trial court erred by finding that defendant's $90,000 portion of the down payment constituted separate property and by excluding it from the marital estate.

V. CONCLUSION

Workers' compensation awards received during a marriage are not necessarily marital property for purposes of a divorce proceeding. Rather, courts must determine what, if any, portion of the award compensates for wages lost during the marriage. Workers' compensation benefits are to be considered marital property to the extent that they compensate for wages lost during the marriage. See MCL 552.19.

In this case, however, while the pre-marriage portion of defendant's retroactive award was initially defendant's separate property, the trial court failed to recognize that those funds lost any separate character they may have had as a result of the parties' course of conduct with respect to the award. Therefore, on remand, the trial court must consider the $90,000 defendant contributed to the purchase of the home as part of the marital estate. Further, after recognizing the parties' separate estates and the marital estate, the court may consider whether invasion of either party's separate assets is appropriate. See MCL 552.23 and MCL 552.401. The court may hold additional hearings and receive additional exhibits and testimony as, in its discretion, it deems necessary.

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

DOE v DOE (ON REMAND)

Docket No. 285655. Submitted May 21, 2010, at Lansing. Decided July 13, 2010, at 9:10 a.m.

John Doe, individually, and Jane Doe, a minor, by her next friend, John Doe, brought an action in the Wayne Circuit Court against John Doe I (Matt DeFillippo), Henry Ford Hospital, Henry Ford Health System, Inc., John Doe II (Timothy O'Connell), and Superior Ambulance Service, seeking damages resulting from the sexual abuse of Jane Doe by DeFillippo while she was being transported in an ambulance driven by O'Connell. Both DeFillippo and O'Connell were emergency medical technicians. DeFillippo had pleaded guilty to a charge of third-degree criminal sexual conduct and was incarcerated at the time the litigation was initiated. The court, Michael F. Sapala, J., entered an order dismissing DeFillippo from the litigation because plaintiffs had failed to serve him notice of the action. Defendants filed a motion, seeking, in part, summary disposition of plaintiffs' claim of liability premised on a failure to report child abuse in accordance with MCL 722.623. The court denied summary disposition with regard to that claim. Superior Ambulance and O'Connell sought leave to appeal that order. The Court of Appeals granted leave to appeal in an unpublished order, entered October 23, 2008 (Docket No. 285655). The Court of Appeals, O'CONNELL, P.J., and TALBOT, J. (STEPHENS, J., dissenting), affirmed in part, reversed in part, and remanded the matter to the trial court for further proceedings, holding, in part, that the trial court did not err by determining that a genuine issue of material fact existed regarding whether O'Connell breached a duty imposed under MCL 722.623. Unpublished opinion per curiam, issued September 17, 2009 (Docket No. 285655). Plaintiffs sought leave to appeal in the Supreme Court, and Superior Ambulance and O'Connell sought leave to appeal as cross-appellants. The Supreme Court denied plaintiffs' application, vacated that part of the Court of Appeals' judgment concerning the reporting requirements under the Child Protection Law, MCL 722.621 *et seq*., and remanded the case to the Court of Appeals for reconsideration of the reporting requirements under MCL 722.623(1)(a) and the effects of MCL 722.622(f), (t), and (u) on those requirements in this case. In all other respects, Superior

Ambulance and O'Connell's application for leave to appeal as cross-appellants was denied. 486 Mich 851 (2010).

On remand, the Court of Appeals *held*:

The reporting requirements of MCL 722.623 are specifically limited in accordance with the meanings attributed to the terms "child abuse," "person responsible for the child's health or welfare," and "nonparent adult" provided in MCL 722.622(f), (u), and (t). MCL 722.623(1)(a) mandates the reporting of suspected child abuse to Children's Protective Services by various enumerated professional disciplines only if the perpetrator of the abuse is the parent, legal guardian, teacher, teacher's aide, clergyman, "or any other person responsible for the child's health or welfare," including a "nonparent adult," as those terms are defined by MCL 722.622(u) and (t). The imposition of a duty to report suspected child abuse is based not on the occurrence of such abuse, but on the type of relationship the alleged perpetrator had with the minor child. The statutory definitions encompassing the term "child abuse" precluded the imposition of a reporting requirement on defendants under the factual circumstances of this case. The trial court's denial of defendants' motion for summary disposition regarding the failure to report the suspected abuse in accordance with MCL 722.623(1)(a) must be reversed.

Reversed.

CRIMINAL LAW — CHILD PROTECTION LAW — CHILD ABUSE — REPORTING REQUIREMENTS.

The purpose of the Child Protection Law is, in part, to require the reporting of child abuse and neglect by certain persons; the act requires the reporting of suspected child abuse to Children's Protective Services by various enumerated professional disciplines only if the perpetrator is the parent, legal guardian, teacher, teacher's aide, clergyman, "or any other person responsible for the child's health or welfare," including a "nonparent adult," as those terms are defined in the act; the duty to report is based not on the occurrence of such abuse, but on the type of relationship the alleged perpetrator had with the minor child (MCL 722.622[f],[t], and [u]; MCL 722.623[1][a]).

Fieger, Fieger, Kenney, Johnson, and Giroux, P.C. (by *Victor S. Valenti*), for John Doe and Jane Doe.

Cardelli, Lanfear & Buikema, P.C. (by *Anthony F. Caffrey III*), and *Williams, Montgomery & John, Ltd.*

(by *Alyssa M. Reiter*), for Timothy O' Connell and Superior Ambulance Service.

ON REMAND

Before: O'CONNELL, P.J., and TALBOT and STEPHENS, JJ.

TALBOT, J. This case returns to this Court on remand from our Supreme Court "for reconsideration of the reporting requirements under the Child Protection Law, MCL 722.623(1)(a), and the effects of MCL 722.622(f), (t), and (u) on those requirements in this case." *Doe v Doe*, 486 Mich 851 (2010). After such consideration, we reverse the trial court's denial of defendants' motion for summary disposition[1] of plaintiffs' claim of liability premised on a failure to report child abuse in accordance with MCL 722.623.

To provide context, a brief summary of the factual circumstances is provided. This case involved the transport by ambulance of a minor female by two emergency medical technicians (EMTs) to a psychiatric facility following her attempted suicide and stabilization at a general hospital. The driver of the ambulance was Timothy O'Connell. The other EMT involved in the transport was Matt DeFillippo, who traveled in the rear of the ambulance with the minor and sexually molested her. The question on remand is whether O'Connell breached a statutory duty, given his suspicions that DeFillippo was engaged in improper and illicit physical contact with the minor, to report the incident of abuse in accordance with MCL 722.623. Although O'Connell did contact his supervisor while en route to seek instruction because of his suspicions and concerns regard-

[1] As used in this opinion, "defendants" refers to defendants Timothy O'Connell and Superior Ambulance Service.

ing his partner's behavior, resulting in a police investigation and charges brought against DeFillippo, plaintiff contends that defendants also had a duty to report the abuse in accordance with the strictures of the Child Protection Law (CPL), MCL 722.621 *et seq*.

We review de novo a trial court's decision to grant or deny summary disposition. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). Similarly, "[t]he proper interpretation of a statutory provision is a question of law that this Court reviews de novo." *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007). Because "[t]he primary goal of statutory interpretation is to give effect to the intent of the Legislature," the "first step is to review the language of the statute." *Id.* "If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *Id.*

The language of MCL 722.623 is clear and unambiguous in mandating that EMTs report child abuse to Children's Protective Services. Specifically, MCL 722.623(1) provides, in relevant part:

> *An individual is required to report* under this act as follows:
>
> (a) A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, *person licensed to provide emergency medical care*, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker, registered social service technician, social service technician, a person employed in a professional capacity in any office of the friend of the court, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider *who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone*

> *or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department*. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act. [Emphasis added.]

While a reporting mandate appears to exist under the language of MCL 722.623, this requirement is limited by MCL 722.622, which provides definitions for some terms "[a]s used in this act[.]"

The term "child abuse" is defined in MCL 722.622(f) as

> harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any *other person responsible for the child's health or welfare* or by a teacher, a teacher's aide, or a member of the clergy. [Emphasis added.]

In turn, a "person responsible for the child's health or welfare" is defined in MCL 722.622(u) as encompassing

> a parent, legal guardian, person 18 years of age or older who resides for any length of time in the same home in which the child resides, or, except when used in [MCL 722.627(2)(e) or MCL 722.628(8)], *nonparent adult*; or an owner, operator, volunteer, or employee of 1 or more of the following:
>
> (*i*) A licensed or registered child care organization.
>
> (*ii*) A licensed or unlicensed adult foster care family home or adult foster care small group home . . . . [Emphasis added.]

A "nonparent adult" is defined in MCL 722.622(t) to mean

> a person who is 18 years of age or older and who, regardless of the person's domicile, meets *all of the following criteria* in relation to a child:

(*i*) Has substantial and regular contact with the child.

(*ii*) Has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare.

(*iii*) Is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree. [Emphasis added.]

Consequently, the statutory definitions specifically limit the reporting requirements of MCL 722.623 in accordance with the meanings attributed to the terms "child abuse," "person responsible for the child's health or welfare," and "nonparent adult." On the basis of these restrictive definitions, MCL 722.623(1)(a) mandates reporting of suspected child abuse to Children's Protective Services by the enumerated professional disciplines only if the perpetrator of the abuse has a very specific relationship with the minor child. Specifically, MCL 722.623(1)(a) requires reporting of suspected child abuse only if the perpetrator is the parent, legal guardian, teacher, teacher's aide, clergyman, "or any other person responsible for the child's health or welfare," including a "nonparent adult," as those terms are defined by MCL 722.622(u) and (t). In other words, the imposition of a duty to report suspected child abuse to Children's Protective Services is based not on the occurrence of such abuse, but on the type of relationship the alleged perpetrator has with the minor child. While such an outcome would seem to be contrary to the normal usage or understanding of such phrases and to the mandatory nature of MCL 722.623(1)(a), the statutory definitions encompassing the term "child abuse" preclude the imposition of a reporting requirement on defendants under the factual circumstances of this case.

To explain this apparent discrepancy, we examine both the stated purpose of the CPL and a previous

decision by another panel of this Court. The CPL indicates its purpose as follows:

> An act to require the reporting of child abuse and neglect *by certain persons*; to permit the reporting of child abuse and neglect by all persons; *to provide for the protection of children who are abused or neglected*; to authorize limited detainment in protective custody; to authorize medical examinations . . . . [Title of 1975 PA 238 (emphasis added).]

In *People v Beardsley*, 263 Mich App 408, 413-414; 688 NW2d 304 (2004), a different panel of this Court reconciled the purpose of the act with its definitional limitations, stating, in relevant part:

> This Court must give effect to the interpretation that accomplishes the statute's purpose. The preamble to the CPL states that the purpose of the CPL is, in part, "to require the reporting of child abuse and neglect by certain persons." The statute's definition of "child abuse," which identifies parents and others responsible for a child's health and welfare, reflects the statute's purpose of protecting children in situations where abuse and neglect frequently go unreported, i.e., when perpetrated by family members or others with control over the child. Hence, reports are required to be made to the [Family Independence Agency] rather than to the police, which would be the appropriate agency to contact in the case of sexual abuse involving a person without any familial contacts or other authority over the child. Typically, parents, teachers, and others who are responsible for the health and welfare of a child will be the first to report instances of child abuse by unrelated third parties. This act is designed to protect children when the persons who normally do the reporting are actually the persons responsible for the abuse, and thus unlikely to report it. [Citation omitted.]

By way of this ruling, we wish to emphasize that the absence of a statutory duty under MCL 722.623(1)(a) to report this wrongdoing to Children's Protective Ser-

vices does not affect the propriety or alleviate the moral obligation of contacting law enforcement personnel to seek an investigation of such reprehensible criminal conduct.[2]

Thus, on the basis of the limiting language of the statutory definitions, we reverse the trial court's denial of defendants' motion for summary disposition regarding the failure to report the suspected abuse in accordance with MCL 722.623(1)(a).

Reversed.

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[2] We note that in the present case a report was made to the police and charges were filed against defendant DeFillippo. DeFillippo pleaded guilty with regard to a charge of third-degree criminal sexual conduct before this action was filed.

DEPARTMENT OF TRANSPORTATION v GILLING

Docket Nos. 285369 and 287552. Submitted September 9, 2009, at Lansing. Decided July 15, 2010, at 9:00 a.m.

The Department of Transportation brought a condemnation action in the Lapeer Circuit Court against Lawrence P. Gilling and others, seeking to acquire a multiacre parcel on highway M-24 as part of a road-widening project. The parcel was owned by the Gilling family and two corporate entities and was used to operate a retail nursery and landscaping businesses. After the condemnation action was filed, defendants moved their businesses to an interim, leased site. In a separate administrative proceeding under the act concerning relocation assistance for persons displaced by acquisition of property for highways, MCL 252.141 *et seq*., plaintiff reimbursed defendants approximately $147,000 for moving and relocation expenses for the move to the interim site. Two years after plaintiff filed the condemnation action, defendants purchased a new site and moved their businesses there. In the condemnation action, defendants asserted that they were entitled to compensation for business-interruption damages, including the costs and expenses of relocating their businesses from the interim site to the new location. Plaintiff argued that under MCL 252.143, reimbursement for moving and relocation expenses was only available through administrative proceedings and, thus, defendants were not permitted to claim moving and relocation expenses in the condemnation action. The court, Michael P. Higgins, J., disagreed with plaintiff, concluding that administrative-reimbursement proceedings constitute a supplementary scheme for the recovery of moving and relocation expenses not otherwise fully compensable under state condemnation law and that defendants could present evidence of their moving and relocation expenses in the condemnation action as long as those expenses were not duplicative of claims that had already been reimbursed. During the trial, defendants moved to exclude the testimony of a real estate broker who was prepared to testify that defendants' new location was available for sale before, during, and after defendants' move to the interim site. Plaintiff argued that this evidence was relevant to the jury's determina-

tion of just compensation because it indicated that defendants had failed to mitigate their damages. The trial court granted defendants' motion and excluded the evidence, determining that it was only collateral to the issue of just compensation. While the trial was ongoing, the parties agreed to a just-compensation award of approximately $736,000 for defendants' building, fixtures, and some site improvements. The jury awarded defendants an additional $585,000 for the taking of their land and $519,550 that included their moving and relocation expenses. Plaintiff appealed, challenging the award of moving and relocation expenses (Docket No. 285369). The circuit court subsequently awarded defendants attorney fees and expert witness fees. Plaintiff also appealed the award of those fees (Docket No. 287552). The appeals were consolidated.

The Court of Appeals *held*:

1. Just compensation includes business-interruption damages. Claims for business-interruption damages may include actual moving and relocation expenses, but do not include lost profits resulting from a business interruption. Thus, defendants could properly seek reimbursement for their business-interruption damages, including moving and relocation expenses, in the condemnation action.

2. The cost of moving fixtures, including trade fixtures, may be included in an award for business-interruption damages. An item is a trade fixture if it is constructively annexed to the property because it is intended to be permanent, would lose value if removed from the property, and enables and is essential to the business. Defendants' nursery stock was not a trade fixture. Rather, it was the product of defendants' businesses. The nursery stock was intended to be sold, and its removal from the property did not impair its value or the value of the property. The trial court erred by allowing defendants to recover for the cost of moving their nursery stock because the losses arising from the relocation of the nursery stock were noncompensable lost profits.

3. The administrative-recovery statutes, MCL 252.141 *et seq*., MCL 213.321 *et seq*., and MCL 213.351 *et seq*., supplement, rather than supplant, a property owner's constitutional right to receive just compensation for moving and relocation expenses as part of a business interruption.

4. The trial court abused its discretion by excluding the evidence concerning the availability of defendants' permanent site when they moved to the interim site. The evidence was central to the issue of just compensation, and plaintiff should have the opportunity to show that at least some of defendants' moving expense was unnecessary and argue that defendants may have

failed to mitigate their damages. Failure to grant a new trial would be inconsistent with substantial justice.

Affirmed in part, reversed in part, and remanded.

1. EMINENT DOMAIN — JUST COMPENSATION — BUSINESS-INTERRUPTION DAMAGES — MOVING AND RELOCATION EXPENSES — ADMINISTRATIVE RECOVERY.

Just compensation for the taking of property includes business-interruption damages; business-interruption damages may include moving and relocation expenses, but do not include lost profits resulting from a business interruption (MCL 213.51 *et seq*.).

2. EMINENT DOMAIN — JUST COMPENSATION — BUSINESS-INTERRUPTION DAMAGES — MOVING AND RELOCATION EXPENSES — FIXTURES — TRADE FIXTURES.

The cost of moving fixtures, including trade fixtures, may be included in an award for business-interruption damages; an item is a trade fixture if it is constructively annexed to the property because it is intended to be permanent, would lose value if removed from the property, and enables and is essential to the business.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Ronald W. Emery*, Assistant Attorney General, for plaintiff.

Steinhardt Pesick & Cohen, PC (by *H. Adam Cohen*, *Jerome P. Pesick*, and *Jason C. Long*), for defendants.

Before: SAAD P.J., and WHITBECK and ZAHRA, JJ.

SAAD, P.J. These consolidated appeals arise out of a condemnation proceeding brought by plaintiff, the Michigan Department of Transportation (MDOT), to acquire a multiacre parcel located on highway M-24 (also known as Lapeer Road) in Lapeer County as part of a road-widening project. In Docket No. 285369, MDOT appeals the trial court's judgment on the jury verdict in favor of defendants, Lawrence P. Gilling, Margaret Gilling, Stephen L. Gilling, Donna Gilling, Robert L. Gilling, Connie Gilling, Gilling's Nursery & Landscaping, Inc., and Gilling's Ar-

tistic Landscaping, Inc. (collectively, "Gilling"). In Docket No. 287552, MDOT appeals the trial court's postjudgment order that awarded Gilling attorney fees and costs under MCL 213.66.

I. CONDEMNATION: MOVING AND RELOCATION EXPENSES[1]

The trial court ruled that business-interruption damages include moving and relocation expenses. The trial court further held that the statutorily authorized administrative-reimbursement proceedings constitute a supplementary scheme for the recovery of moving and relocation expenses not otherwise fully compensable under state condemnation law. See MCL 252.143; MCL 213.328(1); MCL 213.355. We agree in part. First, we hold that claims for business-interruption damages do not allow for lost profits, but permit recovery of moving and relocation expenses. However, although moving and relocation expenses can include expenses for moving trade fixtures, we hold that the trial court erred by classifying defendants' nursery stock as trade fixtures. We also hold that the trial court abused its discretion when it excluded key expert testimony that supported MDOT's position that Gilling was unreasonable in moving to an interim location before moving to its final destination. Finally, we hold that administrative-recovery schemes supplement rather than supplant a property owner's constitutional right to recover just compensation for moving and relocation expenses as part of a business interruption. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

II. FACTS AND PROCEEDINGS

In September 2005, MDOT filed a complaint under the Uniform Condemnation Procedures Act (UCPA),

[1] Docket No. 285369.

MCL 213.51 *et seq*., seeking to acquire a multiacre parcel that was owned by members of the Gilling family and two corporate entities and was used to operate a retail nursery and landscaping businesses. MDOT acquired the property to implement a road-widening project on M-24. Gilling did not challenge the necessity or public use supporting the taking. Therefore, the primary issue was and is the amount of just compensation to which Gilling is entitled.

In September 2005, Gilling relocated its businesses to a leased property site that Gilling found unsuitable as a permanent location. In January 2006, Gilling submitted to MDOT its claims for compensable items. Under MCL 213.55(3), if the property owner believes the good-faith written offer made for the property by MDOT under MCL 213.55(1) is inadequate, the owner may submit a written claim to MDOT that details the nature and substance of property damage caused by the taking apart from the value of the property taken and not described in the good-faith written offer. An underlying premise of Gilling's claim is its assertion that its businesses had to be relocated to an alternate site because the partial taking left only a "small, inadequate remainder[.]" MDOT reimbursed Gilling approximately $147,000 for moving and relocation expenses for the move to the interim site pursuant to this administrative proceeding.

In September 2007, Gilling purchased another site that was better suited to its purpose and relocated to the new, permanent location. In the condemnation proceedings before the trial court, Gilling claimed that it was entitled to compensation for its business-interruption damages, including the costs and expenses of relocating its businesses from the interim site to the permanent site. During Gilling's subsequent motion to exclude MDOT's business-valuation expert witness

from trial, MDOT admitted that it was statutorily required to reimburse an owner for actual moving and relocation expenses. MCL 252.143. But MDOT pointed out that it had already reimbursed Gilling approximately $147,000 for moving and relocation expenses for the move to the interim site in the administrative proceeding. MDOT argued that the types of business-interruption expenses sought by Gilling were actually moving and relocation expenses. MDOT contended that such expenses were properly sought administratively rather than in condemnation proceedings.

In response, Gilling asserted that MDOT's prior administrative payment was "totally irrelevant to MDOT's duty to appraise, and pay, [Gilling's] constitutional business interruption damages." In other words, Gilling contended that any *statutory* moving and relocation allowances did not limit a landowner's *constitutional* business-interruption damages. It asserted that "an owner's statutory moving allowance, and constitutional business interruption damages, are distinct." According to Gilling, under the UCPA, "any amounts that MDOT already paid in statutory moving costs are subtracted from the just compensation estimate for business interruption." Gilling pointed out that its business-interruption appraisal had already made an adjustment for the prior payment. Therefore, according to Gilling, it was not seeking a double payment. After reviewing the facts and proceedings, the trial court denied Gilling's motion to exclude MDOT's expert. The trial court agreed with MDOT that "relocation costs are compensable under MCL 252.143 and are not part of the condemnation proceedings," but concluded that "business interruption damages are part of these proceedings so long as they do not duplicate the relocation costs."

In a later motion in limine to prohibit MDOT from presenting issues of law to the jury, Gilling explained that its actual costs substantially exceeded MDOT's administrative payments. Therefore, Gilling contended, it was not seeking double payment. Rather, according to Gilling, it was merely seeking additional payment for its business-interruption costs caused by the need to relocate. Gilling claimed that because of the inadequacy of MDOT's just-compensation payment, Gilling was unable to initially secure a permanent location and therefore had to incur additional costs in relocating again. Gilling stated that its interim site was not appropriate for use as a permanent site because of limited frontage, poor soil, and inadequate storage. MDOT responded that Gilling was improperly attempting to " 'lump' all of [Gilling's] moving, re-establishment and relocation costs under the heading of 'Business Interruption Damages.' " Although MDOT acknowledged that some of Gilling's claimed damages could be considered business-interruption damages, it maintained that business-interruption damages did not include moving and relocation expenses.

MDOT then moved in limine to exclude all evidence of Gilling's moving and relocation expenses. It argued that MCL 252.143 specifically excludes such expenses from condemnation actions. MDOT recognized that there can be business-interruption expenses that do not involve moving or relocation, which would be compensable as just compensation in a condemnation action. But MDOT contended that any moving and relocation expenses were not compensable in that same manner. MDOT asserted that if Gilling believed that the original administrative payment was insufficient to reimburse it for the move to the interim site, then Gilling could have administratively appealed that decision. Likewise, MDOT stated that Gilling could seek administrative

payment of its moving and relocation expenses for the second move.

In a written opinion, the trial court addressed both Gilling's motion in limine to prohibit MDOT from presenting issues of law to the jury and MDOT's motion in limine to exclude all evidence of Gilling's moving and relocation expenses. According to the trial court, the primary question before it was whether Michigan's administrative procedures for claiming moving and relocation expenses were a property owner's exclusive means of obtaining reimbursement for such costs, or whether those procedures were optional and in addition to the statutory-condemnation and common-law remedies. The trial court observed that the answer to this question required interpretation of MCL 252.143, which states: "Relocation and financial assistance allowed under this act are independent of and in addition to compensation for land, buildings or property rights and shall not be the subject of consideration in condemnation proceedings."

The trial court noted that the parties agreed that a property owner could not claim damages in a condemnation proceeding that duplicated his or her administrative claims. And the trial court acknowledged that Michigan caselaw made clear that business-interruption damages are compensable in condemnation proceedings, separate from administrative proceedings, provided that damages could be proved with a reasonable degree of certainty. Therefore, according to the trial court, the issue boiled down to whether moving and relocation expenses could legitimately be part of business-interruption damages.

Noting a lack of Michigan precedent on point, the trial court examined caselaw from other jurisdictions. The trial court determined that the case that appeared most directly on point was *State ex rel Dep't of Transp v Little*,

100 P3d 707 (Okla, 2004). Indeed, after quoting the Oklahoma Supreme Court's reasoning in that case, the trial court adopted that reasoning, *id*. at 716, concluding that administrative reimbursement proceedings were " 'a *supplementary* scheme of recovery under which . . . funds can be used to reimburse a person displaced from a home, *business*, or farm by a [government] . . . project for that person's moving and related expenses where such expenses are not otherwise fully compensable under state condemnation law.' " (Emphasis added.) The trial court further noted that courts in Florida and Mississippi had reached similar conclusions. *Malone v Florida Dep't of Transp, Admin Div*, 438 So 2d 857 (Fla App, 1983), overruled in part by *Sys Components Corp v Florida Dep't of Transp*, 14 So 3d 967 (Fla, 2009); *Mississippi State Hwy Comm v Rives*, 271 So 2d 725 (Miss, 1972). Accordingly, the trial court granted Gilling's motion to prohibit MDOT from raising Gilling's failure to present its claims in the administrative proceedings and denied MDOT's motion to exclude evidence of Gilling's moving and relocation expenses, provided it did not duplicate expenses previously reimbursed.

The parties agreed on the record to a just-compensation award in the amount of approximately $736,000 for the building, fixtures, and other site improvements on the property. Therefore, the jury was only required to determine the just compensation for the land and, in keeping with the trial court's ruling, the amount to be awarded for the moving and relocation expenses. The jury awarded Gilling a total of $1,104,550: $585,000 in compensation for Gilling's land and an additional $519,550, which included compensation for Gilling's "printed materials at original location," "time and costs," "first move costs," "interim costs," "second move costs," "reestablishment costs," and "property taxes increase[.]" MDOT now appeals the trial court's judgment on the verdict.

III. MOVING AND RELOCATION EXPENSES AND JUST COMPENSATION

A. STANDARD OF REVIEW

MDOT does not challenge the $736,000 awarded as just compensation for the building, fixtures, and other site improvements on the property. Indeed, MDOT has already paid that amount to Gilling. Further, MDOT does not challenge the jury's award of $585,000 as compensation for Gilling's land. MDOT contends, however, that the trial court erred by allowing the jury to award $519,550 in moving and relocation expenses as just compensation. According to MDOT, caselaw has authorized recovery of business-interruption damages as part of just compensation. But, according to MDOT, except for detach-and-reattach expenses for fixtures, business-interruption damages do not include incidental expenses for moving personal property and other relocation expenses. MDOT argues that evidence of the indirect expenses of the taking of a business is nothing more than an attempt to recover lost profits, which Michigan courts have made clear are explicitly excluded from just compensation. MDOT states that recovery of moving and relocation expenses is statutorily provided as an administrative remedy, separate from just compensation. We review de novo questions of statutory and constitutional interpretation. *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008); *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

B. CONSTITUTIONAL JUST-COMPENSATION PRINCIPLES

1. OVERVIEW

"Private property shall not be taken for public use without just compensation therefor being first made or

secured in a manner prescribed by law." Const 1963, art 10, § 2. "[T]he goal of just compensation is to ensure that the injured party is restored, at least financially, to the same position it would have been in if the taking had not occurred." *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 578; 711 NW2d 453 (2006). " 'The constitutional provision entitling the owner of private property, taken for public use, to just compensation, has uniformly been construed to require full and adequate compensation.' " *In re Grand Haven Hwy*, 357 Mich 20, 31; 97 NW2d 748 (1959), quoting *Comm'rs of Parks & Boulevards of Detroit v Moesta*, 91 Mich 149, 154; 51 NW 903 (1892).

Gilling cites four primary cases in support of its argument that a business owner may receive business-interruption damages, including moving and relocation expenses, as constitutional just compensation. They are *Grand Rapids & I R Co v Weiden*, 70 Mich 390; 38 NW 294 (1888), *Grand Haven Hwy*, 357 Mich 20, *Detroit v Hamtramck Community Fed Credit Union*, 146 Mich App 155; 379 NW2d 405 (1985), and *State Hwy Comm v Great Lakes Express Co*, 50 Mich App 170; 213 NW2d 239 (1973). MDOT attempts to distinguish and discount these cases and argues that, except for expenses related to fixtures, incidental expenses for moving and relocation are not part of constitutionally required just compensation. Although we conclude that caselaw, including the cases on which Gilling relies, establishes that a property owner is allowed to recover moving and relocation expenses as business-interruption damages, the trial court erred by ordering MDOT to compensate Gilling for the cost of relocating nursery stock, as these expenses are properly classified as lost profits resulting from the interruption of business and not expenses caused by a business interruption.

2. *GRAND RAPIDS & I R CO v WEIDEN*

In *Weiden*, 70 Mich at 395, the Michigan Supreme Court observed that the appellant property owners were "using their property in lucrative business, in which the locality and its surroundings had some bearing on its value." Therefore, the Court concluded that the appellants were entitled to compensation for their losses that resulted from the interruption of their business in addition to the value of the property itself:

> Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. *Whatever damage is suffered, must be compensated.* Appellants are not legally bound to suffer for [the railroad's] benefit. [The railroad] *can only be authorized to oust them from their possessions by making up to them the whole of their losses*. [*Id*. (emphasis added).[2]]

The Court then reversed the jury's verdict because it failed to adequately compensate for business damages; addressing the claims of one of the appellants, the Court stated:

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[2] See also *In re Slum Clearance*, 332 Mich 485, 497; 52 NW2d 195 (1952), quoting *In re Park Site on Private Claim 16, Detroit*, 247 Mich 1, 3; 225 NW 498 (1929) (stating that "the owner of property taken may recover for interruption of business"); *Moesta*, 91 Mich at 154 (stating that in condemnation cases the remedy afforded is similar to an action in tort "in which property rights have been interfered with without the owner's assent" and that "[i]n such cases damages for the interruption of the owner's business are allowed").

> It appeared affirmatively, and without contradiction, that *the actual expenses of moving* [the] business reached within a few dollars of all that [the jury] awarded for those purposes and for his buildings and improvements. The testimony shows that the buildings and improvements were of considerable value. The verdict is not only grossly unfair, but given without any reference to uncontradicted testimony. Juries have no right to disregard facts, and follow their own caprices. There is no reasonable ground on which the verdict . . . can be sustained. [*Id.* (emphasis added).]

Therefore, *Weiden* made clear that the appellant could be compensated for the "actual expenses of moving his business," in addition to compensation for his buildings and improvements. *Id*.

3. *In re GRAND HAVEN HWY*

In *Grand Haven Hwy*, 357 Mich at 24, the appellee corporation sought damages for expenses occasioned by business interruption and the expense of relocating its machinery and equipment when the state took its manufacturing property, thereby "forcing [the corporation] to move its entire productive facility to a new location." The state highway department, however, argued that recent cases had denied recovery of losses resulting from interruption of business, thereby repudiating former cases, like *Weiden*, that had allowed such damages. *Id*. at 31, citing *In re Condemnation of Lands for Battle Creek Park Purposes*, 341 Mich 412, 422; 67 NW2d 49 (1954), *In re Slum Clearance*, 332 Mich 485, 496; 52 NW2d 195 (1952), *In re Edward J Jeffries Homes Housing Project*, 306 Mich 638; 11 NW2d 272 (1943), and *In re Park Site on Private Claim 16, Detroit*, 247 Mich 1, 3, 4; 225 NW 498 (1929). The Court then explicitly held that the cases cited by the state were

limited to repudiating recovery of lost *profits*, not any and all expenses related to business interruption:

> An examination of the . . . cases cited by [the state] discloses that this Court held that the property owner could not recover loss of profits because of damages caused by business interruption, but did not repudiate *Moesta* or *Weiden* in regards to expenses incurred by business interruption. To eliminate any doubt of this Court's position, we hold that the evidence introduced in this condemnation proceeding showing expenses occasioned by business interruption was properly introduced for consideration as to value and weight by the commissioners making the award. [*Grand Haven Hwy*, 357 Mich at 31-32.]

The *Grand Haven Hwy* Court stated that the proof of business interruptions "must not be speculative and must possess a reasonable degree of certainty." *Id*. at 32. The Court then examined the corporation's evidence regarding the costs that it incurred by having to move to a new site. *Id*. at 32-33. The Court disagreed with the state that the corporation's evidence was speculative, noting that the state's own expert had testified that the corporation's management had spent nearly a year engaging " 'in a large-scale project to appraise various means of developing the new plant required by the loss of land to the State,' " and that it had " 'carefully undertaken a program of projecting out-of-pocket costs . . . for making' " the move. *Id*. at 33. The Court then quoted a letter written by the accounting firm hired by the corporation to review its plans for moving its operations: " '[The] accompanying summary of *estimated costs of relocating* the productive facilities of [the corporation] constitutes a reasonable estimate of such costs on the basis of the various assumptions made . . . .' " *Id*. at 34 (emphasis added). By upholding an award based on estimated relocation costs, the *Grand Haven Hwy* Court made clear that a business

owner was entitled to moving and relocation expenses as just compensation as long as those expenses could be shown with a reasonable degree of certainty.

4. *DETROIT v HAMTRAMCK COMMUNITY FED CREDIT UNION*

In *Hamtramck Community Fed Credit Union*, 146 Mich App at 157, the city of Detroit condemned the defendant credit union's land, and a jury awarded the credit union $122,000 in business-interruption damages. On appeal, the city argued that the evidence supporting those damages was too speculative and conjectural. *Id*. Citing *Weiden* and *Grand Haven Hwy*, this Court noted that "[i]t has long been held that damages resulting from business interruption are compensable in condemnation cases provided the damages can be proven with a reasonable degree of certainty." *Id*. at 158. The Court then ruled that the proofs introduced to support the credit union's claim for business-interruption damages were not too speculative and conjectural. *Id*. More specifically, this Court explained that the credit union's proofs regarding their business-interruption costs included evidence that it was required to make two moves to relocate the business: once to move to a temporary trailer while a new building was being constructed and then again when it moved into the new building. *Id*. at 159-160. The manager of the credit union testified that "as a result of the double move, the credit union spent substantial sums to relocate to the trailer and then to its new permanent location. These expenses made up the bulk of the claims for business interruption damages." *Id*. at 160. This Court found "no error in the trial court's refusal to strike [the credit union's] claim for business interruption damages." *Id*. at 162-163. Therefore, by acknowledging that the credit union's moving and relocation expenses made up the *bulk* of its claims for business-interruption damages, this Court

confirmed that such costs were, in fact, properly compensable business-interruption damages.

5. *STATE HWY COMM v GREAT LAKES EXPRESS CO*

In *Great Lakes Express*, 50 Mich App at 178, the defendant trucking company sought business-interruption damages (as distinct from its claims for fixture damages), arguing that the state's partial taking frustrated a needed expansion of its terminal facilities to such an extent that it was necessary for the defendant to relocate its entire business. This Court did not resolve the issue, but simply held that "[i]t was for the jury to decide whether relocation was necessary in this situation where none of defendant's facilities had been physically damaged by the taking." *Id*. at 178-179. Therefore, this Court again impliedly recognized that moving and relocation expenses fall under the category of business-interruption damages.

6. *In re SLUM CLEARANCE*

Despite these cases, MDOT submits that in *Slum Clearance*, the Michigan Supreme Court "answered the question whether the jury should have been allowed to consider as business interruption damages, business losses arising from expenses due to efforts to relocate." MDOT contends that any attempt to seek indirect or consequential damages in the form of moving and relocation expenses is merely a disguised attempt to seek prohibited lost profits. See *Slum Clearance*, 332 Mich at 496 (concluding that the lower court "was not in error in refusing to allow the jury to consider loss of profits as the 'interruption of business' in determining compensation. Loss of profits is speculative, and not a proper element of pecuniary loss or outlay.").

However, contrary to MDOT's interpretation, the appellant in *Slum Clearance* was *not* seeking damages for its actual costs of relocating. Rather, the appellant sought *lost profits* for the time during which it was constructing and relocating to its new building. *Id*. Thus, *Slum Clearance* stands only for the established proposition that lost profits are not compensable as just compensation. *Grand Haven Hwy*, 357 Mich at 31. It does not "answer[] the question" whether a jury should be allowed to consider actual moving and relocation expenses as business-interruption damages. Contrary to MDOT's contention, lost profits are a category of claimed damages distinct from claims for business-interruption damages. Thus, we conclude that claims for business-interruption damages may include actual moving and relocation expenses, exclusive of claims for lost profits.[3]

7. *In re ACQUISITION OF LAND FOR CIVIC CTR* AND *In re CONDEMNATION OF LANDS FOR BATTLE CREEK PARK PURPOSES*

MDOT also relies on *In re Acquisition of Land For Civic Ctr*, 335 Mich 528; 56 NW2d 375 (1953), and

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[3] See *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 658; 705 NW2d 549 (2005), stating:

> Damages resulting from business interruption are compensable in condemnation cases, provided the damages can be proven with a reasonable degree of certainty. But damages related to lost profits are not recoverable in a business interruption case. *The stadium authority does not dispute that relocation costs are proper business interruption damages*. [Emphasis added; citations omitted.]

See also *Detroit v Larned Assoc*, 199 Mich App 36, 42; 501 NW2d 189 (1993), stating:

> We hold only that to the extent this case is retried on a business-interruption theory, damages for lost profits will not be allowed. With respect to the remainder of [the] testimony (e.g., that concerning rental expenses, advertising expenses, and the like), the jury was free to either accept or reject it. [Citation omitted.]

Condemnation for Battle Creek Park, 341 Mich at 422, to argue that, as opposed to expenses for moving fixtures, just compensation does not require reimbursement for the incidental expenses of moving and relocating personal property. However, we find *Acquisition of Land For Civic Ctr* distinguishable. In that case, the Court did not address the category of damages at issue in this case—business-interruption damages. Further, this Court in *Slum Clearance* established that "trade fixtures" can be distinguished from traditional fixtures that are actually attached or annexed to the land and that trade fixtures include items that might otherwise be considered personal property. *Slum Clearance*, 332 Mich at 493.

In *Slum Clearance*, the appellant electroplating business sought to recover for the cost of moving certain chemical solutions and molten metal as "part of the expense of moving its trade fixtures." *Id*. at 490. The Court acknowledged that the chemical solutions and molten metal were not actually annexed or affixed to the real property and that such attachment was "[o]bviously . . . not . . . possible." *Id*. at 493. But, the Court stated, such actual physical annexation is not a prerequisite to considering the removal of property in determining damages as trade fixtures. *Id*. The Court explained that removal of the chemical solutions and molten metal was essential to the appellant's electroplating business, and, therefore, "they must be considered as trade fixtures, constructively annexed to the real estate." *Id*.

The *Slum Clearance* Court went on to point out that, in other cases, items " 'specially adapted to the full enjoyment of the realty' " were considered as fixtures. *Id*., quoting *Detroit Trust Co v Detroit City Serv Co*, 262 Mich 14, 30; 247 NW 76 (1933). We note that in *Detroit*

Trust, 262 Mich at 29-30, for example, the Court held that an ice and fuel business's trade fixtures included "ammonia compressors, aerating equipment, boilers, motors and refrigerating units, freezing tanks, air compressors, condensers, engines, oil tanks and pumps, platform scales, scorching machines, . . . other machinery for manufacturing ice[,] . . . spare motors, parts, machinery, [and] equipment . . . ." But the *Detroit Trust* Court notably distinguished these items from horses, wagons, trucks, automobiles, office furniture and equipment, and other movable property, which "are of such a character that they can be transported from place to place without impairing their value . . . ." *Id*. at 31. And we note that in *Colton v Mich Lafayette Bldg Co*, 267 Mich 122, 127; 255 NW 433 (1934), the Court held that the trade fixtures of a company that owned an office building included "repair parts to [sic] elevator switchboard, elevator rugs, window shades, awnings, double doors and trim, base and shoe, red gum partitions, storm doors, elevator uniforms, window curtains, rubber matting, entrance mats, chain falls, Minneapolis thermostats and clock, wall case and mirror, [and] pump tanks for elevator [sic] . . . ." Despite the apparent movable quality of things like uniforms and rugs, the *Colton* Court explained that

> [t]hese articles could not be removed from the building or transported from place to place without impairing their value as well as the value of the building. This building was erected for the purpose of renting stores and offices to the public and in order to be rentable must have various articles or accessories such as those listed above. [*Id*.]

Like the *Detroit Trust* Court, the *Colton* Court went on to clarify that detached equipment and "unused supplies consisting of such articles as paper towels, soap, paint, . . . electric light bulbs, . . . pails, mops, vacuum

cleaners, ladders, [an] electric grinder, [and a] drill press" could not "be classed as fixtures or improvements but are clearly personal property." *Id*.

This body of caselaw distinguishes loss of profits resulting from damages caused by business interruption from expenses incurred by business interruption. *Grand Haven Hwy*, 357 Mich at 31-32; *Slum Clearance*, 332 Mich at 495-497. Only the latter expenses are compensable. The cost of moving trade fixtures constitutes an expense incurred as a result business interruption.

At issue here is whether the trees, bushes, and the like that make up the inventory of a nursery business are trade fixtures. We hold that they are not. A nursery might successfully argue that unattached water pumps, chemical fertilizers, and fertilizing equipment are trade fixtures because they are used to produce or maintain the products of the business, or it might establish that, in operating the business, flower display racks and freestanding counters designed for the space are trade fixtures. Those items, while not necessarily attached to the land or building, could be considered "constructively annexed" to the property because they are intended to be permanent, they would lose value if removed from the building, and they enable and are essential to the business of keeping and selling plant material. *Slum Clearance*, 332 Mich at 493-494. In contrast, Gilling's inventory of trees and bushes are the *products* of the business, they are specifically intended to be sold and removed from the property, and their removal does not impair their value or the value of the property. See *Detroit Trust*, 262 Mich at 30. This moveable inventory does not fall within the definition of a "trade fixture" under any of the aforementioned cases and, because it is more akin to personal property, Gilling was not entitled to recover for the expense of moving inventory.

The trial court should not have ruled that Gilling had the right to recover for the cost of moving inventory in the form of trees, shrubbery, etc. These plants are not trade fixtures. Any losses arising from the movement of the nursery products fall within the category of non-compensable lost profits. We hold that Gilling was entitled to just compensation for its business-interruption damages, which included actual moving and relocation expenses that could be proven with a reasonable degree of certainty,[4] but did not include expenses for the moving of nursery stock.

As discussed later, we remand for a new trial in which MDOT will have the opportunity to present expert testimony concerning the necessity of Gilling's temporary relocation to the interim site before moving to its permanent site in 2007. On remand, the trial court should exclude evidence of the cost of moving the nursery products that made up Gilling's inventory.

C. SUPPLEMENTAL ADMINISTRATIVE-RECOVERY PROVISIONS

MDOT argues that state and federal statutes exclusively govern recovery for moving and relocation expenses. But our reading of the statutory language, taken in light of the numerous condemnation cases we have previously analyzed, leads us to the conclusion that the administrative-recovery provisions supplement, rather than supplant, a property owner's constitutional right to receive just compensation for moving and relocation expenses as the result of a business interruption.

The act concerning relocation assistance for persons displaced by acquisition of property for highways pro-

[4] See *Grand Haven Hwy*, 357 Mich at 32; *Detroit/Wayne Co Stadium*, 267 Mich App at 658.

vides, "Relocation and financial assistance allowed under this act *are independent of and in addition to* compensation for land, buildings or property rights and shall not be the subject of consideration in condemnation proceedings." MCL 252.143 (emphasis added). Similarly, the relocation assistance act provides, "Financial assistance and reimbursement allowed under this act is *independent of and in addition to* compensation for land, buildings or property rights and shall not be considered in condemnation proceedings." MCL 213.328(1) (emphasis added). Additionally, the act concerning allowances for moving personal property from acquired real property provides: "Moving allowances *are independent of and in addition to* compensation for land, buildings or property rights. The cost of moving personal property is not subject to consideration in condemnation proceedings for the acquisition of land, buildings or property rights." MCL 213.355 (emphasis added).

A business owner's right to engage in and continue his or her business has long been recognized as a property right.[5] Thus, each of these statutes makes clear that, while certain moving and relocation expenses are statutorily recoverable in administrative proceedings, those supplemental allowances are "independent of and in addition to" constitutional compensation.

Indeed, as the trial court explained, cases from other jurisdictions interpreting similar administrative-

[5] See, e.g., *People v Bennett* (*After Remand*), 442 Mich 316, 329 n 17; 501 NW2d 106 (1993) (referring to "private institutions' property rights in conducting their businesses"); *Bay City v State Bd of Tax Admin*, 292 Mich 241, 259; 290 NW 395 (1940) ("The Constitution vests in every citizen the right to engage in business. Such right is a property right and is protected by the Constitution of 1908, art. 2, § 16."); *Glover v Malloska*, 238 Mich 216, 220; 213 NW 107 (1927) ("It would astound the business world to hold that an established business is barren of property rights of a pecuniary nature.").

reimbursement schemes have held that those administrative-reimbursement proceedings were "a *supplementary* scheme of recovery under which . . . funds can be used to reimburse a person displaced from a home, *business*, or farm by a [governmental] . . . project for that person's moving and related expenses where such expenses are not otherwise fully compensable under state condemnation law." *Little*, 100 P3d at 716 (emphasis added). More specifically, the Oklahoma Supreme Court explained in *Little*, 100 P3d at 716-717, that "the relocation assistance acts *are not the exclusive remedy* for reimbursement of moving and related expenses in those jurisdictions where such expenses are recoverable in a condemnation proceeding," stating that

> we find nothing in the [federal Uniform Relocation Assistance and Real Property Acquisition Act (FURA), 42 USC 4601 *et seq*.] to indicate that the administrative scheme it creates was designed to precede resort to the courts. . . . The federal regulations implementing the FURA recognize that compensation made under traditional eminent-domain principles of state law may precede the filing of a FURA claim and, when read in conjunction with [42 USC 4631(b)], implicitly acknowledge that *state law condemnation compensation may include items that would also be compensable under the provisions of the FURA*. [Emphasis added.]

Courts in Florida[6] and Mississippi[7] have reached similar conclusions.

We acknowledge that the administrative-reimbursement provisions state that *statutory* relocation and mov-

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[6] *Malone*, 438 So 2d at 861 (stating that the FURA "was intended only as a supplementary measure enabling recovery by displaced condemnees of expenses not otherwise compensable under traditional eminent domain principles of state law").

[7] *Rives*, 271 So 2d at 728 (stating that the "legislative intent as expressed in [the Relocation Assistance Program Act], when considered in its entirety, was that the Act would provide compensation for items not previously provable or recoverable as damages in an eminent domain proceeding").

ing allowances "shall not be the subject of consideration in condemnation proceedings." MCL 252.143; see also MCL 213.328(1) and MCL 213.355. But this does not mean that *constitutional* moving and relocation expenses, as business-interruption damages, may not be considered in a condemnation proceeding. As Gilling points out, "no act of the Legislature can take away what the Constitution has given." *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 374; 663 NW2d 436 (2003). Moreover, the UCPA, which "provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation," MCL 213.52(1), protects the state from property owners seeking duplicative payments for moving and relocation expenses: "A person is not entitled to a payment in connection with the acquisition of all or part of that person's property under this act if that payment would be duplicative of any grant or other payment received under any state or federal statute or regulation." MCL 213.63a.

Accordingly, we conclude that the trial court did not err by finding that the administrative schemes are not the exclusive remedy for a business owner to recover moving and relocation expenses necessitated by a taking. Michigan cases have repeatedly authorized a business owner to receive business-interruption damages, *including moving and relocation expenses*, as constitutional just compensation.

IV. EVIDENCE REGARDING PERMANENT SITE

A. STANDARD OF REVIEW

MDOT argues that even if the moving and relocation expenses were properly considered as part of just compensation, it was entitled to have just compensation

determined fairly. According to MDOT, the trial court abused its discretion by excluding MDOT's relevant evidence showing that the permanent site to which Gilling ultimately moved was available at the time that Gilling moved to the allegedly unnecessary interim site. MDOT argues that it was improperly denied the opportunity to show that the costs for the second move were avoidable and unnecessary because Gilling could have moved directly to its permanent site.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

B. THE BOWMAN TESTIMONY

MDOT asserts that the trial court abused its discretion by precluding the testimony and exhibits of Robert Bowman, a licensed real estate broker and sales agent, who was prepared to testify that Gilling's "permanent" site was available for sale before, during, and after Gilling's move to its interim site. We agree. The trial court's decision to exclude evidence about the availability of the permanent site constituted an abuse of discretion, and MDOT is entitled to a new trial on this basis.

The question whether the permanent site was available when Gilling moved to its interim site was central to the issue of just compensation. Gilling sought expenses for both the interim move and the move to the permanent site. If the permanent site was available at the time that Gilling moved to the interim site, serious doubt would be cast on the reasonableness of Gilling's

decision to temporarily relocate to the interim site before moving to the permanent site. The trial court's expressed concern that the evidence would require the jury to consider the costs and efficacy of Gilling's decision to move to a temporary site missed the point because this is precisely the kind of question the jury should have considered when deciding the extent to which MDOT was obligated to compensate Gilling. Gilling sought more than $500,000 for twice moving the business, and it was, therefore, central to MDOT's case that it have the opportunity to show that at least some of that expense was unwarranted. Moreover, the trial court's ruling deprived MDOT of a vital defense because this evidence might have persuaded the jury that Gilling failed to mitigate its damages when it rented a temporary, but ultimately unsuitable, site while a suitable, permanent location was available. Though Gilling asserts that the permanent site required renovation and rezoning, which would have made it less desirable at the time of the taking, it was for the jury to weigh that evidence against Bowman's testimony to determine how to fairly compensate Gilling for the taking.

The trial court's exclusion of Bowman's evidence substantially prejudiced MDOT's ability to present its case and to present a valid defense to the jury and, thus, undermined the jury's verdict. The trial court's exclusion of MDOT's proposed expert testimony on this vital issue was an abuse of discretion because it unjustifiably robbed MDOT of its most pertinent evidence on a key question of the trial. See *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005). Therefore, failure to grant a new trial would be inconsistent with substantial justice. MCR 2.613(A). Accordingly, we reverse and remand for a new trial to

allow MDOT to introduce expert testimony on this issue and to ensure substantial justice.[8]

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

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[8] In Docket No. 287552, MDOT challenges the trial court's postjudgment award of attorney fees. Our holding in Docket No. 285369 obviates the need to address MDOT's argument regarding the trial court's award of attorney fees.

In re DMK

Docket No. 294776. Submitted May 12, 2010, at Grand Rapids. Decided July 15, 2010, at 9:05 a.m.

A Children's Protective Services employee, in response to a complaint about the general well-being of DMK, a minor, visited the home of the child's father (respondent), accompanied by a police officer. The police officer took respondent into custody after ascertaining that an outstanding warrant authorized his arrest. The child, who resided with respondent, was left in the care of Heather Bosack, the mother of a different child of respondent. AK, the mother of DMK, had previously been substantiated as a perpetrator of child neglect and had been granted only supervised parenting time with the child. On October 4, 2007, a petition seeking temporary custody of the child by the Department of Human Services was filed in the Benzie Circuit Court, Family Division. The court, Nancy A. Kida, J., conducted a pretrial hearing on November 2, 2007. Neither respondent nor AK was present or represented by counsel. The court authorized the petition and continued the child's placement with Bosack. In December 2007, the court appointed counsel for both parents. On February 14, 2008, the court exercised jurisdiction over the child in light of AK's admission regarding several allegations in the petition. Respondent remained incarcerated at that time, and no arrangements for his participation in the hearing had been made. A dispositional hearing occurred on March 21, 2008, and a dispositional review hearing occurred in June 2008. Respondent, who was still incarcerated, did not attend either hearing in person or by telephone. Respondent participated by telephone in an August 2008 dispositional review hearing. Respondent attended a September 2009 review hearing and an October 2008 permanency planning hearing by telephone. The court thereafter authorized the department to file a termination petition. The department filed a supplemental petition in November 2008, requesting termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*) and (*ii*), (h), and (j). On April 24, 2009, AK voluntarily relinquished her parental rights to the child. A termination hearing occurred on October 7, 2009. At the conclusion of the hearing, the court terminated respondent's parental rights under MCL 712A.19b(c)(*i*) and (h) after determining that termination was in the child's best interests. Respondent appealed, alleging,

in part, that the circuit court's and the department's failure to involve him in most of the proceedings required the reversal of the order terminating his parental rights.

The Court of Appeals *held*:

1. Respondent was deprived of the opportunity to participate in all the proceedings conducted from November 2007 through July 2008 because the prosecutor, the circuit court, and respondent's counsel all failed to adhere to the procedures described in MCR 2.004(B) and (C). By the time the circuit court recognized respondent's right to participate in the proceedings, the court and the department were ready to move on to the termination hearing. Therefore, respondent missed the crucial period during which the court was called upon to evaluate the parents' efforts and decide whether reunification of the child with respondent could be achieved. Respondent suffered prejudice because he remained absent during this critical time in the child-welfare proceedings. Excluding respondent for a prolonged period of the proceedings was not harmless error.

2. The department deliberately withheld services from respondent with the circuit court's approval. A court may not terminate parental rights on the basis of circumstances and missing information directly attributable to a parent's lack of meaningful prior participation. Because of respondent's inability to participate, there was a hole in the evidence on which the circuit court based its termination decision. The circuit court's order must be reversed and the matter must be remanded to permit the department to provide the services it has neglected to provide and for further proceedings.

3. The circuit court clearly erred by allowing the prosecutor to introduce hearsay evidence to prove that MCL 712A.19b(3)(c)(*i*) warranted termination. Because the circuit court assumed jurisdiction on the basis of AK's plea admitting allegations in the original petition, the department then filed a supplemental petition, and the circuit court proceeded to consider termination of respondent's parental rights on the basis of different circumstances than those admitted by AK, the circuit court should have entertained only legally admissible evidence, as required by MCR 3.977(F).

Reversed and remanded.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Colleen Kelly*, Assistant Attorney General, for petitioner.

Law Office of Patrick Dougherty, PLC (by *Patrick A. Dougherty*), for respondent.

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM. Respondent, the biological father of the minor child involved, appeals as of right a circuit court order terminating his parental rights to the child pursuant to MCL 712A.19b(3)(c)(*i*) and (h). Because the Department of Human Services (DHS) refused to engage respondent in the child protective proceedings, the record remains entirely devoid of any evidence concerning respondent's ability to care for his child in the near future, either personally or through placement with relatives. Consequently, "a 'hole' in the evidence" precluded termination of respondent's parental rights. *In re Rood*, 483 Mich 73, 127; 763 NW2d 587 (2009) (YOUNG, J., concurring in part). We reverse and remand for further proceedings.

I. BASIC FACTS AND UNDERLYING PROCEEDINGS

On October 1, 2007, Children's Protective Services (CPS) received a complaint about "the general well being" of the minor. The child resided with respondent. The child's mother, AK, had previously been substantiated as a perpetrator of child neglect and had been granted only supervised parenting time with the child. CPS worker Michael Visel and a police officer visited respondent's home on October 1, 2007, to investigate the complaint. The officer ascertained that an outstanding warrant authorized respondent's arrest. When the officer took respondent into custody, respondent advised that Heather Bosack, the mother of another child of respondent, could care for the instant minor in his

absence. Respondent had earlier given Bosack a power of attorney authorizing her to care for the child.

Three days later, Visel filed a petition seeking temporary DHS custody of the child.[1] The petition alleged that respondent (1) was incarcerated because of an outstanding warrant, (2) was on parole for prior offenses including home invasion, unlawful use of a motor vehicle, and stealing and retaining a financial-transaction device, (3) had additional convictions of retail fraud, larceny, and domestic violence, (4) was jailed in July 2007 for alcohol and marijuana use, and (5) "is unable to care properly for [the child] due to his current incarceration, legal troubles, lack of employment, unstable housing, lack of transportation and lack of consistent progress even though many services were intact for support." The petition further averred: "Law enforcement is currently investigating a separate complaint that [respondent] sexually assaulted his three year old niece . . . . This investigation is pending."

On November 2, 2007, the circuit court conducted a pretrial hearing. Visel testified that respondent "right now . . . is in Jackson Correctional Facility awaiting a parole board violation hearing with the Department of Corrections." Neither respondent nor AK appeared at the hearing or had counsel present. The circuit court authorized the petition and continued the child's placement with Bosack. In December 2007, the circuit court appointed counsel for both parents.[2]

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[1] The petition named as respondents both respondent and AK. AK eventually relinquished her parental rights to the child and is not a party to this appeal.

[2] The circuit court appointed counsel for AK on December 7, 2007. On December 10, 2007, respondent wrote a letter to the court seeking the appointment of counsel, and the court appointed counsel for him on that date.

On February 14, 2008, the circuit court exercised jurisdiction over the child in light of AK's admission with regard to several allegations in the petition. Respondent remained incarcerated, and no arrangements had been made for his participation in the hearing. Respondent's counsel represented that respondent was "aware of the proceedings and is willing to do whatever needs to be done, although he is going to be incarcerated for the near to long-term future." Visel expressed that he would develop a parent-agency agreement and service plan for AK. A potential service plan for respondent was not mentioned by the court, respondent's counsel, or Visel. Notably, respondent's counsel also did not even propose that respondent participate in future hearings by telephone.

On March 21, 2008, a dispositional hearing occurred. Respondent was still incarcerated and no arrangements had been made to enable him to participate by telephone. The prosecutor represented that the DHS "has entered into an initial service plan with the mother." The court inquired of DHS worker Matthew Dotson whether anything in the service plan related to respondent. Dotson responded negatively, confirming that petitioner had not considered a plan for respondent "because he's still incarcerated at this time." Respondent's counsel told the court that respondent hoped that "when he gets out of prison he can get into a plan himself." Respondent also did not attend the June 2008 dispositional review hearing, either personally or by telephone. The only mention made of him was the court's observation: "So there is probable cause to believe that the legal father is [respondent]. He does have an attorney. Apparently his attorney has been getting some communication from him. And we did discuss that he could be here by telephonic presence if he requests that at future hearings."

At the next dispositional review hearing, counsel and the court discussed an "ex parte letter" respondent had mailed to the court. The letter does not appear in the circuit court record. The court announced that "based on [counsel's] statement, as well as the letter that we recently got, we're going to make sure that [respondent] has the ability to participate in the future court hearings." At the August 2008 dispositional review hearing, respondent participated by telephone. The circuit court inquired whether respondent understood "that we are not able to include you in any sort of a plan, service plan, at this time because you are still incarcerated," and respondent answered affirmatively. Respondent later advised the court that his first projected date to be released from incarceration was October 3, 2009. At the next review hearing in September 2009, virtually no mention was made of respondent, despite his presence by telephone.

In October 2008, the circuit court held a permanency planning hearing, which respondent again attended by telephone. Dotson testified that he had not offered respondent a service plan, but that respondent had previously engaged in services:

> *Q*. [*Respondent's Counsel*.] As far as prior to this case arising, are you aware of any services that [respondent] participated in or took advantage of?
>
> *A*. I believe he participated in services offered through Grand Traverse County in the past. I can't exactly say what those were right off hand but do know there's been involvement from both Grand Traverse and Benzie County with him.
>
> *Q*. And as far as his completing those, is it your understanding that he did all right as far as participation wise?
>
> *A*. Correct. I believe that's why he received custody of [the child].

> *Q*. And so at that point prior to this case arising, the department's position was that [respondent] was the proper person for [the child] to be with?
>
> *A*. Prior to our complaint or our initial complaint we received, yes.

Respondent testified that the child had lived in his care "off and on" from "the winter" of 2006 until July or August 2007. At that point, AK "signed over custody" to him, and he thereafter cared for the child. Respondent explained that the child had special needs and communicated through sign language, which respondent had helped to teach him. Respondent expressed his desire to care for the child and added, "I would be very appreciative of any kind of help [the DHS] would give and any kind of guidance that they would be able to help me with and the goals that they would set down would be more initiative for me to do the best I could do." He reiterated that he anticipated possible release from prison at the end of 2009 or in early 2010.

The court authorized the DHS to file a termination petition. The DHS filed a supplemental petition in November 2008, requesting termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*) and (*ii*), (h), and (j). On April 24, 2009, AK voluntarily relinquished her parental rights to the child.

On October 7, 2009, a termination hearing occurred. At the outset of the hearing, counsel disputed the applicability of MCR 3.977(F)(1)(b), which envisions that when considering the allegations in a supplemental termination petition, the court may order termination of parental rights only on the basis of "clear and convincing legally admissible evidence . . . ." The court ultimately ruled that it would require legally admissible evidence to prove the allegations in subdivision (h), but permitted the prosecutor to introduce any material and

relevant evidence relating to subdivision (c)(*i*). The court also took judicial notice of "the court file and documents."[3] At the conclusion of the hearing, the court terminated respondent's parental rights under MCL 712A.19b(c)(*i*) and (h) and determined that termination of respondent's parental rights would serve the child's best interests.

II. ANALYSIS

A. RESPONDENT'S PARTICIPATION

Respondent raises three issues on appeal, one of which we view as dispositive, specifically respondent's contention that the circuit court's and the DHS's failure to involve him in most of the proceedings demands a reversal of the order terminating his parental rights. The issues we address involve the application and interpretation of court rules and statutes, which we consider de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

Because the prosecutor, the court, and respondent's counsel all failed to adhere to the procedures described in MCR 2.004(B) and (C), respondent was deprived of the opportunity to participate in all proceedings conducted from November 2007 through July 2008.

> A child protective action such as this consists of a series of proceedings, including a preliminary hearing at which the court may authorize a petition for removal of a child from his home, MCL 712A.13a(2), review hearings to evaluate the child's and parents' progress, MCL 712A.19, permanency planning hearings, MCL 712A.19a, and, in some instances, a termination hearing, MCL 712A.19b. Each proceeding generally involves different issues and

[3] The court stated that it "did not rely on any past verbal evidence particularly," but did not elaborate on that statement.

> decisions by the court. Thus, *to comply with MCR 2.004, the moving party and the court must offer the parent "the opportunity to participate in" each proceeding in a child protective action*. [*Mason*, 486 Mich at 154 (emphasis added).]

By the time the circuit court recognized respondent's right to participate in these child protective proceedings, "the court and the DHS were ready to move on to the termination hearing." *Id*. at 155. As in *Mason*, respondent "missed the crucial, year-long review period during which the court was called upon to evaluate the parents' efforts and decide whether reunification of the children with their parents could be achieved." *Id*.[4]

The DHS highlights that respondent had representation by counsel at nearly all the child protective proceedings and participated in the proceedings during the year immediately preceding the termination of his rights. The DHS thus opines that respondent cannot demonstrate that his attendance at the adjudication or the subsequent hearings would have affected the outcome of the case. However, we conclude that respondent endured prejudice because he remained absent during a critical time in these child welfare proceedings. This Court recognized in *In re LaFlure*, 48 Mich App 377, 390-391; 210 NW2d 482 (1973), that the facts gathered during review hearings set the stage for the decisions that follow:

> The purpose of the review hearings provided for by the statute is to determine whether the parents of a child in the temporary custody of the court have managed to "reestablish" a fit home or are likely to do so within the near future. We do not see how such a determination may be intelli-

[4] The respondent in *Mason* did not participate for the first year of the proceedings. Here, the period of respondent's absence was nine months, but this minor distinction does not render *Mason* inapplicable.

> gently made unless the court making the determination is fully aware of the circumstances which prompted placing the child in the temporary custody of the court and of all subsequent circumstances, if any, which prompted keeping the child in the temporary custody of the court.

In this case, respondent did not appear by telephone at the adjudication, the dispositional hearing, or the first three dispositional review hearings. These initial hearings allow the parties to become familiar with the parents' abilities and deficits, the child's needs, and the efforts necessary for reunification. In a sense, the initial dispositional hearings form the cornerstones of the succeeding review hearings, the permanency planning phase, and the ultimate decision to terminate parental rights. Respondent's incarceration does not alter that; had he participated, he could have supplied the court with highly relevant information about his son's needs, the child's paternal family history, familial placement options, and the nature of the services necessary to achieve a permanency goal that would serve the child's best interests. The adjudicative and dispositional processes embodied in Michigan law and our court rules envision that early and meaningful parental participation facilitates the determination of the most beneficial permanency goal. In summary, we reject the DHS's suggestion that excluding a parent for a prolonged period of the proceedings can be considered harmless error.

B. SERVICES

The DHS deliberately withheld services from respondent, with the approval of the circuit court. The failure to offer respondent any services clearly contravenes our Supreme Court's recent decision in *Mason*. In that case, as here, the DHS had focused on attempting reunifica-

tion with the mother "and, in doing so, disregarded respondent's statutory right to be provided services[.]" *Mason*, 486 Mich at 159.[5] In *Mason*, the respondent's release from prison was "potentially imminent at the time of the termination hearing." *Id*. Here, at the termination hearing respondent's parole officer characterized as "realistic" the likelihood that respondent would be released from prison "next month." According to the Michigan Offender Tracking Information System, respondent was released from prison on November 3, 2009, less than a month after the termination hearing. The Supreme Court in *Mason* concluded as follows:

> The state failed to involve or evaluate respondent, but then terminated his rights, in part because of his failure to comply with the service plan, while giving him no opportunity to comply in the future. This constituted clear error. As we observed in *In re Rood*, a court may not terminate parental rights on the basis of "circumstances and missing information directly attributable to respondent's lack of meaningful prior participation." *In re Rood*, 483 Mich [at 119] (opinion by CORRIGAN, J.); see also *id*. at 127 (YOUNG, J., concurring in part) (stating that, as a result of the respondent's inability to participate, "there is a 'hole' in the evidence on which the trial court based its termination decision"). [*Id*. at 159-160.]

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[5] The Supreme Court in *Mason*, 486 Mich at 156, catalogued many different statutory references to the DHS's responsibility to provide parental services throughout child protective proceedings and a court's authority to modify a case service plan: MCL 712A.18f(3)(d) and (5), MCL 712A.19(6)(a) and (c), and MCL 712A.19(7)(a) and (b). The Supreme Court emphasized in *Mason*, 486 Mich at 159, that the circuit court had ignored the statutory language of MCL 712A.19a(6)(c), which envisions that a court need not order the DHS " 'to initiate proceedings to terminate parental rights' " if " '[t]he state has not provided the child's family, consistent with the time period in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts are required.' " (Emphasis omitted.)

In conclusion, because we cannot meaningfully distinguish this case from *Mason*, we reverse and remand for petitioner to provide the services that it, to this point, has neglected to supply respondent and for further proceedings.

C. EVIDENTIARY CONCERNS

Although our reversal of the circuit court's termination order on other court rule and statutory grounds renders unnecessary our consideration of additional appellate issues, we note our concern with evidentiary rulings of the circuit court that may recur on remand. At the termination hearing, the circuit court erred when it permitted the prosecutor to introduce evidence otherwise inadmissible under the Michigan Rules of Evidence.

The circuit court assumed jurisdiction on the basis of AK's plea admitting allegations in the original petition. Petitioner then filed a supplemental petition. Because the circuit court proceeded to consider termination of respondent's parental rights on the basis of different circumstances than those admitted by AK, it should have entertained only legally admissible evidence. MCR 3.977(F) instructs, in relevant part:

> Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.
>
> (1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if

> (a) the supplemental petition for termination of parental rights contains a request for termination;
>
> (b) at the hearing on the supplemental petition, the court finds *on the basis of clear and convincing legally admissible evidence* that one or more of the facts alleged in the supplemental petition:
>
> (i) are true; and
>
> (ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (i), (j), (k), (l), (m), or (n); and
>
> (c) termination of parental rights is in the child's best interests. [Emphasis added.]

"If . . . termination is sought under a supplemental petition, the court considers legally admissible evidence and must state its findings of fact and conclusions of law." *Rood*, 483 Mich at 101-102 (opinion by CORRIGAN, J.).

The circuit court ruled that it would allow the prosecutor to introduce hearsay evidence to prove that MCL 712A.19b(3)(c)(*i*) warranted termination. This ruling amounted to clear legal error. The prosecutor introduced several documents, including a report written by a social worker and another written by a parole board hearing officer, consisting of or containing inadmissible hearsay. Much of this inadmissible evidence focused on an allegation that respondent had sexually abused his niece. Notably, authorities never charged respondent with this alleged act, which he vehemently denied having committed. If proved by clear and convincing evidence, such conduct could constitute a ground for termination of respondent's parental rights. But the prosecutor made no effort to substantiate this allegation with legally admissible evidence.[6] In future

[6] Although certain police reports may qualify as admissible under MRE 803(8), the reports admitted here do not describe matters actually observed by an officer and are replete with multiple levels of inadmissible hearsay.

proceedings, we caution the circuit court to bear in mind the appropriate evidentiary standards in MCR 3.977(F).

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

PEOPLE v BRYANT

Docket No. 280073. Submitted March 4, 2009, at Detroit. Decided July 20, 2010, at 9:00 a.m.

Ramon L. Bryant was convicted by a jury in the Kent Circuit Court, H. David Soet, J., of first-degree criminal sexual conduct, armed robbery, and possession of marijuana. He appealed, arguing that he was deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community because there was only one African-American in the jury venire of 42 people. The Court of Appeals, SMOLENSKI, P.J., and SAWYER, J. (BORRELLO, J., concurring in part and dissenting in part), affirmed in part in an unpublished opinion per curiam, issued March 16, 2004 (Docket No. 241442), and remanded the case to the trial court for the sole purpose of conducting an evidentiary hearing regarding defendant's challenge to the jury venire. On remand, the trial court, Dennis C. Kolenda, J., conducted evidentiary hearings and issued an opinion that held that defendant's Sixth Amendment right to an impartial jury was not violated because African-Americans were not underrepresented in the venire from which defendant's jury was selected and that Kent County's jury-selection process, at the time of defendant's trial, did not systematically exclude African-Americans. Defendant appealed.

The Court of Appeals *held*:

1. The selection of a jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. While the fair-cross-section requirement does not entitle a defendant to a jury that mirrors the community, it guarantees an opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community.

2. To establish a prima facie violation of the Sixth Amendment fair-cross-section requirement, a defendant must show (1) that the group alleged to be excluded was a distinctive group in the community, (2) that the representation of this group in venires from which juries were selected was not fair and reasonable in

relation to the number of such persons in the community, and (3) that this underrepresentation was due to systematic exclusion of the group in the jury-selection process. Once a defendant establishes a prima facie violation, the government may overcome the right to a proper jury by proffering a significant state interest that manifestly and primarily advances those aspects of the jury-selection process that would result in the disproportionate exclusion of a distinctive group.

3. Defendant satisfied the first prong of a prima facie violation because African-Americans are a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes.

4. Although federal courts have applied three different tests, the absolute-disparity test, the comparative-disparity test, and the standard-deviation test, to measure whether representation of a distinctive group in the jury pool was fair and reasonable, and the United States Supreme Court has not specified the preferred method, the Michigan Supreme Court has concluded that no individual method should be used to the exclusion of the others and that a case-by-case approach should be employed. Therefore, provided that the parties proffer sufficient evidence, courts should consider the results of all the tests.

5. While the absolute disparity of 6.03 percent in this case did not indicate substantial underrepresentation, the Court of Appeals has previously recognized that the absolute-disparity method is of questionable usefulness when applied to a group that makes up a small percentage of the population. The absolute-disparity test did not control in this case because of the low percentage of African-Americans who were eligible to vote in Kent County.

6. The comparative-disparity method yielded a calculation that was indicative of the underrepresentation of African-Americans in defendant's venire. Between the absolute-disparity test and the comparative-disparity test, the comparative-disparity test is the most appropriate to measure underrepresentation in cases such as this in which the percentage of African-Americans in the relevant community is low. Therefore, the comparative-disparity test was the most appropriate test to measure underrepresentation in this case. Under the comparative-disparity test, defendant established that African-Americans were underrepresented on the venire from which his jury was selected.

7. The standard-deviation test is not typically used in Sixth Amendment cases, and no court in the country has accepted the test alone as determinative in Sixth Amendment challenges to

jury-selection systems. Therefore, the test had little value in measuring underrepresentation of African-Americans in Kent County jury venires.

8. Systematic exclusion is exclusion inherent in the particular jury-selection process used and is not shown by one or two incidents of disproportionate venires.

9. The underrepresentation in this case was the result of a problem with the computer program used to select jurors that existed over a significant period. Because of the problem, underrepresentation was inherent in the jury-selection process used. Although the problem did not appear to be intentional, a party need not show that the underrepresentation came as a result of intentional discrimination.

10. Defendant established a prima facie violation of the Sixth Amendment's fair-cross-section requirement under the comparative-disparity test. The prosecution failed to proffer any significant state interest that would be advanced by the errors and computer problem that resulted in the systematic underrepresentation of African-Americans in Kent County jury venires. Defendant's convictions must be reversed and the matter must be remanded for a new trial.

Reversed and remanded.

1. CONSTITUTIONAL LAW — JURY — VENIRES — FAIR CROSS SECTION OF COMMUNITY.

The selection of a jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial; while a defendant is not entitled to a jury that mirrors the community, the fair-cross-section requirement guarantees an opportunity for a representative jury by requiring that the jury wheels, pools of names, panels, or venires from which juries are drawn not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community.

2. CONSTITUTIONAL LAW — JURY — VENIRES — FAIR CROSS SECTION OF COMMUNITY — PRIMA FACIE CASE.

A prima facie showing that a jury was not selected from a fair cross section of the community is made when the defendant shows that the group alleged to be excluded was a distinctive group in the community, the representation of this group in venires from which juries were selected was not fair and reasonable in relation to the number of such persons in the community, and this underrepresentation was attributable to systematic exclusion of the group in

the jury-selection process; systematic exclusion is exclusion inherent in the particular jury-selection process utilized and is not shown by one or two incidents of disproportionate venires; once a defendant establishes a prima facie violation of the fair-cross-section requirement, the government may overcome the right to a proper jury by proffering a significant state interest that manifestly and primarily advances those aspects of the jury-selection process that would result in the disproportionate exclusion of a distinctive group.

3. CONSTITUTIONAL LAW — JURY — VENIRES — FAIR CROSS SECTION OF COMMUNITY.

The United States Supreme Court has not specified the preferred method for measuring whether representation of a distinctive group in a jury venire is fair and reasonable; courts have applied three different methods, the absolute-disparity test, the comparative-disparity test, and the standard-deviation test, but, because each test has been criticized, no individual method should be used to the exclusion of the others, and a case-by-case approach should be employed; provided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Assistant Prosecuting Attorney, for the people.

Arthur James Rubiner for defendant.

Before: JANSEN, P.J., and BORRELLO and STEPHENS, JJ.

BORRELLO, J. Defendant appeals as of right the trial court's decision on remand, which found that defendant's Sixth Amendment right to an impartial jury drawn from a fair cross section of the community was not violated because African-Americans were not underrepresented in the venire from which defendant's jury was selected and Kent County's jury-selection process, at the time of defendant's trial, did not system-

atically exclude African-Americans. For the reasons set forth in this opinion, we reverse and remand for a new trial.

I. FACTS AND PROCEDURAL HISTORY

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(e), armed robbery, MCL 750.529, and possession of marijuana, MCL 333.7403(2)(d), by a jury in the Kent Circuit Court in February 2002. He appealed, arguing, in part, that he was deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community because there was only one African-American in the jury venire of 42 people. In an unpublished opinion, we affirmed in part and remanded "for the sole purpose of conducting an evidentiary hearing regarding defendant's challenge to the jury venire." *People v Bryant*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 2004 (Docket No. 241442), p 7.

On remand, the trial court held several evidentiary hearings and issued a written opinion. The trial court rejected defendant's reliance on statistical estimates, reasoning that they were not sufficient to prove underrepresentation. The trial court made four holdings: that "defendant has failed to sustain his burden of proving that African-Americans were substantially underrepresented among the prospective jurors to whom questionnaires were mailed in 2001-2002," that "even if African-Americans were numerically underrepresented from June, 2001, through mid-Fall, 2002, among prospective jurors, defendant has failed to establish that the circumstances were such that that underrepresentation was unconstitutional as defined by the Supreme Courts of the United States and Michigan," that "even if there

was unconstitutional underrepresentation in the total number of prospective jurors, there was no underrepresentation of African-Americans in the venire from which defendant's jury was selected," and, finally, that "any underrepresentation was the product of chance, not any bias, even an innocent and accidental bias, in the jury selection process. Hence, systematic exclusion has not been proven."

Defendant appeals again, arguing that he was denied his Sixth Amendment right to be tried by an impartial jury drawn from a fair cross section of the community because there was only one African-American in the jury venire of 42 people.

II. STANDARD OF REVIEW

We review de novo questions regarding systematic exclusion of minorities from jury venires. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

III. ANALYSIS

The issue in this case is whether defendant was denied his Sixth Amendment right to be tried by an impartial jury drawn from a fair cross section of the community because there was only one African-American in the jury venire of 42 people.

The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Duncan v Louisiana*, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968). In addition, the Michigan Constitution guarantees the right to trial by jury. Const 1963, art 1, § 14. In *Taylor v Louisiana*, 419 US 522, 528; 95 S Ct 692; 42 L Ed 2d 690 (1975), the United States Supreme Court stated "that the selection of a petit jury

from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." While the "fair-cross-section requirement does not entitle the defendant to a petit jury that mirrors the community," it "guarantees an opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community." *Hubbard*, 217 Mich App at 472-473.

In *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979), the United States Supreme Court articulated the showing that a defendant must make to establish a prima facie violation of the Sixth Amendment fair-cross-section requirement:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Once a defendant establishes a prima facie violation of the fair-cross-section requirement, "the government may overcome the right to a proper jury by proffering a significant state interest that manifestly and primarily advances those aspects of the jury selection process that would result in the disproportionate exclusion of a distinctive group . . . ." *Hubbard*, 217 Mich App at 473; see also *Duren*, 439 US at 367-368.

As we observed in our previous opinion in this case, defendant satisfied the first prong of *Duren* because "African-Americans are considered a constitutionally

cognizable group for Sixth Amendment fair-cross-section purposes." *Hubbard*, 217 Mich App at 473.

The second prong of *Duren* "is satisfied where it has been shown that a distinctive group is substantially underrepresented in the jury pool." *Id.* at 474. Although it recently had the opportunity to specify the preferred method of measuring if representation of a distinctive group in the jury pool is fair and reasonable, the United States Supreme Court has not done so. See *Berghuis v Smith*, 559 US ___, ___; 130 S Ct 1382, 1393-1394; 176 L Ed 2d 249, 261 (2010) ("[W]e would have no cause to take sides today on the method or methods by which underrepresentation is appropriately measured."). In *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), our Supreme Court observed that federal courts since *Duren* have applied three different tests to measure whether representation of a distinctive group in the jury pool is fair and reasonable: the absolute-disparity test, the comparative-disparity test, and the standard-deviation test. Recognizing that all three tests are subject to criticism, our Supreme Court stated the following regarding the appropriate method to measure underrepresentation:

> We thus consider all these approaches to measuring whether representation was fair and reasonable, and conclude that no individual method should be used exclusive of the others. Accordingly, we adopt a case-by-case approach. Provided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable. [*Id.* at 204.]

Because the United States Supreme Court did not adopt a specific test to measure underrepresentation in *Berghuis*, we are bound to follow the case-by-case approach articulated by our Supreme Court in *Smith*.

On remand, there was evidence offered regarding all three tests. We will therefore address each test in turn.

The absolute-disparity test measures the difference between the percentage of the distinctive group in the population eligible for jury duty and the percentage of that group who actually appear in the venire. *Ramseur v Beyer*, 983 F2d 1215, 1231 (CA 3, 1992). This Court has previously recognized that the absolute-disparity method of measuring underrepresentation is of questionable usefulness when applied to a group that makes up a small percentage of the population, *Hubbard*, 217 Mich App at 476-477, and in this case African-Americans who were 18 years of age or older made up a small percentage of the Kent County population when defendant's jury was selected. The evidence indicated that 8.25 percent of eligible voters in Kent County were African-American. This Court has stated that an absolute disparity between 2 percent and 11.2 percent is statistically insignificant and does not constitute substantial underrepresentation. *Id.* at 475; see also *Ramseur*, 983 F2d at 1232 (disparities of 2 percent to 11.5 percent do not constitute substantial underrepresentation). Populations that fall within this percentage range can never be statistically significant because "the percentage disparity can never exceed the percentage of African Americans in the community." *United States v Rogers*, 73 F3d 774, 776-777 (CA 8, 1996). Even if the Kent County juror-selection system excluded all African-Americans from jury service, a successful Sixth Amendment fair-cross-section challenge would be impossible because the total percentage of African-American voters in the Kent County population constitutes a percentage that is less than that which is considered statistically significant for Sixth Amendment fair-cross-section purposes. See *Hubbard*, 217 Mich App at 477.

Dr. Paul Stephenson, chairman of the Department of Statistics at Grand Valley State University, calculated the absolute disparity in this case to be 6.03[1] percent; however, he observed that an analysis of absolute disparity is not a viable method of identifying or measuring underrepresentation of the African-American community in this case for the reasons already explained in this opinion. While the absolute disparity of 6.03 percent in this case does not indicate substantial underrepresentation, we conclude, like we did in *Hubbard*, "that the absolute disparity test is an ineffective measure of acceptable disparity" because of the low percentage of African-Americans who were eligible to vote in Kent County. *Id.* Thus, we decline to find the absolute-disparity test controlling in this case.

The comparative-disparity test "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." *Ramseur*, 983 F2d at 1231-1232. The diminished likelihood is calculated by dividing the absolute disparity by the percentage of the population made up by the distinctive group in question. Dr. Stephenson applied the comparative-disparity test to the venire from which defendant's jury was chosen and calculated the comparative disparity to be 73.1 percent. This means that the venire for defendant's trial had 73.1 percent fewer African-Americans than could have been expected in Kent County. In rendering his calculation, Dr. Stephenson relied on the 2000 United States Census, which indicated that 8.25 percent of the population of Kent County 18 years of age or older was African-American.

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[1] This number represents the percentage of Kent County African-American residents who were 18 years of age or older (8.25 percent) minus the percentage of African-Americans appearing in defendant's venire (2.22 percent).

In our previous opinion in this case, this Court articulated its belief that the comparative-disparity test was not controlling because of the fact that the population of African-Americans in Kent County was small and therefore a small change in the jury pool would distort the proportional representation. *Bryant*, unpub op at 3. We acknowledge the difficulties in applying this method to a group that makes up a small percentage of the population.

In choosing the appropriate test to apply in this case, we are mindful that "[e]ach test is imperfect." *Berghuis*, 559 US at ___; 130 S Ct at 1393; 176 L Ed 2d at 261. We are further cognizant that some of the concerns with applying the comparative-disparity test to a group that makes up a small percentage of the population also exist with applying the absolute-disparity test, *Hubbard*, 217 Mich App at 476-477, that courts typically apply the standard-deviation test in Fourteenth Amendment cases, but not in Sixth Amendment cases, and that no court in the country has accepted application of the standard-deviation test alone as determinative in Sixth Amendment challenges to jury-selection systems, *Smith*, 463 Mich at 204. We must apply some test to measure the representation of African-Americans in defendant's venire, and the comparative-disparity method at least yields a calculation that is indicative of the underrepresentation of African-Americans in defendant's venire. We agree with the United States Court of Appeals for the Eighth Circuit that as between the absolute- and comparative-disparity tests, the comparative-disparity test is most appropriate to measure underrepresentation in cases in which the percentage of African-Americans in the relevant community is low. *Rogers*, 73 F3d at 776-777. In *Rogers*, the Eighth Circuit opined:

> While . . . both [absolute and comparative disparity] provide a simplified statistical shorthand for a complex issue, the comparative disparity calculation provides a more meaningful measure of systematic impact *vis-a-vis* the "distinctive" group: it calculates the representation of African Americans in jury pools relative to the African-American community rather than relative to the entire population. [*Id*. at 777.]

For the reasons we have just outlined, we conclude that the comparative-disparity test is the most appropriate test to measure underrepresentation in this case.[2]

Seventy-three and one-tenth percent is a significant comparative disparity and is sufficient to demonstrate that the representation of African-Americans in the venire for defendant's trial was unfair and unreasonable. See *id.* (holding that comparative disparity of more than 30 percent satisfies the second prong of *Duren*); see also *Smith*, 463 Mich at 219 (CAVANAGH, J., concurring) (stating that comparative disparities of 40 percent have been held to be borderline). In any event, the comparative disparity in this case, 73.1 percent, is substantially higher than the 30 or 40 percent that has been deemed sufficient to demonstrate an unfair and unreasonable representation of minorities in a jury

[2] To the extent that the previous unpublished opinion in this case concluded that the comparative-disparity test is not controlling, we find that the law-of-the-case doctrine does not preclude this Court from concluding, after remand, that the comparative-disparity test is the appropriate test to measure underrepresentation under the facts of the case. First, the law-of-the-case doctrine applies only if the facts remain substantially or materially the same, *People v Phillips (After Second Remand)*, 227 Mich App 28, 32; 575 NW2d 784 (1997), and in this case the trial court conducted several evidentiary hearings on remand, which yielded significant expert testimony regarding each of the three tests. Second, the law-of-the-case doctrine does not limit an appellate court's power, but is instead a discretionary rule of practice. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007).

venire. Thus, under the comparative-disparity test, defendant has established that African-Americans were underrepresented on the venire from which his jury was selected.

On remand, there was some evidence regarding the standard-deviation test, which explains the probability that any disparity was the result of random chance. *Smith*, 463 Mich at 219 (CAVANAGH, J., concurring). Standard deviation is calculated "by multiplying the number of prospective jurors in the jury pool by the percentage of the distinct group in the population by the percentage of the population that is not in the distinct group, and then taking the square root of that product." *Id.* at 220. At one of the postremand evidentiary hearings, Dr. Chidi Chidi, an expert presented by defendant, testified that the appearance of one African-American in the venire failed the standard-deviation test. In a report that was admitted into evidence on remand, Dr. Chidi calculated the standard deviation to be 27.86. This figure is close to the standard deviation of 29 condemned in *Castaneda v Partida*, 430 US 482, 496 n 17; 97 S Ct 1272; 51 L Ed 2d 498 (1977). However, Dr. Stephenson's opinion regarding use of the standard-deviation test was that the "test uses a normal approximation of a binomial random variable. In this case, the normal approximation is not valid, and therefore, the standard deviation test is not appropriate." Furthermore, our Supreme Court has noted that the standard-deviation test is not typically used in Sixth Amendment cases and that " 'no court in the country has accepted [a standard-deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems.' " *Smith*, 463 Mich at 204, quoting *United States v Rioux*, 97 F3d 648, 655 (CA 2, 1996). For these reasons, we conclude that in this case, the standard-

deviation test has little value in measuring the underrepresentation of African-Americans in Kent County jury venires.

The third prong of *Duren* requires proof that underrepresentation of African-Americans "is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 US at 364. Systematic exclusion is exclusion "inherent in the particular jury-selection process utilized." *Id.* at 366. Systematic exclusion is not shown by one or two incidents of disproportionate venires. *Hubbard*, 217 Mich App at 481. In *Duren*, the United States Supreme Court concluded that underrepresentation of women in every weekly venire for nearly a year constituted underrepresentation that was systematic. *Id.* at 366.

In this case, there was evidence of a significant problem with the jury-selection process, and the prosecution has conceded that this problem lasted for a significant duration. The problem with the jury-selection process in Kent County was twofold. First, the Secretary of State provided Kent County with a list of 453,414 individuals who were eligible to vote in Kent County, but the information technology department of the Kent Circuit Court erroneously reduced this list to only 118,000 individuals. Second, it is not disputed that a computer program used in Kent County did not select jurors at random across all zip codes, as it was supposed to do. As a result of the problem with the computer program, jurors were overselected from zip codes with small minority populations and underselected from zip codes with large minority populations. The prosecution previously conceded that "there was indeed a problem in the jury selection process in Kent County which occurred from late 2001 to July 2002," explaining:

> "[I]n essence . . . a computer program used to select potential jurors chose a disproportionately large number of jurors from areas with lower zip codes, which had the unintended effect of selecting fewer jurors from areas of the county where African-Americans live. The assumption is that this led to an artificial shortfall of African-American jurors, though to what extent has never been determined." [*Bryant*, unpub op at 4.]

We find that the underrepresentation in this case was the result of the system by which juries in Kent County were selected because jurors from zip codes with small minority populations were routinely overselected and jurors from zip codes with large minority populations were routinely underselected as the result of a glitch or problem with the computer program that selected jurors. Given this problem with the computer program, underrepresentation was inherent in the jury-selection process used in Kent County during the time that the computer glitch existed. It is irrelevant that the problem with the computer program's failing to randomly select jurors across all zip codes does not appear to be intentional. A party need not show that the underrepresentation of a distinctive group came as a result of intentional discrimination. *Duren*, 439 US at 368 n 26.

Moreover, there was evidence that the error began in April 2001 and persisted over a period of 16 months. Terry Holtrop, the case-management manager for the Kent Circuit Court, testified that he became aware in April 2001 that there was a problem of underrepresentation of minorities on Kent County juries. Gail VanTimmeren, the jury clerk for the Kent Circuit Court, testified that it was "visually evident" that there were not enough minorities coming in for jury duty and that she had spoken to the administrator "over and over again" about this. VanTimmeren asserted that on a number of occasions, she handpicked individuals who

appeared to be African-American to be placed on a panel from which a jury would be selected. She asserted that "we significantly, in every single week, were not getting minorities in, and something was wrong."

There was also testimony and statistical evidence[3] presented by Dr. Stephenson that supports our conclusion that the underrepresentation of African-Americans on Kent County jury venires occurred over a significant period. Dr. Stephenson examined census data and determined that in the vast majority of the zip codes that were overrepresented, there were a small number of African-Americans, and that in the zip codes that were underrepresented, there were a large number of African-Americans. Furthermore, Dr. Stephenson testified that "the way that the process was performing did, in effect, over the long run, create a situation where black or African-Americans were going to be underrepresented, in my opinion, in the compilation of jury venires." Dr. Stephenson also provided data and statistics that permit this Court to calculate the comparative disparity for the three-month period of January through March 2002 at 49.5 percent. This is higher than the 30 percent found to satisfy the second prong of *Duren* in *Rogers*, 73 F3d at 777.

In sum, we conclude that defendant has established a prima facie violation of the Sixth Amendment's fair-cross-section requirement. Because defendant established a prima facie violation, the burden shifts to the prosecution to demonstrate that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in

[3] The trial court's conclusion that statistics are inadequate to demonstrate underrepresentation is incorrect. In *Duren*, 439 US at 364, the United States Supreme Court found that "[t]he second prong of the prima facie case was established by petitioner's statistical presentation."

the disproportionate exclusion of" African-Americans. *Duren*, 439 US at 367-368. The prosecution filed a brief the day before oral argument in this case but failed to proffer any significant state interest that would be advanced by the errors and computer glitch that resulted in the systematic underrepresentation of African-Americans in Kent County jury venires. In fact, we cannot conceive of any significant state interest that could possibly justify the jury-selection process used in Kent County during the time the computer glitch systematically excluded African-Americans from jury venires.

Reversed and remanded for a new trial before an impartial jury that is drawn from a fair cross section of the community. We do not retain jurisdiction.

STATE FARM MUTUAL INSURANCE CO v
BROE REHABILITATION SERVICES, INC

Docket No. 289230. Submitted June 2, 2010 at Detroit. Decided July 22, 2010, at 9:00 a.m.

State Farm Mutual Insurance Company brought an action for discovery against Broe Rehabilitation Services, Inc., in the Oakland Circuit Court. Plaintiff sought to obtain information about the treatment that defendant had provided to several of its insureds pursuant to MCL 500.3158(2) and 500.3159, which allow a court to enter an order for discovery if there is a dispute regarding an insurer's right to discovery of facts about an injured person's history, condition, treatment, and dates and costs of treatment. Defendant moved for summary disposition, arguing that because there was no dispute between the parties, these provisions did not apply and the court lacked jurisdiction over the matter. The court, Nanci J. Grant, J., denied the motion, ruling that the Insurance Code explicitly authorizes the relief plaintiff sought and that an actual controversy existed despite the fact that plaintiff was not seeking actual damages. Defendant moved for reconsideration of this ruling, and plaintiff moved to compel discovery. The court denied the former motion and granted the latter, and defendant appealed.

The Court of Appeals *held*:

An insurance company has the right under MCL 500.3158(2) and 500.3159 to demand copies of records from a physician, hospital, clinic, or other medical institution about an insured person's history, condition, treatment, and dates and costs of treatment in relation to that person's claim. The services in question need not have been billed, nor need payment be outstanding, for an insurer to exercise this right. Rather, a refusal to comply with a demand made under MCL 500.3158(2) gives rise to the "dispute regarding an insurer's right to discovery of facts" required by MCL 500.3159 for entry of a discovery order. Because this constitutes an actual dispute between the parties that can be redressed by a discovery order, it is a dispute over which a court has jurisdiction. An insured person is entitled to notice that the insurer has sought this information.

Affirmed in part; order compelling discovery vacated and case remanded for further proceedings.

1. INSURANCE — NO-FAULT — MEDICAL RECORDS — DISCOVERY OF MEDICAL RECORDS.

An insurance company has the statutory right to demand copies of records from a physician, hospital, clinic, or other medical institution about an insured person's history, condition, treatment, and dates and costs of treatment in relation to that person's claim; the services need not have been billed, nor need payment be outstanding, for an insurer to exercise this right; a refusal to comply with this demand gives rise to a dispute over which a court has jurisdiction (MCL 500.3158[2], 500.3159).

2. INSURANCE — NO-FAULT — MEDICAL RECORDS — RIGHT TO DISCOVERY OF MEDICAL RECORDS — NOTICE OF DISCOVERY TO INSUREDS.

An insured person is entitled to notice that an insurer has sought information under MCL 500.3158(2) from a physician, hospital, clinic, or other medical institution about that person's history, condition, treatment, and dates and costs of treatment.

Hewson & Van Hellemont, P.C. (by *James F. Hewson, Christine M. Sutton,* and *Steven G. Silverman*), for plaintiff.

Law Offices of Richard R. Mannausa, PLC (by *Richard R. Mannausa*), for defendant.

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM. Defendant appeals as of right an order denying its motion for summary disposition and an order denying reconsideration and granting plaintiff's motion to compel discovery. We affirm the denial of summary disposition and the denial of reconsideration, but we vacate the order compelling discovery and remand the case for further proceedings.

Plaintiff, an insurance company, commenced this suit with a "complaint for discovery" seeking medical records for certain of its insureds who had been pro-

vided services by defendant. However, plaintiff is not currently in litigation with any of these insured persons, and it has, for the most part, paid the bills defendant submitted. Rather, plaintiff's purpose in seeking these records is to ascertain whether defendant billed improperly and what diagnoses were made and what treatments defendant performed so that plaintiff can determine whether present treatment by other providers is reasonable and necessary.[1] Plaintiff filed its "complaint for discovery" when defendant refused plaintiff's request for the medical records and to have its employees submit to examinations under oath.

Defendant moved for summary disposition, arguing that the court had no jurisdiction because there was no dispute between the parties. The trial court disagreed, as do we. Jurisdictional issues and questions of standing are reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). Statutory interpretation is a question of law that is also considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

We agree with defendant that there is no such thing as a "complaint for discovery," but it has long been the law in this state that it is the substance of the complaint that controls. *Group Ins Co of Mich v Czopek*, 440 Mich 590, 605; 489 NW2d 444 (1992); see also *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 554; 619 NW2d 66 (2000) (stating that the Court would not

[1] Defendant has a history of fraudulently billing for its services. See *Allstate Ins Co v Broe*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2008 (Docket No. 274809), pp 11-12. And plaintiff was involved in an earlier lawsuit in which defendant's allegedly erroneous diagnosis resulted in years of allegedly incorrect treatment of one of plaintiff's insureds.

"rely[] on the superficial language of the complaint while ignoring its substance"). What plaintiff sought in essence in its complaint was a declaratory judgment concerning the extent of the rights and responsibilities of the parties under §§ 3158 and 3159 of the no-fault act, MCL 500.3101 *et seq*., and the equitable relief of an order compelling discovery.

The first section, MCL 500.3158, reads in relevant part as follows:

> A physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) shall furnish forthwith a written report of the history, condition, treatment and dates and costs of treatment of the injured person and (b) shall produce forthwith and permit inspection and copying of its records regarding the history, condition, treatment and dates and costs of treatment. [MCL 500.3158(2).]

The second section, MCL 500.3159, reads in its entirety as follows:

> In a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

The constitutional test for standing in Michigan requires three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [*Rohde v Ann Arbor Pub Sch*, 479 Mich 336, 348; 737 NW2d 158 (2007) (brackets, quotation marks, and citations omitted).]

Under the no-fault act, plaintiff has a statutory right to demand copies of medical records from medical providers who have provided treatment or services "in relation to" an insured's claim. MCL 500.3158(2). The statute does not require that the services have been billed or that payment be outstanding. Once defendant had refused to comply with the statutory mandate, the "dispute" required by MCL 500.3159 arose. Notably, the statute requires a "dispute *regarding an insurer's right to discovery of facts*," not a dispute about payment of a claim or a dispute about an insured's earnings, history, condition, or treatment, as defendant argues. In this case, there was a very concrete, actual dispute over the extent of plaintiff's statutory right to obtain the records, caused by defendant's refusal to comply with MCL 500.3158, that can be redressed by a discovery order from the trial court. This is very different from the "minute and generalized" injury the plaintiffs alleged in *Rohde*, 479 Mich at 354.

Because there was an actual dispute between the parties, the trial court did not err by concluding that it

had jurisdiction to decide the case. See, e.g., *Allstate Ins Co v Hayes*, 442 Mich 56, 65-68; 499 NW2d 743 (1993). Additionally, we conclude that plaintiff met the "good cause" requirement for the same reason that there is an actual case or controversy. We further observe that, given defendant's history of fraud and alleged misdiagnoses, plaintiff is not merely embarking on a fishing expedition.

Nevertheless, we do not agree that the insureds are not interested parties entitled to notice. Plaintiff asserts that the insureds' policies require them to waive any medical-records privilege when they file a claim for benefits and thus that they have no interest in a cause of action solely designed to obtain those records. We do not believe that plaintiff's conclusion necessarily follows from its premise. The insureds have presumably waived any right to preclude plaintiff from accessing those records, but given the potentially sensitive information therein, we conclude that the insureds have an interest in, at a minimum, simply knowing that plaintiff has accessed them; furthermore, the insureds would obviously be interested in knowing that plaintiff is investigating the reasonableness and necessity of their current treatment. The insureds have an interest and must be given notice.

The trial court's order denying summary disposition is affirmed. The trial court's order compelling discovery is vacated. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

McMANUS v TOLER

Docket No. 290249. Submitted June 5, 2010, at Grand Rapids. Decided July 27, 2010, at 9:00 a.m.

Claude McManus and his daughter, Valerie McManus-Zoerhof, brought an action in the Kent Circuit Court against Kevin M. Toler, seeking a declaratory judgment that there was no binding contract between the parties for the sale of an American Express Financial Advisors, Inc., franchise, to void or rescind the contract if there was one, and damages for the breach of any such contract. Defendant submitted an offer of judgment under MCR 2.405 to plaintiffs "in the amount of $25,000.00 inclusive of interest and costs in this matter." Plaintiffs did not respond to the offer. Following a bench trial, the court, Donald A. Johnston, J., ruled that there was a valid contract for the sale of the franchise, that defendant had not breached that contract, and that plaintiffs did not have a valid cause of action. The Court of Appeals, DONOFRIO, P.J., and SAWYER and MURPHY, JJ., affirmed in an unpublished opinion per curiam, issued July 1, 2008 (Docket No. 274407). Before the appeal was filed, defendant had moved to assess fees and costs against plaintiffs under MCR 2.405(D). Plaintiffs had objected, arguing that defendant's offer had not complied with the court rule. The trial court disagreed and granted the motion. After the Court of Appeals upheld the trial court's ruling on the merits of the case, the trial court entered an order assessing costs under MCR 2.405 and ordering plaintiffs to pay defendant's attorney fees in the amount of $50,559.80. Plaintiffs moved for reconsideration, which the trial court denied. McManus appealed.

The Court of Appeals *held*:

The offer-of-judgment rule, MCR 2.405, applies to offers of judgment for a sum certain. Defendant's offer to settle this case for $25,000 was an offer for a sum certain. The fact that some of the claims in this case were based in equity did not render the rule inapplicable. Even if the rule does not apply to purely equitable actions, it applies to cases such as this one involving both claims at law and claims in equity in which the offer of judgment addresses only monetary damages and the equitable claims are to be dismissed.

Affirmed.

ACTIONS — OFFER OF JUDGMENT — SUM CERTAIN — EQUITABLE CLAIMS — CLAIMS AT LAW.

The offer-of-judgment rule applies to a case involving both claims at law and claims in equity in which the offer of judgment addresses only monetary damages of a sum certain and the equitable claims are to be dismissed (MCR 2.405).

Wheeler Upham, P.C. (by *Walter J. Russell*), for Claude McManus.

Law Weathers (by *Michael J. Roth*) for Kevin M. Toler.

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM. Plaintiff, Claude McManus,[1] appeals as of right the circuit court's final judgment entered on September 22, 2008. We affirm.

The facts of this case were summarized in *McManus v Toler*, unpublished opinion per curiam of the Court of the Appeals, issued July 1, 2008 (Docket No. 274407). Plaintiff owned and operated an American Express Financial Advisors, Inc. (AEFA) franchise. He employed his daughter and defendant. In 2002, AEFA offered plaintiff a position as field vice president, but under AEFA rules he would have had to divest himself of his ownership interest in the franchise to take the position. Plaintiff decided to sell the franchise to defendant, but with his daughter acquiring a contingent joint ownership interest when she acquired the licenses necessary to own the franchise. This was written in a memorandum. However, plaintiff's daughter was not able to

[1] Plaintiff Claude McManus is appealing. His daughter, Valerie McManus-Zoerhof, was a plaintiff during the lower-court proceedings and was a listed party on the final order assessing attorney fees and costs, but she is not a party to this appeal. Therefore, when "plaintiffs" are mentioned with regard to the lower-court proceedings, the reference is to both parties, but "plaintiff" refers only to Claude McManus.

obtain her licenses within the agreed-upon period, even though defendant gave her deadline extensions.

The parties ended up in court to determine if the memorandum merely expressed an intent to contract or was a legally enforceable contract. The trial court found that there was a valid contract between the parties and that defendant did not breach the contract. On appeal, this Court affirmed the trial court's findings. Plaintiff accepts the facts as set forth in this Court's July 1, 2008, opinion, although he does not agree with them.

On June 23, 2006, defendant submitted an offer of judgment to plaintiffs. Plaintiffs never responded to the offer. On October 25, 2006, the trial court entered a verdict of no cause of action against plaintiffs and in favor of defendant. Defendant subsequently moved to assess fees and costs under MCR 2.405(D). On November 13, 2006, plaintiffs filed a response in opposition to defendant's motion, stating that the offer of judgment did not comply with the requirements of MCR 2.405. On the same day, the trial court held a hearing on defendant's motion. The court granted the motion, but gave plaintiffs an opportunity to challenge the reasonableness of the requested attorney fees. Plaintiffs did not submit any additional briefing.

On September 11, 2008, defendant served plaintiffs with a notice of presentment. Plaintiffs did not object. On September 22, 2008, the trial court entered an order assessing costs under MCR 2.405 and ordering plaintiffs to pay defendant's attorney fees in the amount of $50,559.80. On September 25, 2008, plaintiffs filed a motion for reconsideration. On January 15, 2009, the trial court denied plaintiffs' motion. Plaintiff is appealing the order awarding costs and attorney fees.

Plaintiff first argues that defendant's offer of judgment was not for a sum certain and, therefore, did not

comply with the requirements of MCR 2.405. Plaintiff relies on *Knue v Smith*, 478 Mich 88; 731 NW2d 686 (2007), as analogous. We disagree.

We review de novo both the trial court's interpretation of a court rule and its decision to award sanctions. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 520; 664 NW2d 263 (2003). Generally, the rules governing statutory interpretation apply equally to the interpretation of court rules. *Yudashkin v Holden*, 247 Mich App 642, 649; 637 NW2d 257 (2001). If the plain meaning of the language of the court rule is clear, "then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used." *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002).

MCR 2.405(A)(1) states:

> "Offer" means a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued. If a party has made more than one offer, the most recent offer controls for the purposes of this rule.

Few cases have addressed the question of what constitutes a "sum certain" for purposes of MCR 2.405(1). In *Knue*, a quiet-title action, the Michigan Supreme Court held that the plaintiffs' offer of $3,000 to the defendants in return for a quitclaim deed was not an offer of a sum certain. *Knue*, 478 Mich at 90, 93 (opinion by TAYLOR, C.J.); *id*. at 97 (YOUNG, J., concurring). The plaintiffs had filed an action to quiet title, stating that they had acquired a strip of land through adverse possession. The plaintiffs' attorney sent the defendants an offer for settlement under MCR 2.405. The plaintiffs offered to pay the defendants $3,000 for a quitclaim

deed with the stipulation that the parties would dismiss all claims "with prejudice and without costs . . . ." *Id*. at 90 (opinion by TAYLOR, C.J.). The defendants replied that the offer did not qualify as an offer of judgment under MCR 2.405 and they did not accept it. The trial court and the Court of Appeals determined that the offer was for a sum certain under MCR 2.405. *Id.* at 90-92.

On appeal, the Michigan Supreme Court reversed. The Court found that the plaintiffs' offer fell outside the scope of MCR 2.405(A)(1), and no costs or attorney fees were awarded. The Court determined that the offer of judgment rule does not apply to lawsuits when the offer would not result in a judgment for a sum certain. In his lead opinion, then Chief Justice TAYLOR stated:

> [T]o be an "offer" the offer must propose to stipulate the entry of a *judgment in a sum certain*. There is no latitude given in this rule for offers of judgment that culminate in something other than a "judgment for a sum certain." That is, it is nonconforming for the offer to require a reciprocal exchange of cash for the execution of a recordable real estate document culminating in a judgment of dismissal with prejudice and without costs. For such an offer, the offer of judgment rule is simply inapplicable and no consideration of the distinctions between equity and law is required to resolve this matter. [*Id.* at 93.]

Chief Justice TAYLOR determined that the plaintiffs' offer of a quitclaim deed in exchange for $3,000 and a judgment of dismissal was not for a sum certain because it fell outside the scope of MCR 2.405(A)(1). *Id*. He stated that the offer of judgment rule does not apply to offers that are not for a sum certain. *Id*. Because the plaintiffs' offer did not meet the requirements of the rule, they were not entitled to sanctions under the rule. *Id.* at 93-94.

Justices CAVANAGH and CORRIGAN concurred with Chief Justice TAYLOR. Justices YOUNG, WEAVER, and KELLY concurred in the result. Justice YOUNG, joined by Justice WEAVER, stated that because "plaintiffs' offer required a quit claim deed in addition to the transfer of $3,000, the offer could not be for a sum certain. Therefore, MCR 2.405 does not apply to this case." *Id.* at 97 (YOUNG, J., concurring).

Knue is distinguishable from the present case because this case does not involve a reciprocal exchange or a condition. In this case, defendant served plaintiffs with a document titled "OFFER OF JUDGMENT." A footnote in defendant's offer stated:

> As a point of clarification, the $25,000.00 offer of judgment represents an amount to be paid to the Plaintiffs in addition to the original $300,000.00 purchase price for acquiring certain clients from Mr. McManus. The amount currently owing on the original purchase price is $200,617.04 and requires monthly payments bearing interest at the fixed rate of 7% amortized over a ten year period commencing January 1, 2003 as set forth on the attached amortization schedule.

Plaintiff argues that this footnote made the offer "conditional" and not for a sum certain. We disagree. It is clear from the language of defendant's offer that the offer was not conditional but for a sum certain of $25,000. The footnote merely acknowledged the outstanding balance on the business purchase and that the offer of judgment did not affect the outstanding obligation under that agreement. We conclude that it is very clear from the language of defendant's offer that it was an offer for a sum certain.

Additionally, both parties cite *Hessel v Hessel*, 168 Mich App 390; 424 NW2d 59 (1988), in their briefs. *Hessel* is also distinguishable from this case. In *Hessel*,

168 Mich App at 395, this Court held that, in a divorce proceeding, a proposed property settlement was not a "sum certain." The defendant offered the plaintiff real estate, a car, household furnishings, and certificates of deposit. The "[d]efendant valued the property he offered [the] plaintiff at $143,200." *Id*. The trial court valued the same property at approximately $108,000. *Id*. This Court held that a proposed property settlement did not offer a sum certain; it offered a division of marital property. *Id.* The Court reasoned that there was no way that the defendant's offer of the items could be equated with a "sum certain." *Id.* The Court noted that even if the worth of the property were considered a "sum" for purposes of MCR 2.405, it was still not "certain." *Id.*

In the case at bar, defendant's offer was for a sum certain. Therefore, it complied with the requirements of MCR 2.405.

Plaintiff next argues that the circuit court should have determined whether MCR 2.405 applies to actions in equity. Plaintiff claims that in examining the rule, it is clear that the intent of the rule is that it not apply in equitable actions and because plaintiffs' claim was wholly in equity, defendant cannot recover under the court rule. We disagree.

There is nothing in MCR 2.405 that states that the rule does not apply to equitable actions. In *Knue*, the lead opinion did not touch on the issue whether MCR 2.405 applied to actions seeking equitable relief. However, in her concurring opinion, Justice KELLY stated, "I would hold that the offer of judgment rule, MCR 2.405, is inapplicable when equitable relief is sought." *Knue*, 478 Mich at 94 (KELLY, J., concurring). To the contrary, in his dissent, Justice MARKMAN stated that "[t]he

language of MCR 2.405 does not differentiate between legal and equitable claims." *Id.* at 97 (MARKMAN, J., dissenting).

In this case, plaintiff claims that the case was wholly in equity. We disagree. Plaintiffs' first amended complaint alleged a breach of contract, stating: "WHEREFORE, Plaintiffs respectfully request entry of a judgment in their favor and against the Defendant that grants to Plaintiffs damages to be determined by the Court caused by Defendant's breaches of contract along with applicable costs, interest, and attorney fees." It is clear from the language of plaintiffs' first amended complaint that plaintiffs' case was not wholly based in equity. Plaintiffs' complaint asked for monetary damages. The offer of judgment only offered monetary damages. Even if the offer of judgment rule does not apply to purely equitable actions, we conclude that, at the minimum, it does apply to mixed law and equity actions in which the offer of judgment only offers monetary damages and the equitable claims are to be dismissed.

Affirmed.

JILEK v STOCKSON

Docket No. 289488. Submitted April 13, 2010, at Detroit. Decided July 29, 2010, at 9:00 a.m.

Joy A. Jilek, as personal representative of the estate of Daniel D. Jilek, deceased, brought a medical-malpractice action in the Washtenaw Circuit Court against board-certified family-medicine physician Carlin C. Stockson, M.D., EPMG of Michigan, P.C., which was Stockson's employer, Trinity Health-Michigan, and others, relating to Stockson's treatment of Daniel at an urgent-care center. Plaintiff filed two affidavits of merit, both of which asserted that the applicable standard of care was that of a board-certified emergency-medicine physician. In their answer to plaintiff's complaint, Stockson and EPMG denied that Stockson was practicing as an emergency-medicine physician and submitted an affidavit of meritorious defense that referred to the standard of care applicable to a family-medicine physician. Following a motion by plaintiff, the court, David S. Swartz, J., ruled that plaintiff's affidavits were adequate. Shortly before trial, Trinity Health-Michigan moved to bar one of plaintiff's experts, a board-certified emergency-medicine physician, from testifying, arguing that the standard of care was that applicable to a family-medicine physician, not an emergency-medicine physician. The court disagreed and denied the motion. Trinity Health and another defendant filed an emergency application for interlocutory leave to appeal, which the Court of Appeals denied in an unpublished order, entered August 1, 2008 (Docket No. 286780). At trial, defense counsel contended that the issue of what specialty governed the standard of care remained unresolved. The trial court allowed the parties to present expert testimony to the jury concerning their views of the relevant specialty and standard of care. When instructing the jury at the close of proofs, the trial court stated that the applicable standard of care was that of a physician specializing in family practice and working in an urgent-care center. The jury returned a verdict of no cause of action in favor of Stockson and EPMG. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by instructing the jury that the standard of care was that of a family-medicine physician working in an urgent-care setting. The applicable standard of care under

MCL 600.2169(1)(a) is that of the one most relevant medical specialty. The record in this case established that the most relevant medical specialty was emergency medicine. Although Stockson was board-certified in family practice, the specialty she was engaged in during the course of the alleged malpractice was emergency medicine.

2. Even if the trial court's jury instruction on the applicable standard of care had been correct, reversal would be necessary in this case. The proper standard of care is a matter of law and must be determined before trial so that objections to expert witnesses can be made and the parties can appropriately argue their proofs under a single standard of care. The court's earlier rulings in this case led plaintiff to believe that the standard of care was that applicable to emergency-medicine physicians. By either changing the applicable standard of care at the end of the trial or withholding a decision on the applicable standard of care until the end of the trial, the court seriously prejudiced plaintiff.

3. The trial court erred by excluding several practice guidelines that plaintiff proffered as relevant to the standard of care. Although practice guidelines, such as EPMG's chest-pain guideline, may not be used to establish the standard of care, they are admissible when they are relevant to the standard of care at issue and to the injury alleged.

Reversed and remanded for a new trial.

BANDSTRA, P.J., dissenting, stated that because Stockson was board-certified in family medicine, Stockson and EPMG were properly permitted to present expert testimony by board-certified family-medicine specialists under MCL 600.2169 and the trial court properly instructed the jury that the applicable standard of care was that of a physician specializing in family practice. Plaintiff benefitted to the extent that the jury was permitted to hear testimony from plaintiff's emergency-medicine experts. The trial court also properly excluded the practice guidelines proffered by plaintiff, which were inadmissible under controlling precedent. Even if the majority correctly identified any trial errors, those errors did not result in a jury verdict that was inconsistent with substantial justice. Accordingly, the verdict should have been affirmed.

1. NEGLIGENCE — MEDICAL MALPRACTICE — STANDARD OF CARE — PHYSICIANS — SPECIALISTS — BOARD-CERTIFIED PHYSICIANS.

The applicable standard of care in a medical-malpractice action against a board-certified physician is the one most relevant standard of practice or care, i.e., that standard of practice or care applicable to the specialty engaged in by the physician during the

course of the alleged malpractice; the proper standard of care is a matter of law and must be determined before trial (MCL 600.2169[1][a]).

2. NEGLIGENCE — MEDICAL MALPRACTICE — STANDARD OF CARE — EVIDENCE — PRACTICE GUIDELINES FOR MEDICAL CARE.

Practice guidelines, policies, and procedures adopted or used by medical providers do not establish the standard of care at issue in a medical-practice action, but they are admissible when they are relevant to the standard of care and to the injury alleged.

Mark Granzotto, *P.C.* (by *Mark Granzotto*), and *Davis & Kuhnke*, *P.C.* (by *Peter A. Davis* and *Carol A. Kuhnke*), for Joy A. Jilek.

Collins, *Einhorn*, *Farrell & Ulanoff*, *P.C.* (by *Noreen L. Slank*), for Carlin C. Stockson and EPMG of Michigan, P.C.

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

SHAPIRO, J. Plaintiff brought a wrongful-death suit against Dr. Carlin Stockson and her employer/principal EPMG of Michigan, P.C.[1] Plaintiff alleged that Dr. Stockson was negligent in her evaluation, diagnosis, and treatment of Daniel Jilek when she saw Jilek at the Maple Urgent Care center on March 1, 2002.[2] The jury returned a verdict of no cause of action in favor of Dr. Stockson and EPMG.

For reasons the record does not explain, Jilek went for treatment at Maple Urgent Care on March 1, 2002, rather than to his primary doctor. According to the

[1] EPMG stands for Emergency Physicians Medical Group.

[2] Plaintiff also initially named Jilek's family doctor as well as Trinity Health-Michigan, the entity that operates the urgent-care center. Each was dismissed before judgment, and they are not parties to this appeal. However, certain actions by Trinity Health before the dismissal remain relevant to the procedural posture of the case.

front desk form he completed, Jilek was complaining of "continued sinus/respiratory congestion." The triage nurse documented a statement by Jilek that he had had head and chest congestion for several months and, though a course of antibiotics in December had resulted in some improvement, he was not completely better. Jilek's blood pressure was elevated at triage. He was seen by Dr. Stockson, who, in addition to the complaints recorded at triage, noted "chest tightness" and "trouble breathing" that were "[i]nterfering with [his] ability to run." Dr. Stockson also noted that Jilek was in "moderate" distress. Plaintiff asserted that Dr. Stockson failed to adhere to the standard of care for emergency medicine, which plaintiff asserted required Dr. Stockson to further investigate the symptoms reported to her by Jilek by taking a more detailed history, taking an electrocardiogram (ECG), and referring Jilek for additional outpatient care by a cardiologist. Plaintiff further asserted that if Jilek's ECG had not been normal or he had active chest tightness at the time of the examination, he should have been immediately transferred to the emergency department at the hospital for further testing before discharge. Plaintiff further claimed that until any suspicion of cardiac involvement was appropriately ruled out, the standard of care required Dr. Stockson not to prescribe albuterol and to instruct Jilek to refrain from exercise.

Jilek died while exercising after albuterol use, five days after his visit to Maple Urgent Care. The autopsy revealed that Jilek had significant coronary-artery disease in his left anterior descending coronary artery and that he died as a result of a heart attack caused by an acute blood clot in that vessel, which formed in the hours before his death. Plaintiff asserted that had Dr. Stockson acted within the standard of care, Jilek's cardiac disease would have been discovered and timely

treated or she would not have prescribed what plaintiff asserted was a contraindicated medication that precipitated the heart attack.

There are three issues on appeal. First, plaintiff asserts that the trial court erred by allowing the jury to hear evidence on the standard of care applicable to inapplicable specialties, incorrectly instructing the jury on the applicable specialty, and failing to make a clear pretrial ruling on the applicable specialty. Second, plaintiff asserts that the trial court improperly excluded evidence of practice guidelines issued by the American College of Emergency Physicians, as well as policies, procedures and guidelines used in the operation of the urgent-care center. Third, plaintiff argues that the trial court should have barred defendants'[3] experts from testifying in light of defendants' failure to answer expert witness interrogatories. We agree with plaintiff on the first two claims and, accordingly, reverse and remand for a new trial. In light of our resolution of the first two issues, we need not address the third.

I. STANDARD OF CARE

We find error requiring reversal in the trial court's instruction regarding the applicable standard of care. We also find error requiring reversal in the manner by which the trial court determined the standard of care. With regard to the former, we conclude that the hybrid standard of care fashioned by the trial court did not comply with *Woodard v Custer*, 476 Mich 545, 560, 566; 719 NW2d 842 (2006), and that the trial court erred by not determining what single recognized medical specialty constituted "the one most relevant specialty,"

[3] Unless otherwise specified, the use of the term "defendants" throughout this opinion refers to appellees Dr. Stockson and EPMG.

which in this case was emergency medicine. With regard to the latter, we conclude that the trial court erred by allowing experts in varying specialties to testify at trial about their differing views of what medical specialty was being practiced at the time of the alleged malpractice despite the fact that only testimony by experts specializing in emergency medicine should have been admitted.

The proper standard of care for purposes of MCL 600.2169(1)(a) is determined as a matter of law. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 16 n 16; 651 NW2d 356 (2002) (stating that this Court "erred in holding that the standard of care was an evidentiary matter reviewed for an abuse of discretion"). Accordingly, as a question of law, we review this issue de novo. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

Plaintiff's complaint alleged that Dr. Stockson "breached the standard of practice or care in emergency medicine . . . ." Plaintiff filed two affidavits of merit. Each asserted that the standard of care that applied to Dr. Stockson was "that of a physician who is board certified in emergency medicine." One of the affidavits further explained that "[w]hile Dr. Stockson was board certified in family practice medicine, she was practicing emergency medicine, and therefore, subject to the standard of care in emergency medicine." One of these affidavits was signed by Dr. Michael Sama, a board-certified emergency-medicine physician. The other was signed by Dr. Richard Birrer, who is board-certified in both emergency medicine and family practice.

Defendants' answer denied that Dr. Stockson was practicing as an emergency-medicine physician, but did not specify what standard of care applied other than an undefined reference to "the standard of practice of [her]

profession . . . ." The affidavit of meritorious defense filed by Dr. Stockson and EPMG was signed by a board-certified family practice doctor and referred to "[t]he standard of care applicable to a physician practicing family medicine . . . ."

Defendants filed affirmative defenses, including one asserting that plaintiff's affidavits of merit did not comply with statutory requirements, and asserted that "[d]efendants intend to file a Motion for Summary Disposition upon this ground in the near future." However, defendants did not file such a motion. Plaintiff served affirmative-defense interrogatories asking for the basis of this affirmative defense, i.e., asking in what way the affidavits had been noncompliant. Defendants did not answer this interrogatory. Therefore, in March 2006, plaintiff filed a motion asking the trial court to determine the validity of the affidavits of merit and to strike defendants' affirmative defense. Plaintiff's motion noted that the apparent basis of the affirmative defense lay in the question of whether the standard of care was that of emergency medicine or family practice. Plaintiff further noted that if the affidavits were in fact defective, then plaintiff would have to take curative action and that plaintiff did not wish to allow defendants to prejudice her claim by withholding information regarding the alleged defect until the period of limitations had run. Plaintiff's brief stated:

> [I]n the absence of any substantive or well-founded objection to the affidavits, and because time is ticking on the statute of limitations and statute of repose, plaintiff must ask that the court review these issues now, while there is time to cure any defect should the court agree with defendants.

Defendants' response to the motion continued their effort to preserve a right to object to plaintiff's affida-

vits, but withhold the basis of that objection until the period of limitations had run. Indeed, the response did not assert any defect in the affidavits whatsoever nor assert that plaintiff's experts were not qualified by reason of being in the wrong specialty. Defendants mysteriously asserted only that "the adequacy of Plaintiff's experts and therefore the adequacy of their Affidavit is subject to question" and sought to delay a determination concerning that adequacy.[4] The trial court, after hearing arguments, granted plaintiff's motion, holding that "plaintiff's affidavits of merit are adequate and in compliance with the relevant court rules and statutes, and as such . . . defendants' [sic] Stockson and EPMG's affirmative defenses nos. 5 and 15 are hereby dismissed with prejudice." The trial court also directed defendants to answer plaintiff's outstanding interrogatories regarding affirmative defenses.

More than two years later and less than one month from trial, nonappellee defendant Trinity Health-Michigan moved to exclude plaintiff's emergency-medicine expert, Dr. Sama, from testifying on the grounds that the applicable standard of care was family practice, not emergency medicine.[5] Plaintiff's counsel argued that the standard of care was emergency medicine and that

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[4] The practice of challenging affidavits of merit and notices of intent only after it is too late to cure the alleged defect, commonly known as "sandbagging," while tempting to the practitioner seeking to prevail for his or her client does little for the reputation of the courts as a place where substantive justice occurs. Given our Supreme Court's recent decisions in *DeCosta v Gossage*, 486 Mich 116, 118-119; 782 NW2d 734 (2010), *Potter v McLeary*, 484 Mich 397, 406; 774 NW2d 1 (2009), and *Bush v Shabahang*, 484 Mich 156, 161; 772 NW2d 272 (2009), the efficacy of such gamesmanship appears to have been greatly reduced, if not eliminated.

[5] Plaintiff's other standard-of-care expert was board-certified in both emergency medicine and family practice. However, like Dr. Sama, he had opined in his affidavit and deposition that the relevant specialty was emergency medicine.

Dr. Sama was therefore properly qualified. At the conclusion of the argument, the trial court stated, "The Court agrees with the plaintiff. Motion denied."[6]

Trinity Health requested a stay of the proceedings on the eve of trial while it sought to appeal the trial court's ruling allowing plaintiff's experts to testify. The trial court denied the motion, citing prejudice to plaintiff and because the court had "determined that defendants' claims of error are without merit . . . ."[7] On the morning of trial, plaintiff and Trinity Health placed a settlement on the record, and Trinity Health was dismissed from the case.

Despite the trial court's ruling two years earlier finding adequate an affidavit of merit that used an

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[6] Trinity Health filed a motion for reconsideration of the trial court's order denying its motion to exclude Dr. Sama's testimony. The motion for reconsideration offered a different analysis than did the original motion. The original motion argued that Dr. Sama could not testify because the applicable standard of care was family practice and he was not a family practitioner. The motion for reconsideration asserted for the first time that urgent-care medicine is a distinct specialty. The reconsideration motion asked the court to consider materials attached to the motion purporting to demonstrate the existence of an entity called the "American Board of Urgent Care Medicine" as well as two other entities purporting to be accrediting boards of urgent-care medicine. Under the court rules, no response to the motion for reconsideration could be filed and no hearing was held. The record received by this Court does not contain any order granting or denying the motion for reconsideration. However, at a July 30, 2008, hearing on other motions, the trial court stated, without further explanation, that it had reviewed the motion for reconsideration and that it was denied. Defendants, unlike Trinity Health, have never argued either below or on appeal that there is a separate specialty board in urgent-care medicine. The possible existence of such a specialty is further discussed in n 10 of this opinion.

[7] Six days later, the nonappellee defendants filed an emergency application for leave to appeal in this Court, asking for a determination whether the trial court erred by allowing plaintiff's emergency-medicine experts to testify. This Court denied the application "for failure to persuade the Court of the need for immediate appellate review." *Jilek v Trinity Health-Mich*, unpublished order of the Court of Appeals, entered August 1, 2008 (Docket No. 286780).

emergency-medicine standard of care and the trial court's denial just a few weeks before trial of Trinity Health's motion to bar Dr. Sama from testifying, defendants' counsel took the position at trial that the issue of what specialty governed the standard of care was still an unresolved question. Its prior rulings notwithstanding, the trial court allowed each party to argue its own view of the relevant specialty and present standard-of-care experts from those varying specialties. During trial, defense counsel interrupted the testimony of plaintiff's experts with objections, asserting, in the presence of the jury, that plaintiff's experts were opining on the basis of emergency-medicine standards and that emergency-medicine standards were wholly irrelevant. The trial court did not rule on these objections, instead stating that it was taking them under advisement.

Not surprisingly, the issue came to a head when, at the end of proofs, the attorneys and the trial court were discussing jury instructions. Plaintiff argued that the trial court's denial of defendants' pretrial motion to strike the experts' testimony necessarily implied a finding by the court that the relevant specialty was emergency medicine. Defendants argued that the pretrial ruling merely allowed plaintiff to have its emergency-medicine experts testify and left open the question of the applicable specialty for the standard of care. In response to these arguments, the trial court stated:

> I have no problem with allowing emergency room physicians to testify to the standard of care in this case . . . . I don't think it's a problem. I think it's appropriate.
>
> But what we have is we have Doctor Stockson. She is a family practitioner, board certified practicing in an urgent care setting. That's what she's going to be evaluated at.

The trial court then instructed the jury that the applicable standard of care was that of "a physician

specializing in family practice and working in an urgent care center . . . .” This instruction plainly runs afoul of the principles governing standards of care set forth in *Woodard*, 476 Mich at 560. In *Woodard*, the Supreme Court foreclosed the notion of multiple or hybrid standards of care and instead made clear that the sole standard to be applied is that flowing from the one most applicable medical specialty. *Id.* Specifically, the *Woodard* Court held that expert witnesses must “match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice . . . .” *Id.* The Court went on to define “specialty” as “a particular branch of medicine or surgery in which one can potentially become board certified.” *Id*. at 561. As there is no board certification titled “family practice in an urgent-care center,” this cannot be considered a specialty defining the most relevant standard of care, let alone the “one most relevant” standard.

Defendants argued that the relevant standard of care is controlled by the fact that Dr. Stockson is a board-certified family practitioner. However, Dr. Stockson’s residency and board certification as a family practitioner would not be relevant to the standard of care if the locus or substance of the medicine she was practicing at the time of the alleged malpractice defined a different specialty. This issue was resolved in *Reeves v Carson City Hosp* (*On Remand*), 274 Mich App 622, 630; 736 NW2d 284 (2007), in which this Court concluded that a physician, board-certified in family practice but practicing in the emergency room, was held to the emergency-medicine standard, not a family-practice one.[8]

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[8] This was again confirmed in *Gonzalez v St John Hosp & Med Ctr*, 275 Mich App 290; 739 NW2d 392 (2007), in which we held that a resident is

A review of the record reveals overwhelming support for the conclusion that the controlling standard in this case is that of emergency medicine, not family practice. On the website for St. Joseph Mercy Hospital (SJMH), the hospital affiliated with Maple Urgent Care, Dr. Stockson's medical specialty was listed as emergency medicine. She was not listed in the hospital's listing of urgent-care physicians or family-medicine physicians. Her office was located with the Emergency Physicians Medical Group, and she was listed as a member of the emergency department of the hospital. Her position description indicated that she had primary responsibility for day-to-day management of the emergency department. She signed facility policy statements for Maple Urgent Care that were titled "Emergency Services Guideline[s]."[9] Moreover, the hospital represented that its urgent-care facilities were routinely staffed by physicians and nurses who were "trained to handle emergency cases." Dr. Stockson's report on Jilek's visit was designated as an "EMERGENCY PHYSICIAN RECORD," and she signed his discharge instructions as the "Emergency Physician." Dr. Stockson testified at her deposition that urgent care is not part of the family-practice department and that she reported to the chair of the emergency-medicine department, and defendants admitted that urgent care was under the emergency-services division of the hospital. There was

held to the standard of the specialty he or she is practicing in even though the resident is not yet a specialist in any field.

[9] Dr. Stockson argues that these are representations of the hospital and that she did not request that she be so listed in the hospital's materials and did not print the guidelines. However, we do not rely on these listings and items as admissions by Dr. Stockson. Rather, we view them as a description of how the hospital and medical profession defined the specialty of Dr. Stockson. We are unaware of any evidence in this case that the hospital believed it erred in the manner in which it listed her or its guidelines.

also evidence that the parking lot at the urgent-care location had parking spaces designated by signs for emergency patients despite the fact that there was no adjacent or nearby facility called an emergency room. Accordingly, the evidence in the record indicates that, regardless of Dr. Stockson's family-medicine board certification and her ineligibility to be board-certified in emergency medicine, the specialty she was engaged in during the course of the alleged malpractice was emergency medicine. See *Woodard*, 476 Mich at 560.

We also consider the nature of the term "urgent care" itself. The word "urgent" is defined in various dictionaries as "[c]ompelling immediate action; pressing," *American Heritage Dictionary* (2007); "[d]emanding immediate attention," *Webster's New Basic Dictionary* (2007); and "calling for immediate attention," Merriam-Webster <http://www.merriam-webster.com/dictionary/urgent> (accessed July 28, 2010). These terms are far more consistent with the scope of emergency medicine than they are with the scope of family practice.

Defendants maintain that urgent-care centers also serve as substitute primary caregivers for patients seeking episodic rather than continuous care. This may be true. However, defendants concede that this is also true of hospital emergency rooms, but it does not allow family practitioners practicing in an emergency room to avoid the emergency-medicine standards. Indeed, in the instant case, Jilek had a primary-care doctor but, for some reason, elected to go instead to an urgent-care facility on the day in question. As a matter of law, the proper standard of care was that for emergency-medicine specialists.[10]

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[10] While we conclude that emergency medicine is "the one most relevant specialty" in this case, and is the standard to be applied at

Moreover, even if the trial court's standard-of-care instruction had been substantively correct, we would nevertheless find it necessary to reverse and order a new trial in this case. As set forth previously, plaintiff had every reason to believe that the trial court had concluded that the standard of care was that of emergency medicine. By approving the affidavits of merit, the trial court implicitly made a determination of the relevant standard of care.[11] This was confirmed only a few weeks before trial when the court ruled that Dr. Sama, an emergency-medicine expert, could testify about the standard of care. Given that standard-of-care testimony may only be given by experts in the relevant specialty, this ruling necessarily rejected defendants' argument that the proper standard of care was for a family-practice physician in an urgent-care setting and adopted plaintiff's argument that the applicable standard of care was that

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retrial, we do not foreclose the possibility that in a different case, given appropriate evidence and findings, a trial court could conclude that there is a specialty of "urgent-care medicine" and that it is the one most relevant specialty. We note that in its motion for reconsideration in the trial court, Trinity Health submitted documentation that there is a board certification in a specialty called urgent-care medicine. The motion did not assert, however, that this is a specialty or subspecialty recognized by the American Board of Medical Specialties and so, on this record, we cannot determine whether the organization referred to is " 'an officially recognized and legally constituted body . . . .' " *Woodard*, 476 Mich at 564. In any event, defendants did not make that argument in either the trial court or this Court. In fact, they have consistently stated their position that "[Dr. Stockson] cannot be regarded as a 'specialist' in urgent care, because urgent care is not a board certified practice . . . ." Further, neither of defendants' experts would have qualified as an expert in urgent care since each conceded that less than 50 percent of his professional time in the year before the case arose was spent in an urgent-care facility.

[11] An affidavit of merit may satisfy the statute even when signed by an unqualified expert if the attorney "reasonably believes" that the expert meets the testimonial requirements. MCL 600.2912d(1). However, the issue of reasonable belief was never raised by either party to the motion concerning the affidavits of merit and played no role in the ruling.

of emergency medicine. Thus, even assuming that the trial court's hybrid standard of care could have been appropriate, the fact that the trial court *changed* the standard of care *at the end of trial* created serious prejudice to plaintiff.

The proper standard of care is a matter of law. *Cox*, 467 Mich at 16 n 16. The applicable specialty must be determined before trial so that objections to expert witnesses can be made and the parties can appropriately argue their proofs under a single standard of care. It is highly confusing to juries, and prejudicial to the parties, to permit argument throughout trial about what specialty was being practiced. Waiting until the end of trial to determine the applicable standard of care results in the jury hearing standard-of-care evidence from experts who are not qualified to so testify. The trial court erred as a matter of law by either changing its pretrial ruling that the emergency-medicine standard applied or, alternatively, by withholding a final decision on the relevant standard until the close of proofs and permitting experts advocating dueling standards of care to testify to the jury.

Accordingly, we reverse the trial court's decisions to permit the jury to hear evidence concerning the standard of care for family-practice physicians and to instruct the jury that the applicable standard of care was that of a family-practice physician working in an urgent-care center. We remand for a new trial. The governing standard of care to be employed at the new trial is that of emergency medicine. The parties shall be granted reasonable time to amend their expert witness lists and for any additional necessary expert witness discovery.

II. ADMISSION OF GUIDELINES

Because we are remanding for a new trial, we must address the admissibility of the guidelines proffered by

plaintiff. Previously, the trial court excluded several practice guidelines that plaintiff wished to admit as relevant to the standard of care. These included internal guidelines and policies adopted by EPMG, SJMH, and Maple Urgent Care. We conclude that to the degree these documents are relevant and are not otherwise infirm under the rules of evidence, they are admissible. We specifically reject defendants' reading of *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761; 431 NW2d 90 (1988), so as to bar the admission of all internal guidelines in medical malpractice cases. We also conclude that the trial court erred by excluding practice guidelines promulgated by the American College of Emergency Physicians.

We begin our analysis by noting that no statute bars the admission of such guidelines, and we do not find any legislative enactment of a privilege that would do so. By contrast, the Legislature has created a statutory privilege regarding peer-review investigations in MCL 333.20175(8). The Legislature has also established statutory privileges with respect to probation reports, MCL 791.229; accountant-client communications, MCL 339.732; penitent-clergy communications, MCL 600.2156; spousal testimony and communications, MCL 600.2162; journalistic sources, MCL 767.5a; physician-patient communications, MCL 600.2157; psychologist-patient communications, MCL 333.18237; social worker-client communications, MCL 333.18513; and student records and communications, MCL 600.2165; among others. However, it has not created such a privilege with respect to the guidelines or policies of medical providers in place at the time a case arises.

In the absence of legislative support, defendants rely on this Court's opinion in *Gallagher*. However, defendants ignore *Gallagher*'s recognition that "a hospital's

rules could be admissible as reflecting the community's standard where they were adopted by the relevant medical staff and where there is a causal relationship between the violation of the rule and the injury." *Id.* at 767.[12] This principle clearly applies in this case and should be the standard by which admission of internal policies, guidelines, and procedures are governed in medical malpractice cases.

Focusing the inquiry on relevancy is also consistent with the cases on which *Gallagher* relied. The internal policies were excluded in those cases because the plaintiffs asserted that those policies defined the duty or even created a duty beyond that set by law. By contrast, plaintiff in this case does not argue that the policies themselves set or defined the standard of care, only that they may be considered relevant to the jury's determination, in light of the expert testimony, of what that standard was. In *Dixon v Grand Trunk W R Co*, 155 Mich 169, 173; 118 NW 946 (1908), our Supreme Court held that the railroad company's internal rules regarding keeping switches locked "do not *fix* the obligations and liability of the defendant . . . ." (Emphasis added.) Indeed, in *Dixon*, the plaintiff specifically alleged that the defendant was liable *solely* because its employees violated the company's internal regulation, and the plaintiff sought to have the jury form ask: " 'Was defendant negligent in failing to enforce its rule to lock switches?' " *Id.* at 174.

McKernan v Detroit Citizens' Street-Railway Co, 138 Mich 519; 101 NW 812 (1904), concerned the speed of

[12] We reject defendants' suggestion that this statement was without purpose and that we should conclude that *Gallagher* adopted an absolute bar to admission of these materials despite their relevancy to the standard of care and causation. Moreover, to the degree defendants argue that their view of *Gallagher* is accurate and that we must adhere to it, we note that *Gallagher* was decided in 1988 and we are not bound to follow it under MCR 7.215(J)(1).

operation of a trolley as it passed a firehouse. The statutory speed limit was 20 miles an hour, but the trolley company had an internal rule that the trolley's speed when passing a firehouse should not exceed 4 miles an hour. *Id.* at 523. The trial court excluded this rule from evidence. The Supreme Court noted briefly that the trolley company's rule did not "add to the defendant's obligations to the public . . . ." *Id.* at 524. The issue was further discussed in Justice HOOKER's concurrence, in which he explained that internal rules do not "make a new . . . standard of care, from which the railroad cannot safely depart." *Id.* at 527 (HOOKER, J., concurring). He went on to say that an internal rule might constitute some evidence tending to show negligence, but the failure to observe the rule was not negligence per se. *Id.* at 528. Finally, *Wilson v W A Foote Mem Hosp*, 91 Mich App 90, 95; 284 NW2d 126 (1979), like *Dixon*, held that internal rules "do not *fix* the applicable standard of care" and "do not establish the applicable standard of care." (Emphasis added.)[13]

Consistent with these cases, plaintiff does not assert that the standard of care is "fixed" or "established" by

[13] Defendants also refer us to two post-*Gallagher* cases: *Buczkowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992), and *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002). *Buczkowski* involved a suit brought by a man injured by shotgun ammunition fired by Walter McKay. The plaintiff alleged that defendant, Kmart, sold ammunition to McKay while he was intoxicated. *Buczkowski*, 441 Mich at 97-98. McKay fired the shotgun hours later and miles away, and the plaintiff was hit by a ricochet while he was in his backyard. *Id.* at 98-99. The Supreme Court concluded that a firearms merchant had no duty to third persons injured by the firearm even if the purchaser was intoxicated. *Id.* at 100. Since the Court found no duty as a matter of law, it did not have to determine whether the jury could consider Kmart's internal rules to determine whether Kmart had acted negligently. *Zdrojewski* is also inapplicable because the only rules at issue were external rules established by the Joint Commission on Accreditation of Healthcare Organizations and the Court found that they were admissible. *Zdrojewski*, 254 Mich App at 62-63.

internal policies or guidelines. Defendants suggest that, as a matter of public policy, all such policies should be excluded, even if relevant, so as to avoid discouraging their creation. Such an argument is better made to the Legislature, which, if it wishes, can adopt such a privilege. Moreover, we find no reference in any of the cases we have reviewed, the record, or defendants' briefs to any empirical data that supports the speculative conclusion that medical providers will choose not to define procedures and guidelines for their employees if it is possible that those procedures may at some point be considered as relevant, but not controlling, evidence in a legal matter.

We also consider the opinions of sister jurisdictions. Nearly all of the states that have published law on the subject appear to follow the rule that internal policies may be introduced as relevant to the standard of care but, standing alone, do not fix or establish that standard. See *Taylor v Lakeside Behavioral Health Sys*, opinion of the Tennessee Court of Appeals, issued March 15, 2010 (Docket No. W2009-00914-COA-R3-CV); *Stone v Proctor*, 259 NC 633; 131 SE2d 297 (1963); *Foley v Bishop Clarkson Mem Hosp*, 185 Neb 89; 173 NW2d 881 (1970); *Boland v Garber*, 257 NW2d 384 (Minn, 1977); *Williams v St Claire Med Ctr*, 657 SW2d 590 (Ky App, 1983); *Van Steensburg v Lawrence & Mem Hosps*, 194 Conn 500; 481 A2d 750 (1984); *Happersett v Bird*, unpublished opinion of the Wisconsin Court of Appeals, issued October 22, 1998 (Docket No. 97-3726);[14] *Wuest ex rel Carver v McKennan Hosp*, 2000 SD 151; 619 NW2d 682 (2000); *Moyer v Reynolds*, 780 So 2d 205 (Fla App, 2001); *Reed v Granbury Hosp Corp*, 117 SW3d 404 (Tex App, 2003); *Luettke v St Vincent Mercy Med Ctr*, unpublished opinion of the Ohio Court of

[14] 222 Wis 2d 624; 587 NW2d 457 (Table).

Appeals, issued July 28, 2006 (Docket No. L-05-1190); *Riverside Hosp, Inc v Johnson*, 272 Va 518; 636 SE2d 416 (2006); *Jones v Nat'l Railroad Passenger Corp*, 942 A2d 1103 (DC App, 2008); *Peterson v Nat'l Railroad Passenger Corp*, 365 SC 391; 618 SE2d 903 (2005); *Unger v Allen*, 3 Pa D & C 5th 191 (PA Com Pl, 2006); *Caldwell v K-Mart Corp*, 306 SC 27; 410 SE2d 21 (SC App, 1991); *Adams v Family Planning Assoc Med Group, Inc*, 315 Ill App 3d 533; 733 NE2d 766 (2000). But see *Monroe v Brown*, unpublished opinion of the Alaska Supreme Court, issued February 20, 1991 (Docket No. S-3326).

Having recognized that the question is one of relevancy, we turn to the specific documents excluded by the trial court. We conclude that several of them should have been admitted and that several were properly excluded. We will first review those documents that were improperly excluded and then those that were properly excluded.

Plaintiff's proposed exhibit 27, "Process for Transferring Urgent Care Patients With Chest Pain to the SJMH [Chest Pain Center]," was admissible, and the trial court erred by excluding it. That policy provides, "Adult patient with chest pain arrives at Urgent Care; vital signs and ECG obtained." This could be interpreted several different ways. First, it could be read as indicating that all adult patients with chest pain arriving at the urgent-care center must have their vitals taken and receive an ECG, in which case it was admissible to support plaintiff's claim that the standard of care required that all patients complaining of chest pain (including chest tightness) should be given an ECG. It could also be interpreted as indicating that only those adult patients who presented at the urgent-care center, had their vitals taken, and received an ECG would be

evaluated for transfer, in which case it was inapplicable here because Jilek did not receive an ECG. Because the document can be reasonably interpreted in a fashion that is applicable to the instant case, its admissibility would turn on the manner in which the parties' experts viewed it in light of the applicable standard of care.

Similarly, the trial court erred by excluding plaintiff's proposed exhibit 23, the American College of Emergency Physicians' "Clinical Policy for the Initial Approach to Adults Presenting with a Chief Complaint of Chest Pain, With No History of Trauma." Such external guidelines have been previously found to be admissible. *Zdrojewski*, 254 Mich App at 62-63. In addition, since this policy was specifically adopted by SJMH for use in its emergency department and urgent-care centers, including Maple Urgent Care, at the time that Dr. Stockson treated Jilek, it as also admissible under *Owens v Allis-Chalmers Corp*, 414 Mich 413, 422-423; 326 NW2d 372 (1982), and *Gallagher*, 171 Mich App at 767.[15]

Plaintiff's proposed exhibit 24, an internal EPMG document entitled "Introduction to EPMG's Chest Pain

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[15] Defendants characterize the American College Emergency Physicians' policy as relating to patients presenting with *primary* complaints of chest pain or respiratory difficulty. In fact, only one of the guidelines provides that the "chief complaint" must be chest pain. The other guidelines only state that the patient must complain of chest pain and provide no requirement that it be the "primary" complaint. Moreover, although the title indicates that it is related to those with a "chief complaint," the policy itself provides:

> Published studies report that up to 7% of visits to the [emergency department] involve complaints regarding chest pain. The complaint of chest pain encompasses a wide variety of conditions that range from insignificant to high risk in terms of threat to the patient's life. This policy strives to be broad and flexible enough to cover the wide spectrum of identifiable causes of medically significant chest pain.

Guideline" was also wrongly excluded from evidence. This document reflects EPMG's adoption of the American College of Emergency Physicians' guidelines and defines a "Best Practice Guideline" that provides:

> **Patients with non-traumatic chest pain (or other anginal equivalents) will not be sent home after a single [ECG] or cardiac marker determination (unless other definitive studies have ruled out [a myocardial infarction]).**
>
> Obviously, some patients with obvious chest wall pain or other etiologies will not need an [ECG] or cardiac marker determination, and may be safely sent home with neither of these done. But, if a physician's index of suspicion is high enough to order an [ECG] to rule out ischemia, or a cardiac marker to rule out cardiac injury, then a second set of cardiac markers must be ordered at least four hours later — a single cardiac marker determination does not rule out [a myocardial infarction].

Defendants can certainly argue that Jilek's chest pain was not of the type to which this policy would be relevant. However, as plaintiff presented evidence that Jilek's chest pain was of that type, the document was relevant to the standard of care and thus admissible.

We affirm the trial court's exclusion of proposed exhibits 25, 26, and 29, all of which are SJMH emergency-services policies for Maple Urgent Care. Proposed exhibit 25 is captioned "Urgent Care Scope of Care." The document provides, "Patients are seen on a first-come, first-serve basis except those who are experiencing the following signs and symptoms: chest discomfort such as tightness, heaviness, squeezing, pain and/or pressure for any reason . . . ." The policy pro-

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Finally, it seems axiomatic that it is the responsibility of the health-care professional to assign priority to the complaints of a patient rather than simply assume that whatever the patient thinks is most important is in fact so.

vides that patients experiencing such symptoms "receive prompt evaluation by a [registered nurse] and/or physician . . . ." In this case, Jilek did not disclose his chest tightness until he was seen by Dr. Stockson, so the action called for in the document—prompt evaluation by a physician—took place before the chest-pain complaint was made. Further, there is no allegation in this case that Jilek should have been seen *sooner*. Since the policy only determines what order patients are seen in, it is not implicated in this case. Similarly, plaintiff's proposed exhibit 26, another SJMH emergency-services guideline, designated as guideline number 582, governs patient check-in at the urgent-care clinic and is not relevant as Jilek did not identify his chest tightness until Dr. Stockson was already examining him. The same is true of proposed exhibit 29, which is captioned, "Pre-Physician Evaluation and Treatment" and designated as guideline number 585. This guideline addresses nursing care, not physician care.

Each of these three guidelines, however, states that chest tightness falls within the type of chest pain suggestive of cardiac involvement. Therefore, to the extent that Dr. Stockson, who signed the guidelines offered as proposed exhibits 26 and 29, testifies that Jilek's chest tightness was not suggestive of the need for immediate assessment, the guidelines could be used for purposes of impeachment. The same is true of proposed exhibit 25, which defines the scope of care at the facility where Dr. Stockson was medical director.[16]

We also affirm the exclusion of plaintiff's proposed exhibit 31, SJMH patient care policy number 305.1, entitled "Patients—Screening, Stabilization and Transfer."

[16] If Dr. Stockson signed or adopted other internal policies and guidelines that are not substantively admissible, the same approach would apply.

This document sets forth guidelines for "Off-Campus departments," which include Maple Urgent Care. However, the document relates to the provision of emergency care and screening regardless of the patient's ability to pay and does not include any medical guidelines relating to chest pain.

In sum, we reject defendants reading of *Gallagher* as standing for a wholesale exclusion of internal medical-provider guidelines even when they are relevant to the applicable standard of care and the injury. We hold, consistently with *Gallagher*, that while internal policies and guidelines do not in and of themselves set the standard of care,[17] they should be admitted as long as they are relevant to the applicable specialty's standard of care and to the injury alleged. Accordingly, we reverse and remand for a new trial.

III. CONCLUSION

In sum, we conclude that the trial court erred in the standard of care instruction given to the jury and by excluding evidence of relevant policies, procedures, and guidelines. These two errors are sufficient to require a new trial. Accordingly, we reverse the judgment of no cause of action and remand for a new trial. We do not retain jurisdiction.

BORELLO, J., concurred.

BANDSTRA, P.J. (*dissenting*). I adamantly disagree with my colleagues' conclusion that a jury verdict in favor of defendants, rendered after a lengthy trial during which the jurors were presented with comprehensive testimony regarding the applicable standard of

[17] Thus, violation of an internal policy or guideline is not negligence per se.

care and whether defendants violated it, should be thrown out. I disagree with the majority's conclusion that the trial court erred in its determination of the issues about which plaintiff complains on appeal and, further, to the extent there were any errors, I do not think that they warrant reversal.

The majority initially agrees with plaintiff's argument that the trial court erred by concluding that the applicable standard of care here was family medicine, under MCL 600.2169. That statute specifically states that "if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." MCL 600.2169(1)(a). Dr. Carlin Stockson is a specialist board-certified in family medicine, not emergency medicine. Thus, defendants were properly allowed to present expert testimony in defense of the claims against Dr. Stockson by board-certified family-medicine specialists. Similarly, the trial court did not err by instructing the jury that the applicable standard of care was that of "a physician specializing in family practice . . . ."[1]

[1] I disagree with the majority in its conclusion that "Dr. Stockson's . . . board certification as a family practitioner would not be relevant to the standard of care" because it is directly contrary to the clear statutory directive that board certification is of paramount concern. *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622, 630; 736 NW2d 284 (2007), on which the majority relies, did not consider the statute in this regard. Instead *Reeves* merely assumed, without any discussion whatsoever, that a board-certified family-medicine specialist working in the emergency room of a hospital could be held to an emergency-medicine standard of care. Moreover, common sense suggests there are large differences between an urgent-care (or, as some call it, "doc in a box") facility such as that at issue here and a hospital emergency room such as that in *Reeves*. See, e.g., *Lutz v Mercy Mt Clemens Corp*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2005 (Docket No. 261465), p 3 (stating that "clearly it is unreasonable to equate urgent care with emergency medicine").

Further, the trial court went on to specify for the jury that the applicable standard of care was that of a family-practice physician who was "working in an urgent care center . . . ." The jury had heard testimony from experts presented by both sides regarding the differences between an urgent-care facility and an emergency room, as well as the standards Dr. Stockson should have complied with as a family-medicine physician working in an urgent-care setting. To the extent that Dr. Stockson was thus held to a higher standard of care because of the place in which she practiced her family medicine and to the extent that plaintiff was allowed to present testimony from emergency-medicine experts against Stockson, plaintiff's case was strengthened, not weakened. In any event, the bottom line here is that the jurors were presented with comprehensive arguments and jury instructions that fairly presented the standard-of-care question for their resolution. They properly determined, after brief deliberations, that Dr. Stockson had not been negligent in her care of her patient.

The trial court also concluded that all of plaintiff's nine proposed documentary exhibits relating to guidelines and policies for the care of persons allegedly like the deceased were to be excluded from consideration by the jury. The majority finds fault with the trial court with respect to only three of those documents, and it does so only after concluding that it is either "not bound to follow" the only Michigan precedent directly on point, *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761; 431 NW2d 90 (1988), or that the holding of *Gallagher* should be ignored while dictum within that precedent should be followed. I disagree with the majority and conclude that binding precedent that applied and reiterated the *Gallagher* holding cannot be distinguished away. See *Buczkowski v McKay*, 441 Mich

96; 490 NW2d 330 (1992), and *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002). But, apart from all of that, even if I were to agree with the majority's conclusion that the three documents were improperly excluded, I would not conclude that it would have made any difference in the outcome of the trial.

And that brings me to my chief concern. Perhaps not surprisingly, the majority makes no mention of the standard of review we must apply on this appeal of a jury verdict:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, [or] for setting aside a verdict, . . . unless refusal to take this action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

The majority makes no attempt to explain how the errors it discerns from this record resulted in a jury verdict that was "inconsistent with substantial justice."

A fair reading of the lengthy record in this case demonstrates the exact opposite. The decedent presented to Dr. Stockson complaining only of the kind of respiratory problems that are commonplace during Michigan winters, for which he had received partially successful treatment from other caregivers over the preceding months. His chief complaint was not chest pain. In response, Dr. Stockson took some action, but she failed to take other actions that plaintiff's experts later contended should have been taken. The jurors heard lengthy testimony and argument from both sides about whether Dr. Stockson acted appropriately as a family-medicine specialist practicing in an urgent-care setting. The jury determined, in response to the first question presented on the verdict form, that Dr. Stock-

son was simply not negligent, and it rendered a verdict in favor of defendants accordingly.

The rule governing our review recognizes that no trial is perfect and allows us to disturb such a jury verdict only if it is "inconsistent with substantial justice." This is far from that kind of a case, and we should affirm.

JAGUAR TRADING LIMITED PARTNERSHIP v PRESLER

Docket No. 290972. Submitted June 16, 2010, at Grand Rapids. Decided August 3, 2010, at 9:00 a.m.

Jaguar Trading Limited Partnership, Wilford J. Presler, and Douglas Cunningham were parties to an agreement that provided for binding arbitration of any controversy or claim arising from the agreement. A dispute arose and, on August 13, 2007, an arbitration award was rendered in favor of Jaguar. On August 12, 2008, Jaguar, without filing a complaint or any other pleadings, filed in the Ingham Circuit Court a form from the State Court Administrative Office titled "Binding Arbitration Award," seeking confirmation of the arbitration award. Cunningham sought summary disposition on the ground that no complaint had been filed. Cunningham also argued that because Jaguar's filing was made one day before the expiration of the one-year period of limitations set forth in MCR 3.602(I) for the filing of a complaint seeking confirmation of an arbitration award, any further proceedings were barred. Jaguar argued that under the court rule, a party seeking confirmation of an arbitration award need only "file" the award with the clerk of the appropriate court within one year after the award was entered. The court, Joyce A. Draganchuk, J., denied Cunningham's motion and granted summary disposition in favor of Jaguar, holding that the court rule allows a party seeking confirmation of an arbitration award to initiate a proceeding by filing the award with the clerk of the court. Cunningham appealed.

The Court of Appeals *held*:

1. An arbitration agreement, like the one in this case, that provides that a judgment may be entered on the arbitration award is a statutory arbitration agreement governed by the Michigan arbitration act, MCL 600.5001 *et seq*. MCR 3.602 governs the judicial review and enforcement of statutory arbitration agreements.

2. To be effective, an arbitration award filed with a court must be confirmed by the court. This confirmation must result in an order of confirmation by the court. MCR 3.602(B)(1) requires a party seeking an order under MCR 3.602 to first file a complaint if no action is pending.

3. There is no authority within the Michigan arbitration act for the commencement of a confirmation proceeding other than by the filing of a complaint. Jaguar failed to properly initiate a civil action by filing a complaint as required by both MCL 600.1901 and MCR 2.101(B). Jaguar was entitled to neither confirmation of the arbitration award nor summary disposition because it failed to invoke the circuit court's jurisdiction under the Michigan arbitration act by properly initiating a civil action through the filing of a complaint.

4. Jaguar filed the arbitration award with the clerk of the circuit court within one year after the award was rendered, thus strictly complying with the time limitation of MCR 3.602(I). Therefore, MCR 3.602(I) itself would not prohibit Jaguar from filing a complaint in the circuit court for confirmation of the timely filed award.

Reversed and remanded.

ARBITRATION — CONFIRMATION OF ARBITRATION AWARDS — ACTIONS — COMPLAINTS.

A party seeking confirmation of a statutory arbitration award under MCR 3.602(I) and the Michigan arbitration act must, if there is no action pending between the parties, file a complaint in the circuit court in order to invoke the circuit court's jurisdiction (MCL 600.5001 *et seq*.).

Timothy E. Dixon, Attorney at Law, PLC (by *Timothy E. Dixon*), for Jaguar Trading Limited Partnership.

Douglas C. Cunningham, *in propria persona*.

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM. Defendant Douglas Cunningham[1] appeals as of right the trial court's order denying his motion for summary disposition, granting summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2), and confirming an arbitration award in favor of plaintiff. We reverse and remand.

[1] Wilford John Presler was named as a defendant in the trial court, but he did not appear and is not a party to this appeal. The term "defendant" as used in this opinion refers solely to Douglas Cunningham.

The facts of the dispute in the underlying arbitration matter are not at issue in this appeal. The sole issue is whether plaintiff, as a party seeking confirmation of an arbitration award under MCR 3.602(I) and the Michigan arbitration act (MAA), MCL 600.5001 *et seq*., was required to file a complaint in the circuit court in order to invoke the circuit court's jurisdiction. We conclude that, because no action was pending between the parties, plaintiff was required to file a complaint to initiate a civil action under the MAA. See MCR 3.602. We further conclude, however, that, pursuant to MCR 3.602(I), plaintiff timely filed the arbitration award with the clerk of the court.

Plaintiff and defendant were parties to an agreement that provided for binding arbitration of any controversy or claim arising from the agreement. A dispute arose between the parties, and, on August 13, 2007, an arbitration award was issued, awarding plaintiff $18,456.94, plus fees and costs. On August 12, 2008, plaintiff filed Form MC 284, a form approved by the State Court Administrative Office (SCAO) and titled "Binding Arbitration Award," in the trial court. On the form, plaintiff checked boxes indicating that the basis for binding arbitration was "[s]tatutory based on contract"; that the nature of the claim arbitrated was "[c]ommercial"; and that the total amount of the award was $25,219.44. Plaintiff attached several documents to the SCAO form, including the original arbitration award and exhibits submitted in the arbitration proceedings. Plaintiff did not file a complaint or any other pleadings.

Defendant, rather than filing an answer, sought summary disposition on the ground that no complaint had been filed. Defendant noted that MCR 3.602(B)(1), which governs statutory arbitration under the MAA,

provides that a party seeking relief under the rule must first file a complaint as in other civil actions. Defendant further argued that because plaintiff's filing was made one day before the expiration of the one-year limitations period set forth in MCR 3.602(I) for the filing of a complaint seeking confirmation of an arbitration award, any further proceedings were barred.

Plaintiff's attorney filed an affidavit explaining that he believed, on the basis of his reading of the MAA and MCR 3.602 and his research concerning SCAO Form MC 284, that he had followed the appropriate procedure for seeking confirmation of an arbitration award. Plaintiff argued that under MCR 3.602(I), a party seeking confirmation of an arbitration award need only "file" the award with the clerk of the appropriate court within one year after the award is rendered and that the language in MCR 3.602(B)(1) relied on by defendant is not applicable to confirmation requests under MCR 3.602(I). The trial court denied defendant's motion and instead granted summary disposition in favor of plaintiff under MCR 2.116(I)(2), holding that MCR 3.602(I) allows a party seeking confirmation of an arbitration award to initiate a proceeding by filing the award with the clerk of the court.

This Court reviews 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 court may grant summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, rather than the moving party, is entitled to judgment. *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). The trial court in this case held that plaintiff was entitled to judgment on the basis that no genuine issue of fact remained. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genu-

ine issue concerning any material fact and a party is entitled to judgment as a matter of law. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004).

The interpretation and application of a court rule involves a question of law that this Court reviews de novo. *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 123-124; 693 NW2d 374 (2005); *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 412; 766 NW2d 874 (2009). The rules governing the construction of statutes apply to the interpretation of court rules. *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); *Greater Bethesda*, 282 Mich App at 412. Clear and unambiguous language in a court rule must be accorded its plain meaning and enforced as written. *Greater Bethesda*, 282 Mich App at 412; *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007).

When an arbitration agreement provides that judgment may be entered on the arbitration award, as did the parties' agreement in this case, it falls within the definition of statutory arbitration and is governed by the MAA. MCL 600.5001(2); *Wold Architects & Engineers v Strat*, 474 Mich 223, 225, 229; 713 NW2d 750 (2006). MCR 3.602 governs judicial review and enforcement of statutory arbitration agreements. MCR 3.602(A); MCL 600.5021; *Brucker v McKinlay Transp, Inc*, 454 Mich 8, 16-17; 557 NW2d 536 (1997).

Plaintiff contends that the plain and unambiguous language of MCR 3.602(I) makes clear that a party seeking confirmation of an arbitration award need not file a complaint to invoke circuit-court jurisdiction. MCR 3.602(I) provides:

> Award; Confirmation by Court. An arbitration award *filed with the clerk of the court* designated in the agreement

> or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule. [Emphasis added.]

Plaintiff maintains, on the basis of the emphasized language, that a proceeding to confirm an arbitration award is initiated simply by *filing* the arbitration award with the clerk of the court. We disagree.

To be effective, a filed award must be "confirmed" by the court. And this confirmation necessarily must result in an order of confirmation by the court. And, as defendant notes, MCR 3.602(B)(1) requires a party seeking any order under MCR 3.602 to first file a complaint if no action is pending. As amended in 2007, MCR 3.602(B)(1) provides:

> (B) Proceedings to Compel or to Stay Arbitration.
>
> (1) A request for an order to compel or to stay arbitration or for another order under this rule must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. *If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions*.[2] [Emphasis added.]

The emphasized language is consistent with the overall content of MCR 3.602, which makes clear that any request for circuit-court relief in an arbitration matter takes place within the context of a "civil action" and is therefore subject to all the procedural requirements that apply to such an action.[3] As noted earlier, MCR 3.602(B)(1), (J)(1), and (K)(1) provide for the filing of complaints and motions in proceedings involv-

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[2] As plaintiff notes, in 2007 the emphasized language in MCR 3.602(B)(1) was also added to the subrules governing vacation and modification of arbitration awards, MCR 3.602(J) and (K).

[3] See also the 1985 staff comment to MCR 3.602: "Subrule(B)(1) requires that *a request to invoke court jurisdiction in an arbitration matter is to be*

ing arbitration matters "as in other civil actions." Similarly, MCR 3.602(M) provides for the taxing of costs "as in civil actions," and MCR 3.602(N) provides for the taking of appeals "as from order or judgments in other civil actions."

Pursuant to MCR 2.101(A), "[t]here is one form of action known as a 'civil action,' " and, under MCR 2.101(B), "[a] civil action is commenced by filing a complaint with a court." Furthermore, § 1901 of the Revised Judicature Act (RJA), in which the MAA is located, provides that "[a] civil action is commenced by filing a complaint with the court." MCL 600.1901. There is no authority within the MAA for the commencement of a confirmation proceeding other than by the filing of a complaint as directed in MCL 600.1901.[4] Indeed, our Supreme Court has noted that "[a]fter an arbitration award is rendered, the successful party has one year *to commence a civil action* requesting that the court confirm the award and reduce it to judgment." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 501-502; 475 NW2d 704 (1991) (emphasis added).[5] As the Court further explained:

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made by filing a civil action, unless the matter arises in a pending action, in which case a motion may be used." (Emphasis added.)

[4] See also 5 Longhofer, Michigan Court Rules Practice (5th ed), § 3602.8, pp 107-108:

> A party seeking confirmation of an award [under MCR 3.602(I)] must file the award with the clerk of the court designated in the agreement within one year after the award was rendered. In a pending action, the filing of the award is coupled with the filing of a motion seeking its confirmation. *If no action is then pending, the party seeking confirmation must file a complaint seeking that relief*. The award is attached to and filed with the complaint. Service of the pleadings is made under MCR 2.105. MCR 2.116 is available for summary disposition of the action. [Emphasis added; citations omitted.]

[5] The Supreme Court's opinion in *Gordon Sel-Way* was released before the most recent 2007 amendment of the court rule. However, the rationale applied to the rule then still applies to the rule as written today.

> In Michigan, "civil action" is broadly defined as an action "commenced by filing a complaint with a court." MCR 2.101(B), MCL 600.1901 . . . . The procedure to obtain a money judgment on an arbitration award is governed by the rules applicable to civil actions *and commences with the filing of a complaint with a court*. MCR 3.602. [*Id*. at 509 (emphasis added).][6]

Plaintiff failed to properly initiate a civil action by filing a complaint as required by both MCL 600.1901 and MCR 2.101(B). Indeed, plaintiff has failed to file any pleading or make any official request in the circuit court.[7] Having failed to invoke circuit-court jurisdiction under the MAA by properly initiating a civil action through the filing of a complaint, plaintiff was entitled to neither confirmation of the arbitration award nor summary disposition.

Defendant additionally argues that, because the one-year limitations period of MCR 3.602(I) has expired, further proceedings are barred, citing *Huntington Woods v Ajax Paving Indus, Inc* (*After Remand*), 196 Mich App 71, 73; 492 NW2d 463 (1992). We disagree. In *Huntington Woods*, the proponent of the arbitration award sought its confirmation by properly filing a complaint, but it did not do so within the one-year period allowed by MCR 3.602(I). *Id*. at 73-74. Thus, apparently no action whatsoever was taken seeking confirmation of the award within the time limit of that rule. In contrast, plaintiff here filed the arbitration

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[6] The Court in *Gordon Sel-Way*, 438 Mich at 490, concluded that MCL 600.6013 governs the interest on arbitration awards "from the date a complaint is filed requesting confirmation of an award and continues until the date judgment rendered on the award is satisfied."

[7] SCAO Form MC 284 does not contain any request for confirmation of an existing arbitration award; rather, the form, which is captioned "Binding Arbitration Award," is simply a document that may be completed by an arbitrator for use as the arbitration award itself.

award with the clerk of the circuit court within one year after the award was rendered, thus strictly complying with the time limitation and the clear language of the rule. Accordingly, MCR 3.602(I) does not itself prohibit plaintiff from filing a complaint in the lower court for confirmation of the timely filed award.[8]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

[8] We have been presented with no argument apart from the rule supporting the conclusion that a complaint might be otherwise time-barred. On remand, the lower court may consider any such argument if it is advanced.

ALBERTO v TOYOTA MOTOR CORPORATION

Docket No. 296824. Submitted May 13, 2010, at Detroit. Decided August 5, 2010, at 9:00 a.m.

Lilia Alberto, personal representative of the estate of Guadalupe Alberto, deceased, brought an action in the Genesee Circuit Court against Toyota Motor Corporation, Toyota Motor Engineering & Manufacturing North America, Inc., Toyota Motor Sales U.S.A., Inc., and others, seeking damages in connection with a claim that a defect in a 2005 Toyota Camry driven by the decedent led to the sudden acceleration of the vehicle and thereby caused an accident that resulted in the decedent's death. Plaintiff noticed the video depositions of Yoshima Inaba, the chairman and chief executive officer of Toyota Motor Sales, and Jim Lentz, the president and chief operating officer of Toyota Motor Sales. Toyota Motor Sales moved for a protective order to prevent the depositions, claiming that neither Inaba nor Lentz had participated in the design, testing, manufacture, warnings, sale, or distribution of the 2005 Camry or the day-to-day details of vehicle production and that neither officer had unique information pertinent to issues in the case. Toyota Motor Sales also averred that plaintiff could not show that the depositions were necessary to prevent injustice, because the information sought could be obtained from those persons who worked directly on the design, testing, and manufacture of the vehicle. In response, plaintiff argued that the two corporate officers possessed information relevant to the case. The court, Archie L. Hayman, J., denied the motion, and Toyota Motor Sales sought leave to appeal the order. The Court of Appeals entered an unpublished order on March 10, 2010, that, in part, granted Toyota Motor Sales's motion for a stay of the depositions until further order of the Court (Docket No. 296824). On March 11, 2010, the Court of Appeals entered an unpublished order that, in part, granted the application for leave to appeal and continued in full force pending the resolution of the appeal the order that granted the stay of the depositions (Docket No. 296824). The order also directed the parties to address specifically whether the apex-deposition rule should or does apply to corporate defendants.

The Court of Appeals *held*:

1. The apex-deposition rule applies in Michigan cases to high-ranking officials in the public sector and to high-ranking corporate officers in the private sector. The rule provides that before a plaintiff may take the deposition of a high-ranking or "apex" governmental official or corporate officer, the plaintiff must demonstrate both that the governmental official or corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by deposing lower-level officials or employees. The rule applies as follows. After the party opposing the deposition demonstrates by affidavit or other testimony that the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims at issue, the party seeking the deposition of the high-ranking corporate officer or public official must demonstrate that the relevant information cannot be obtained absent the disputed deposition. This procedure does not shift the burden of proof to the party seeking discovery because if the defendant and the potential deponent make the requisite showing, only then must the party seeking the deposition show that the potential deponent has unique or superior knowledge of issues relevant to the litigation and that that information cannot be obtained by less intrusive means.

2. Neither Inaba nor Lentz had any actual knowledge, much less a unique or superior knowledge, of the design, engineering, manufacturing, or testing processes that went into the building of the vehicle, and both had only generalized knowledge of the sudden-acceleration problem that had resulted in the recall of certain Toyota vehicles, not including the vehicle driven by the decedent.

3. The trial court abused its discretion by denying Toyota Motor Sales's motion for a protective order to quash the depositions. The order denying the motion must be vacated, and the case must be remanded to the trial court for reconsideration.

Vacated and remanded.

JANSEN, J., dissenting, stated that, given Michigan's existing discovery rules that adequately protect high-ranking corporate officers and their respective corporations from potential discovery abuses, Michigan does not need a broad apex-deposition rule to shield high-ranking corporate officers from abusive or burdensome discovery. The decisions in *Fitzpatrick v Secretary of State*, 176 Mich App 615 (1989), and *Hamed v Wayne Co*, 271 Mich App 106 (2006), which involved attempts to depose high-ranking governmental officials, were concerned with protecting the public's interest in the service of governmental employees

and do not compel the creation of a new apex-deposition rule for high-ranking corporate officers. Judge JANSEN would also conclude that, under the existing rules of civil discovery, the trial court properly denied the motion for a protective order to quash the depositions. Plaintiff demonstrated a strong probability that Inaba and Lentz possessed personal knowledge of particular information relevant to the litigation in this case. Their depositions likely would have led to the discovery of relevant, admissible evidence and would not have been annoying, embarrassing, oppressive, unduly burdensome, or unduly expensive. There was no showing that the depositions would have been abusive. Toyota Motor Sales failed to carry its burden to establish that a protective order was warranted under MCR 2.302(C). The trial court's order should be affirmed.

PRETRIAL PROCEDURE — DEPOSITIONS — APEX-DEPOSITION RULE — CORPORATE OFFICERS.

The apex-deposition rule applies in Michigan to high-ranking officials in the public sector and to high-ranking corporate officers in the private sector; the rule provides that, before a plaintiff may take the deposition of a high-ranking or apex governmental official or corporate officer, the plaintiff must demonstrate both that the governmental official or corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by deposing lower-level officials or employees; when the party opposing the deposition demonstrates by affidavit or other testimony that the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims at issue, the party seeking the deposition must demonstrate that the relevant information cannot be obtained absent the disputed deposition.

Hilborn & Hilborn, P.C. (by *George Hilborn*); *Thomas J. Murray & Associates* (by *Thomas J. Murray*); *Edgar F. Heiskell, III*; *Bailey & Glasser, LLP* (by *Benjamin L. Bailey*, *Eric B. Snyder*, and *Robert P. Lorea*); *Lewis & Babcock* (by *A. Camden Lewis*); and *Bendure & Thomas* (by *Mark R. Bendure*) for Lilia Alberto.

Bowman and Brooke LLP (by *Lawrence C. Mann, Andrea L. Moody,* and *Carmen M. Bickerdt*), for Toyota Motor Sales U.S.A., Inc.

Amicus Curiae:

Dickinson Wright PLLC (by *Robert W. Powell, Phillip J. DeRosier,* and *Michael D. Bossenbroek*), and *Hugh F. Young, Jr.*, for Product Liability Advisory Council, Inc.

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

SAAD, P.J. Defendant Toyota Motor Sales U.S.A., Inc.,[1] appeals by leave granted the trial court's order that denied its motion for a protective order to quash the depositions of two corporate officers, Yoshimi Inaba and Jim Lentz. We vacate the trial court's order and remand this case for further proceedings.

I. FACTS AND UNDERLYING PROCEEDINGS

This is a personal-injury, products-liability suit wherein plaintiff seeks to depose two high-ranking Toyota corporate officers in connection with the claim that a defect in a Toyota vehicle caused the accident that resulted in the death of plaintiff's decedent.

Plaintiff filed this wrongful-death action and claimed that the decedent drove a 2005 Toyota Camry at a speed of less than 25 miles an hour when the vehicle suddenly accelerated to a speed in excess of 80 miles an hour. Plaintiff also asserts that the decedent attempted unsuccessfully to apply the vehicle's brakes, but the vehicle struck a tree, went airborne, and struck another tree, and plaintiff's decedent sustained fatal injuries.

Plaintiff noticed the video depositions of Yoshimi Inaba, defendant's chairman and chief executive officer,

[1] The other named defendants were dismissed from plaintiff's lawsuit and are not parties to this appeal. References to "defendant" in the singular throughout this opinion are to defendant-appellant Toyota Motor Sales U.S.A., Inc., only.

and Jim Lentz, defendant's president and chief operating officer, pursuant to MCR 2.306 and MCR 2.315. Defendant moved for a protective order pursuant to MCR 2.302(C) to prevent the depositions, because defendant says that neither Mr. Inaba nor Mr. Lentz "participated in the design, testing, manufacture, warnings, sale, or distribution of the 2005 Camry, or the day-to-day details of vehicle production," and that neither officer had "unique information pertinent to issues in the case." Defendant also avers that plaintiff could not show that the depositions of Messrs. Inaba and Lentz were necessary to prevent injustice, because the information plaintiff sought could be obtained from those persons who worked directly on the design, testing, and manufacture of the vehicle at issue. Defendant noted that Michigan adheres to the so-called "apex-deposition rule" for high-ranking governmental officials, observed that various federal and state courts had applied the apex-deposition rule to high-ranking corporate officers in addition to governmental officials, and argued that Michigan should do so as well.

In response, plaintiff argues that while Michigan has adopted the apex-deposition rule for public officials, it has not applied the apex-deposition rule in connection with high-ranking corporate officers, and that even if Michigan were to adopt the apex-deposition rule for corporate officers, it should not apply here. Plaintiff contends that Mr. Lentz has been the "public face" of Toyota as the company's safety problems became widely known and emphasized that Mr. Lentz had made numerous public appearances and testified before Congress regarding Toyota's recent recalls of vehicles.[2] Plaintiff also noted that Mr. Inaba had testified before Congress regarding Toyota's efforts to complete its

[2] The recent recalls do not involve the vehicle at issue here.

current recalls and review its quality-control processes and had said that he would be involved in the quality-control review.

Though the trial court found that Messrs. Inaba and Lentz were apex, or high-ranking, corporate officers, the trial court held that Michigan's caselaw and court rules did not preclude the depositions from taking place.

Defendant sought leave to appeal in this Court and moved for immediate consideration and a stay of the depositions. Ultimately, this Court granted defendant's application and continued in effect a prior order of the Court that had stayed the depositions of Messrs. Inaba and Lentz. The Court also ordered the appeal expedited and directed the parties to "address specifically the issue of whether the apex deposition rule should or does apply to corporate defendants." *Alberto v Toyota Motor Corp*, unpublished order of the Court of Appeals, entered March 11, 2010 (Docket No. 296824).

II. NATURE OF THE CASE AND THE APEX-DEPOSITION RULE

This appeal presents the question whether Michigan should formally adopt the apex-deposition rule in the corporate context. As used by other state and federal courts, the apex-deposition rule provides that before a plaintiff may take the deposition of a high-ranking or "apex" governmental official or corporate officer, the plaintiff must demonstrate both that the governmental official or corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by deposing lower-ranking employees. See, e.g., *Baine v Gen Motors Corp*, 141 FRD 332, 334-335 (MD Ala, 1991).

Courts have applied the apex-deposition rule not to shield high-ranking officers from discovery, but to sequence discovery in order to prevent litigants from deposing high-ranking governmental officials as a matter of routine procedure before less burdensome discovery methods are attempted. See, e.g., *Sneaker Circus, Inc v Carter*, 457 F Supp 771, 794 n 33 (ED NY, 1978). Courts have reasoned that giving depositions on a regular basis would impede high-ranking governmental officials in the performance of their duties, and thus contravene the public interest. See, e.g., *Union Savings Bank v Saxon*, 209 F Supp 319, 319-320 (D DC, 1962). In essence, the apex-deposition rule prevents high-ranking public officials from being compelled to give oral depositions unless a preliminary showing is made that the deposition is necessary to obtain relevant information that cannot be obtained from another discovery source or mechanism. *Baine*, 141 FRD at 334-336.

Premised on similar reasoning, several federal appellate and district courts have extended application of the apex-deposition rule to high-ranking corporate executives. Generally, these cases hold that before a high-ranking corporate executive may be deposed, the plaintiff must establish that the executive has superior or unique information regarding the subject matter of the litigation and that such information cannot be obtained through a less intrusive method, such as by deposing lower-ranking executives. See, e.g., *Salter v Upjohn Co*, 593 F2d 649, 651 (CA 5, 1979); *Lewelling v Farmers Ins of Columbus, Inc*, 879 F2d 212, 218 (CA 6, 1989); *Thomas v Int'l Business Machines*, 48 F3d 478, 482-484 (CA 10, 1995); *Mulvey v Chrysler Corp*, 106 FRD 364, 366 (D RI, 1985); *Baine*, 141 FRD at 334-336; *Evans v Allstate Ins Co*, 216 FRD 515, 518-519 (ND Okla, 2003).

State courts, including those in California and Texas, have also adopted the apex-deposition rule in the corporate context. For example, in *Liberty Mut Ins Co v San Mateo Co Superior Court*, 10 Cal App 4th 1282, 1289; 13 Cal Rptr 2d 363 (1992), the California Court of Appeal, relying on federal decisions such as *Salter*, *Mulvey*, and *Baine*, adopted the apex-deposition rule in the corporate context and held that the potential deponent, the president and chief executive officer of Liberty Mutual, could not be deposed absent a showing that the officer had "unique or superior personal knowledge of discoverable information." The *Liberty Mut* court held that absent such a showing, "the trial court should issue the protective order and first require the plaintiff to obtain the necessary discovery through less intrusive methods." *Id*. If after these less intrusive methods are exhausted and the plaintiff makes a showing that the apex officer has information relevant to the case, the trial court may allow the deposition to proceed. *Id*. Similarly, in *Monsanto Co v May*, 889 SW2d 274, 277 (Tex, 1994), the Texas Supreme Court, relying on federal decisions such as *Salter* and *Mulvey* and on the decision in *Liberty Mut*, adopted the apex-deposition rule and held that the rule "presents a fair balance between the right of a plaintiff to conduct discovery in its case within the limits of the rules, and the right of someone at the apex of the hierarchy of a large corporation to avoid being subjected to undue harassment and abuse."

The question posed by Toyota's motion and the trial court's order is whether Michigan caselaw should take into account the position within an organization of the person sought to be deposed. Because Michigan's court rules contemplate such a rule and because our courts have, in essence, applied the principles of the apex-deposition rule to governmental officials, albeit, with-

out using the aforementioned terminology, and because there is no principled reason for not affording similar safeguards to corporate defendants, we hereby adopt the apex-deposition rule as explained more thoroughly below.

III. ANALYSIS

We hold that the apex-deposition rule applies to high-ranking officials in the public sector and to high-ranking corporate officers in the private sector.

Michigan has a broad discovery policy that permits the discovery of any matter that is not privileged and that is relevant to the pending case. MCR 2.302(B)(1); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). However, Michigan's court rules acknowledge the wisdom of placing reasonable limits on discovery. MCR 2.302(C) provides, in 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, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place[.]

Michigan's rules of discovery largely track the federal discovery rules.[3] In the absence of Michigan precedent, courts of this state routinely seek guidance from federal

[3] FR Civ P 26(c) provides for the issuance of a protective order in discovery proceedings.

cases construing a similar federal rule. *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997).

This Court has applied the apex-deposition rule, while not referring to it as such, in two cases involving governmental officials. In *Fitzpatrick v Secretary of State*, 176 Mich App 615, 617-618; 440 NW2d 45 (1989), this Court reversed the trial court's order that denied the defendant's motion to quash the deposition of the Secretary of State on the grounds that the Secretary of State lacked personal knowledge of the relevant facts and that the information sought could be obtained by other means. More recently, in *Hamed v Wayne Co*, 271 Mich App 106, 109-110; 719 NW2d 612 (2006), this Court reversed the trial court's order that denied the defendants' motion to quash the depositions of the Wayne County Executive and the Wayne County Sheriff on the ground that the plaintiff had made no showing that either official possessed relevant information that could not be obtained through other methods.

We find that application of the apex-deposition rule in the public sector and private corporate context is consistent with Michigan's broad discovery policy, *Reed Dairy Farm*, 227 Mich App at 616, and with Michigan's court rules, which allow a trial court to control the timing and sequence of discovery "for the convenience of parties and witnesses and in the interests of justice," MCR 2.302(D), and to enter protective orders "for good cause shown," MCR 2.302(C). As noted, in *Fitzpatrick*, 176 Mich App at 617-619, this Court reversed the trial court's denial of a motion for a protective order to preclude the taking of the deposition of the Secretary of State. The *Fitzpatrick* Court did not specifically state that the Secretary of State could be deposed if the plaintiff could show that doing so would be necessary to

prevent injustice. However, in *Hamed*, 271 Mich App at 112, this Court adopted the holding in *Fitzpatrick* and clarified that depositions of governmental officials could be taken upon a showing by the plaintiff that the depositions were necessary "to prevent prejudice or injustice[.]" These cases rely on the Michigan Court Rules, see, e.g., *Fitzpatrick*, 176 Mich App at 617, and *Hamed*, 271 Mich App at 109-110, and the analysis employed in *Fitzgerald* and *Hamed* is consistent with those federal and state court cases that have applied the apex-deposition rule in the corporate context.

Recognizing that the highest positions within a juridical entity rarely have specialized and specific first-hand knowledge of matters at every level of the complex organization, courts have adopted the apex-deposition rule in the corporate context to (1) promote efficiency in the discovery process by requiring that before an apex officer is deposed it must be demonstrated that the officer has superior or unique personal knowledge of facts relevant to the litigation, see *Salter*, 593 F2d at 651, and (2) prevent the use of depositions to annoy, harass, or unduly burden the parties. See *Lewelling*, 879 F2d at 218; *Baine*, 141 FRD at 335-336. Of course, no court has applied the apex-deposition rule to hold that an apex or high-ranking corporate officer cannot be deposed under any circumstances. And neither do we. Rather, courts have applied the rule to ensure that discovery is conducted in an efficient manner and that other methods of discovery have been attempted before the deposition of an apex officer is conducted. See, e.g., *Salter*, 593 F2d at 651-652; *Liberty Mut*, 10 Cal App 4th at 1287-1289. Moreover, those cases adopting the apex-deposition rule in the corporate context do not shift the burden of proof, but merely require the party seeking discovery to demonstrate that the proposed deponent has unique personal knowledge of the subject matter of

the litigation and that other methods of discovery have not produced the desired information *only after* the party opposing discovery has moved for a protective order and has made a showing regarding the lack of the proposed deponent's personal knowledge and that other discovery methods could produce the required information. Cf. *Crest Infinity II, LP v Swinton*, 2007 OK 77, ¶ 17; 174 P3d 996, 1004 (2007) (declining to adopt a form of the apex-deposition rule that shifts the burden to the party seeking discovery on the ground that the burden of showing good cause is statutorily placed on the party seeking discovery). In other words, after the party opposing the deposition demonstrates by affidavit or other testimony that the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims in issue, then the party seeking the deposition of the high-ranking corporate officer or public official must demonstrate that the relevant information cannot be obtained absent the disputed deposition.

Application of the apex-deposition rule does not, contrary to plaintiff's argument, shift the burden of proof to the party seeking discovery. If the defendant and the potential deponent make the requisite showing outlined above, only then must the party seeking the deposition show that the potential deponent has unique or superior knowledge of issues relevant to the litigation and that the information cannot be obtained by less intrusive means, such as by deposing lower-level officials or employees. Moreover, nothing herein can or should be read to preclude the deposition of high-ranking public or corporate officials who possess relevant personal knowledge of matters in issue that cannot be obtained by other allowable discovery.

In adopting the apex-deposition rule, we recognize, as have other courts, that an apex corporate officer, like a

high-ranking governmental official, often has no particularized or specialized knowledge of the day-to-day operations or the particular factual situations that lead to litigation, and has far-reaching and comprehensive employment duties that require a significant time commitment. And, therefore, to allow depositions of high-ranking governmental officials or corporate officers without any restriction or conditions could result in the abuse of the discovery process and harassment of the parties. Accordingly, our adoption of the apex-deposition rule should serve as a useful rule for trial courts to use in balancing the discovery rights of the parties.

IV. APPLICATION

We review for an abuse of discretion a trial court's decision on a motion for a protective order. *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002).

Defendant moved for a protective order on the ground that neither Mr. Inaba nor Mr. Lentz had unique, personal knowledge of facts relevant to the litigation.[4] Plaintiff points to the fact that both Messrs. Inaba and Lentz have made public appearances to discuss Toyota's safety difficulties and recall efforts. But no evidence before us demonstrates that, during

[4] We note that defendant also based its motion for a protective order on the ground that plaintiff had engaged in no discovery efforts designed to elicit the information she sought from Messrs. Inaba and Lentz. At the time the trial court heard defendant's motion, plaintiff had deposed a former employee of defendant Toyota Motor Engineering & Manufacturing North America, Inc., a company that had no involvement in the design or manufacturing of the vehicle at issue. The fact that plaintiff has engaged in other discovery, including the taking of depositions, since the hearing on defendant's motion, is irrelevant to the issue before us at this time.

those appearances, either officer demonstrated any actual knowledge, much less a unique or superior knowledge, of the design, engineering, manufacturing, or testing processes that went into the building of the vehicle, a 2005 Camry. The executives spoke in only general terms about Toyota's safety difficulties and recall efforts.[5]

In terms of plaintiff's contention that Messrs. Inaba and Lentz had general knowledge of the issues, the instant case is analogous to *In re Continental Airlines, Inc*, 305 SW3d 849 (Tex App, 2010). In *Continental*, the plaintiffs filed suit following an accident involving a Continental Airlines flight that injured 37 persons. *Id*. at 851. The plaintiffs noticed the deposition of Larry Kellner, Continental's chief executive officer (CEO) and chairman of the board of directors, arguing that Kellner had unique or superior knowledge of discoverable information regarding the accident. *Id*. The plaintiffs pointed to the following facts: (1) Kellner briefed members of the media immediately following the accident, (2) Kellner repeatedly stated that he would learn the cause of the accident in order to prevent future accidents, (3) Kellner sent personal letters to the passengers, (4) Kellner interviewed the pilots and gave commendations to crew and flight members, and (5) Kellner served on the board of directors of the Air Transport Association of America (ATA), a safety organization, and thus had knowledge regarding Continental's implementation of the ATA's policies. *Id*.

The trial court denied the defendant's motion for a protective order and granted the plaintiffs' motion to compel the deposition. *Id*. The defendant moved for a writ of mandamus, asking the appellate court to compel

[5] As stated earlier, the recall campaigns about which Messrs. Inaba and Lentz spoke did not include the 2005 Camry.

the trial court to set aside its order granting the motion to compel the deposition. *Id*. at 850-851.

The appellate court reviewed the pertinent law and the evidence, including statements made by other Continental employees in depositions and statements in Kellner's own affidavit, *id*. at 853-857, and found that the defendant showed that Kellner did not have "unique or superior knowledge regarding what occurred before and during the accident or the cause of the accident." *Id*. at 858. The court noted that while Kellner made public statements following the accident, the information he provided was given to him by another Continental employee; that Kellner was not Continental's representative with regard to the investigation by the National Transportation Safety Board (NTSB); that Kellner had not received information regarding the cause of the accident in his executive briefs; and that Kellner did not serve as Continental's representative on the ATA's safety committee. *Id*.

Furthermore, the *Continental* court found that the plaintiffs had not demonstrated that less intrusive methods were inadequate to obtain the discovery sought, notwithstanding the fact that the plaintiffs in *Continental*, unlike plaintiff here, had conducted extensive discovery, including submitting 110 requests for production and 74 interrogatories and taking 11 depositions. *Id*. at 859. The court noted that Continental had asserted that the plaintiffs had not deposed Continental's corporate representative, other individuals were present when Kellner received information regarding the accident, and other employees were more directly involved in the NTSB investigation. *Id*. The court reasoned that, while Kellner would be "best able to address his own subjective intent in making his generalized public statements following the accident," Kell-

ner's "subjective intent in making the subject public statements [did] not establish anything regarding negligence, proximate cause, or damages." *Id*. The *Continental* court held that the trial court had abused its discretion by compelling Kellner's deposition, and directed the trial court to set aside the order compelling the deposition. *Id*. Here, in contrast, virtually no discovery preceded the disputed efforts to depose Messrs. Inaba and Lentz.

We note that the CEO in *Continental* was in a position similar to that of the Toyota executives here, Messrs. Inaba and Lentz. The Continental CEO had generalized knowledge of the accident and served as the airline's public face in dealing with the media, but had no particular knowledge of the cause of the accident. The record reflects that Messrs. Inaba and Lentz had only *generalized* knowledge of Toyota's unintended acceleration problems and had no unique or superior knowledge of, or role in designing, the vehicle at issue or in implementing manufacturing or testing processes. The court's reasoning in *Continental* is instructive and applicable to the proposed deponents here.

V. CONCLUSION

We adopt the apex-deposition rule for high-ranking corporate officers, as well as for governmental officials,[6] and therefore hold that the trial court abused its discretion by denying defendant's motion for a protective order to quash the depositions of Messrs. Inaba and Lentz. We vacate the trial court's order and remand this case to the trial court for reconsideration in accordance with this opinion.

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[6] *Fitzpatrick*, 176 Mich App at 617-618; *Hamed*, 271 Mich App at 109-110.

Vacated and remanded. We retain jurisdiction.

DONOFRIO, J., concurred.

JANSEN, J. (*dissenting*). I cannot join the majority's announcement of a broad, new "apex-deposition rule" shielding high-ranking corporate officers from certain discovery in Michigan litigation. Nor can I conclude, under existing principles of Michigan law, that the trial court abused its discretion by denying defendant's[1] motion for a protective order to quash the scheduled depositions of Yoshimi Inaba and Jim Lentz. Accordingly, I must respectfully dissent.

I

As explained by the majority, plaintiff noticed the video depositions of Inaba, defendant's chairman and chief executive officer, and Lentz, defendant's president and chief operating officer, pursuant to MCR 2.306 and MCR 2.315. Defendant moved for a protective order under MCR 2.302(C), seeking to prevent the scheduled depositions for the reason that neither Inaba nor Lentz "participated in the design, testing, manufacture, warnings, sale, or distribution of the 2005 Camry, or the day-to-day details of vehicle production." Defendant also asserted that neither Inaba nor Lentz possessed "unique information pertinent to the issues in this case" and argued that the so-called "apex-deposition rule" should be extended to shield high-ranking corporate officers from certain discovery in Michigan.

Plaintiff responded by arguing that although Michigan's courts had occasionally applied something similar to the apex-deposition rule in the context of high-

[1] I use the term "defendant" throughout this dissenting opinion to refer to defendant-appellant Toyota Motor Sales U.S.A., Inc., only.

ranking governmental officials, the rule had never been applied to shield corporate officers from discovery. Plaintiff contended that Inaba and Lentz possessed specific information relevant to this case and argued that defendant's motion for a protective order should therefore be denied. In particular, plaintiff asserted that Inaba and Lentz had failed to share with the government and the public certain information in their possession concerning the phenomenon of "sudden acceleration" in Toyota vehicles. Plaintiff pointed to a letter from two congressmen alleging that Toyota had concealed information regarding this sudden-acceleration problem. Plaintiff also pointed to certain public statements by Inaba suggesting that Toyota had saved $100 million by concealing information regarding sudden acceleration and to certain portions of Inaba's testimony before Congress in which he testified that he was personally involved in the quality-control review of Toyota vehicles. Plaintiff argued that this evidence, taken together, was sufficient to show that Inaba and Lentz personally possessed information relevant to the litigation and that their depositions were therefore warranted. Plaintiff also argued that she could not obtain the desired information by deposing other lower-level employees because some of the information was uniquely within the possession of Inaba or Lentz and because several of the statements and representations at issue had been made by Inaba or Lentz directly.

After oral argument, the trial court ruled that Inaba and Lentz were high-ranking corporate officers, but determined that Michigan law did not preclude plaintiff from deposing them. Specifically, the court observed, "[W]ith the documents [plaintiff] presented, it certainly would appear that [Inaba and Lentz] are in the know as to the issues that . . . [plaintiff is] concerned about in this particular case; and so I do think it is appropriate

for [plaintiff] to depose them at this time." For the reasons that follow, I believe that the trial court's ruling on this issue was correct.

II

As an initial matter, I cannot join the majority's announcement of a broad, new apex-deposition rule shielding high-ranking corporate officers from certain discovery in Michigan civil litigation. The majority's announcement of this new rule is neither necessary nor warranted on the facts of this case. It is well settled that Michigan law *already authorizes* a trial court to enter protective orders and restrict discovery in order to prevent "annoyance, embarrassment, oppression, or undue burden or expense . . . ." MCR 2.302(C); *Eyde v Eyde*, 172 Mich App 49, 56; 431 NW2d 459 (1988). Similarly, Michigan's trial courts are *already authorized* to restrict discovery that would be abusive, excessive, or irrelevant, *Hartmann v Shearson Lehman Hutton, Inc*, 194 Mich App 25, 29; 486 NW2d 53 (1992), and to limit discovery for the purpose of preserving a litigant's privacy rights, see *Yates v Keane*, 184 Mich App 80, 84; 457 NW2d 693 (1990). Within the confines of these rules, Michigan's trial courts have "broad discretion to issue protective orders to prevent . . . potential abuses[.]" *Marketos v American Employers Ins Co*, 185 Mich App 179, 197; 460 NW2d 272 (1990).

Because I believe that these existing principles of law are already adequate to protect high-ranking corporate officers and their respective corporations from potential discovery abuses, I dissent from the majority's adoption of a broad apex-deposition rule in this case. I fully acknowledge that, on occasion, certain litigants may seek to depose high-ranking corporate officers who truly lack personal knowledge of the relevant facts. At

times, such litigants may actually be driven by a desire to annoy or embarrass the high-ranking corporate officers or to unnecessarily prolong the discovery process. But more commonly, I suspect, such litigants are simply mistaken about their belief that the high-ranking corporate officers at issue personally possess any relevant information. Whatever the litigants' motivations, however, our present rules of civil discovery are more than sufficient to curtail any undue burden, expense, or annoyance that might result from such discovery requests. See MCR 2.302(C). Given our existing discovery rules, Michigan does not need a broad apex-deposition rule to shield high-ranking corporate officers from abusive or burdensome discovery. The new apex-deposition rule announced by the majority today is quite simply unnecessary.

Nor do I believe that the majority's new apex-deposition rule for corporate officers is merely a logical outgrowth of this Court's decisions in *Fitzpatrick v Secretary of State*, 176 Mich App 615; 440 NW2d 45 (1989), and *Hamed v Wayne Co*, 271 Mich App 106; 719 NW2d 612 (2006). In *Fitzpatrick*, this Court reversed the trial court's order denying the defendant's motion to quash the deposition of the Secretary of State. *Fitzpatrick*, 176 Mich App at 618-619. The *Fitzpatrick* Court observed that the Secretary of State lacked personal knowledge of the relevant facts and that the information sought by the plaintiff could be obtained through other means. *Id*. Similarly, in *Hamed*, this Court reversed the trial court's order denying the defendants' motion to quash the depositions of the Wayne County Executive and the Wayne County Sheriff. *Hamed*, 271 Mich App at 110-112. The *Hamed* Court based its holding on the fact that the plaintiff had not established that the information she sought was not available from other discovery sources, such as lower-

ranking county officials. *Id*. at 111-112. Defendant and the majority appear to believe that this Court's decisions in *Fitzpatrick* and *Hamed* naturally lead to, and somehow compel, the creation of a new apex-deposition rule for high-ranking corporate officers.

However, a faithful reading of *Fitzpatrick* and *Hamed* reveals a critical distinction between the circumstances of those cases and the circumstances of the case at bar. In *Fitzpatrick* and *Hamed*, this Court was concerned with protecting the public's interest in good government. Both the *Fitzpatrick* Court and the *Hamed* Court pointed out that the public has a strong interest in the effective and efficient operation of governmental agencies, and both panels suggested that allowing a litigant to depose a high-ranking governmental official without first making a showing of actual need might hinder the effective functioning of that official's office. See *Fitzpatrick*, 176 Mich App at 617 (explaining that "the time and exigencies of an agency head's everyday business would be severely impeded if every plaintiff filing a complaint against an agency head, in his official capacity, was allowed to take his oral deposition" and that "[s]uch a procedure is against the public interest"); *Hamed*, 271 Mich App at 111 (observing that "[t]he purpose of this heightened scrutiny is to strictly limit the intrusions that would burden the public official's efforts to advance the effective and efficient operation of the public agency"). I agree with the statement of plaintiff's counsel at oral argument before this Court that "the very purpose of the *Fitzpatrick* and *Hamed* rule is to protect a public interest—the public interest in the service of the [governmental] employee." No such public interest is implicated in the present case; there is generally no public interest in the management and operation of private corporations. I cannot conclude

that the rationale underlying this Court's decisions in *Fitzpatrick* and *Hamed* applies in the case at bar.

In sum, I believe that Michigan's existing rules of civil discovery are fully adequate to protect high-ranking corporate officers and their respective corporations from potential discovery abuses, and I cannot conclude that the majority's creation of a new apex-deposition rule for high-ranking corporate officers is in any way compelled by this Court's decisions in *Fitzpatrick* and *Hamed*.[2]

III

I also conclude that, under our existing rules of civil discovery, the trial court properly denied defendant's motion for a protective order to quash the depositions. "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Our civil discovery rules "should be liberally construed to promote the discovery of the true facts and circumstances of the controversy rather than to aid in their concealment." *Dowood Co v Mich Tool Co*, 14 Mich App 158, 161; 165 NW2d 450 (1968).

Plaintiff, through her reliance on certain statements, documents, and other evidence presented in the trial

[2] Even under the apex-deposition rule adopted by the majority, I would still conclude that plaintiff is entitled to depose Inaba and Lentz. "[T]he apex deposition rule is intended to protect busy, high-level executives who lack unique or personal knowledge" and "is bottomed on the apex executive lacking *any* knowledge of relevant facts." *Minter v Wells Fargo Bank, NA*, 258 FRD 118, 126 (D Md, 2009). In light of the public statements and representations made by Inaba and Lentz, it is clear that they possessed *at least some* personal knowledge of the information sought by plaintiff in this case.

court, demonstrated a strong probability that Inaba and Lentz possessed personal knowledge of particular information relevant to the litigation in this case. Specifically, plaintiff established a high likelihood that Inaba and Lentz possessed relevant, personal knowledge concerning the phenomenon of sudden acceleration in Toyota vehicles and that they also had personal knowledge of possible efforts to conceal or obscure the scope and breadth of this problem. Thus, unlike the appellants' discovery requests in *In re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996), plaintiff's requests to depose Inaba and Lentz did not amount to mere "fishing expedition[s]." Instead, the record establishes that plaintiff had in mind certain specific matters that she wished to pursue during the depositions. These matters clearly would have been pertinent and material to the present controversy. I recognize that the Toyota Camry model driven by plaintiff's decedent was apparently not among the models subject to recall for sudden acceleration. However, plaintiff was nonetheless entitled to ask Inaba and Lentz about their knowledge of sudden acceleration in other, similar Toyota models. See *Savage v Peterson Distrib Co, Inc*, 379 Mich 197, 202; 150 NW2d 804 (1967); *McNamara v E W Ross Co*, 225 Mich 335, 339-340; 196 NW 336 (1923). And even if Inaba and Lentz only possessed knowledge pertaining to sudden acceleration in *unrelated* Toyota models, plaintiff was still entitled to ask them about this matter in order to establish that defendant was on notice of the problem of sudden acceleration in general. *Dowood*, 14 Mich App at 161. I conclude that the depositions of Inaba and Lentz likely would have led to the discovery of relevant, admissible evidence. *Domako v Rowe*, 438 Mich 347, 359 n 10; 475 NW2d 30 (1991).

I also conclude that the depositions of Inaba and Lentz would not have been annoying, embarrassing,

oppressive, unduly burdensome, or unduly expensive under MCR 2.302(C), which is primarily intended to protect parties from discovery "abuses." See *Marketos*, 185 Mich App at 197. The party opposing discovery of a certain matter generally has the burden of showing why the request for discovery should be denied. See *Wilson v Saginaw Circuit Judge*, 370 Mich 404, 413; 122 NW2d 57 (1963). In the present case, there was simply no showing that plaintiff's depositions of defendant's officers would have been "abus[ive]."

The standard for judging whether a protective order should issue under MCR 2.302(C) surely cannot be a subjective one. After all, no one generally *wants* to give a deposition, and under a subjective standard it could almost always be argued that a proposed deposition would subject the deponent to "annoyance" or "embarrassment" within the meaning of MCR 2.302(C). Instead, the standard clearly must be an objective one. Thus, Inaba's and Lentz's own beliefs that the scheduled depositions would be annoying, embarrassing, or burdensome certainly were not sufficient for the issuance of a protective order in this case.

Moreover, Inaba and Lentz made several public statements and representations suggesting that they *uniquely* possessed certain information that was relevant to this litigation. And the very nature of these public statements implied that other, lower-level employees *did not* have knowledge of the same facts. Given the substance of Inaba's and Lentz's public statements, and viewed objectively, I cannot say that plaintiff's depositions of Inaba and Lentz would have been any more annoying, embarrassing, oppressive, or burdensome than any other deposition of any other deponent possessing relevant, discoverable information. While it might be annoying, embarrassing, oppressive, or bur-

densome to depose high-ranking corporate officers whose knowledge of the relevant facts is merely coextensive with that of lower-level employees, the public statements and representations made by Inaba and Lentz in this case implied a unique, singular knowledge concerning the phenomenon of sudden acceleration in Toyota vehicles and the possible effort to conceal or obscure this problem. Defendant failed to carry its burden of establishing that a protective order was warranted under MCR 2.302(C). See *Wilson*, 370 Mich at 413.

Lastly, I wish to make clear my belief that high-ranking corporate officers should be held to the same civil discovery standards as any other deponent, witness, or party. Indeed, I believe that our law demands this. It is clear to me that Judge Archie Hayman, the trial judge in this case, carefully examined the evidence presented in advance of his ruling and applied the same standard to defendant and its officers as he would have applied to any party appearing before him. This is exactly what every trial judge should strive to do.

In sum, I cannot conclude that the trial court abused its discretion by denying defendant's motion for a protective order to quash the depositions of Inaba and Lentz. See *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35, 38-39; 654 NW2d 610 (2002). Because I believe that the trial court's ruling was correct, I would affirm.

RIVER INVESTMENT GROUP, LLC v CASAB

Docket No. 290645. Submitted July 14, 2010, at Detroit. Decided August 10, 2010, at 9:00 a.m.

River Investment Group, L.L.C., brought an action in the Wayne Circuit Court against Michigan Financial Investments, L.L.C.; the principal of Michigan Financial, Romel E. Casab; and the Wayne County Treasurer for unjust enrichment and conversion. Plaintiff alleged that it purchased the site of a former gas station in the city of Detroit and made significant investments in the property to improve it and reopen it as a branded gas station. At the time that plaintiff purchased the property, the Wayne County Treasurer had already begun foreclosure proceedings as a result of taxes that had not been paid by the previous owner. The treasurer held a foreclosure sale and sold the property to Michigan Financial. Plaintiff alleged that the treasurer failed to properly notify it of the foreclosure proceedings and that defendants were unjustly enriched as a result of the improvements it made to the property after the foreclosure. Michigan Financial and Casab filed a counterclaim for trespass and to quiet title. Plaintiff also brought related proceedings in the Court of Claims, which ordered that plaintiff's claim brought against the treasurer in that court be joined with plaintiff's circuit court action. The circuit court, Mary Beth Kelly, J., granted partial summary disposition in favor of Michigan Financial and Casab, concluding that under MCL 211.78*l*, the circuit court lacked jurisdiction over plaintiff's claims. Plaintiff sought interlocutory leave to appeal, which the Court of Appeals denied in an unpublished order, entered December 15, 2004 (Docket No. 258214). Plaintiff and the treasurer reached a settlement and the treasurer was subsequently dismissed from the case. Following a bench trial, the circuit court, William J. Giovan, J., entered judgment in favor of Michigan Financial on its counterclaim. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff's claim arose under MCL 211.78*l* because, as the owner of an extinguished recorded or unrecorded interest in property, plaintiff claimed injury resulting from a lack of notice of the foreclosure proceedings, and plaintiff sought monetary dam-

ages to compensate for that injury. MCL 211.78*l*(2) confers original and exclusive jurisdiction in the Court of Claims over actions arising under that section without regard to whether the defendant is a governmental entity.

2. Plaintiff was not prejudiced by the circuit court's alleged failure to provide notice of entry of the final judgment in this case until one day before the deadline for timely filing an appeal in light of the fact that the Court of Appeals granted plaintiff's application for delayed leave to appeal.

3. Plaintiff waived its argument that the circuit court erred by concluding that its motion for reconsideration was not timely filed when plaintiff failed to identify the issue in its statement of questions presented in its brief on appeal.

Affirmed.

COURTS — COURT OF CLAIMS — JURISDICTION — FORECLOSURES — ACTIONS FOR RECOVERY OF MONETARY DAMAGES AFTER JUDGMENT FOR FORECLOSURE.

The Court of Claims has original and exclusive jurisdiction over actions for the recovery of monetary damages brought by the owner of any extinguished recorded or unrecorded interest in a parcel of property who claims after a judgment of foreclosure that he or she did not receive any notice required under the General Property Tax Act regardless of whether the defendant is a governmental entity (MCL 211.78*l*).

Roger S. Canzano for River Investment Group, L.L.C.

Thav, *Gross*, *Steinway & Bennett*, *P.C.* (by *Barry A. Steinway*), for Romel E. Casab and Michigan Financial Investments, L.L.C.

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM. Plaintiff appeals by delayed leave granted the trial court's judgment in favor of defendant/counterplaintiff, Michigan Financial Investments, L.L.C. (MFI). On appeal, plaintiff challenges the trial court's earlier order granting summary disposition in favor of defendants, Romel E. Casab and MFI (here-

inafter collectively referred to as "defendant"),[1] on plaintiff's unjust enrichment and conversion claims. We affirm.

Plaintiff first argues that the trial court erred when it concluded that the circuit court did not have jurisdiction over plaintiff's claims and, accordingly, granted summary disposition in favor of defendant on plaintiff's claims. We disagree.

On appeal, a decision to grant a motion for summary disposition is reviewed de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in the same manner as the trial court. *Id.* Any court considering such a motion must consider all the pleadings and the evidence in the light most favorable to the nonmoving party. *Id.* The motion tests whether there exists a genuine issue of material fact. MCR 2.116(C)(10). "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

Issues of law are also reviewed de novo. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008). Whether a court has subject-matter jurisdiction is a question of law. *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App 285, 290; 698 NW2d 879 (2005).

Plaintiff's property was foreclosed on by the Wayne County Treasurer and sold to defendant. Plaintiff sued

[1] Casab is the principal of MFI. Casab and MFI filed a joint brief on appeal. The Wayne County Treasurer was dismissed from the case by stipulation.

defendant for unjust enrichment and conversion arising from improvements plaintiff made to the property after the foreclosure, but without notice of the foreclosure. The trial court concluded that MCL 211.78*l* precludes circuit court jurisdiction over the case. MCL 211.78*l* provides, in relevant part:

> (1) If a judgment for foreclosure is entered under [MCL 211.78k] and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in [MCL 211.78k], the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.
>
> (2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.

Plaintiff first argues that MCL 600.6419 and MCL 600.6437 specify that the Court of Claims has jurisdiction *only* in actions against governmental entities. Therefore, MCL 211.78*l* cannot be read to require exclusive Court of Claims jurisdiction over plaintiff's action against defendant because defendant is not a governmental entity.

This Court's primary goal when considering statutory language is to give effect to the intent of the Legislature. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39; 761 NW2d 269 (2008). If the statutory language is unambiguous, the plain meaning of the language must be applied. *Id*. A statutory provision is ambiguous if it irreconcilably conflicts with another provision or if it is equally susceptible to more than one meaning. *Id*. at 39-40. Every word or phrase should be ascribed its plain and ordinary meaning. MCL 8.3a; *Alvan Motor*, 281 Mich App at 40. Finally, "it is

important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

MCL 600.6419(1) provides:

> 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 state administrative board is hereby vested with discretionary authority upon the advice of the attorney general, to hear, consider, determine, and allow any claim against the state in an amount less than $1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under [MCL 600.6458] upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. *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. Any claim of the state or of any department, commission, board, institution, arm, or agency of the state may be pleaded by way of counterclaim in any action brought against the state, or any other department, commission, board, institution, arm, or agency of the state. [Emphasis added.]

MCL 600.6437 provides:

> The court *may order entry of judgment against the state* or any of its departments, commissions, boards, institutions, arms or agencies based upon facts as stipulated by counsel after taking such proofs in support thereof as may

> be necessary to satisfy the court as to the accuracy of such facts and upon being satisfied that such judgment is in accordance with applicable law. [Emphasis added.]

MCL 600.6419 confers jurisdiction over claims against the state and its subunits in the Court of Claims. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767-768; 664 NW2d 185 (2003). MCL 600.6437 authorizes the Court of Claims to "order entry of judgment against" the state and its subunits. However, nothing in either statute states that the Court of Claims *may not* exercise jurisdiction over any other case, if the Legislature were to grant it additional jurisdiction. See *Parkwood*, 468 Mich at 767 ("The jurisdiction of the Court of Claims is provided by statute."). MCL 211.78*l*(2) states that the Court of Claims has jurisdiction "in any action to recover monetary damages under this section." Nothing in the statutes cited by plaintiff precludes reading MCL 211.78*l*(2) as conferring jurisdiction in the Court of Claims over an action arising under MCL 211.78*l*, and plaintiff cites no authority for that proposition. Therefore, assuming that this action arises under MCL 211.78*l*, plaintiff's argument is unavailing.

Plaintiff relatedly argues that its action against defendant does not arise under MCL 211.78*l*. Plaintiff specifically asserts that this action is not an "action to recover monetary damages under this section" for two reasons. MCL 211.78*l*(2). First, plaintiff argues that MCL 211.78*l* contemplates actions for the failure to receive adequate notice of foreclosure, which plaintiff does not attribute to defendant. Expanding on that premise, plaintiff further argues that because MCL 211.78*l* only contemplates actions for failure of notice, it only contemplates actions against the entity charged with providing notice, not a private party such as

defendant. Thus, plaintiff's action is not an "action . . . under this section." MCL 211.78*l*(2).

MCL 211.78*l*(1) first contemplates an action by a party "who claims that he or she did not receive any notice required under" the General Property Tax Act (GPTA), MCL 211.1 *et seq*. Plaintiff *does* claim that it did not receive notice of the foreclosure proceedings. Plaintiff argues that it does not allege any wrongdoing on the part of defendant with respect to the lack of notice; it is only a fact to explain why plaintiff continued to make improvements to the property after it had been sold to defendant. Nevertheless, the language of MCL 211.78*l*(1) is unambiguous: plaintiff is an owner of an extinguished recorded or unrecorded interest in property and claims injury from the fact that it did not receive notice as required under the GPTA. See *Alvan Motor*, 281 Mich App at 39 (no judicial construction required where statutory language is unambiguous).

Next, MCL 211.78*l*(1) prohibits bringing "an action for possession of the property against any subsequent owner . . . ." Defendant is the subsequent owner, but plaintiff does not seek possession of the property from defendant. MCL 211.78*l*(1) specifies that rather than bring an action for possession, an aggrieved former interested party "may only bring an action to recover monetary damages . . . ." Finally, MCL 211.78*l*(2) provides that the Court of Claims has "original and exclusive jurisdiction" in such an action. Nothing in MCL 211.78*l* requires that an action under that section be against a governmental entity.[2]

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[2] To the extent that the intent of the Legislature was to provide jurisdiction only over actions against governmental bodies, see the Court of Claims Act, MCL 600.6401 *et seq*. (creating the Court of Claims for the purpose of hearing actions against governmental bodies), the responsibility to alter the statute lies with that branch of government, not with this Court. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 357-358; 584 NW2d 345 (1998).

Plaintiff next argues that because the Court of Claims ordered plaintiff's claim against the treasurer in the Court of Claims joined with its claim against defendant and the treasurer in the circuit court, this conferred jurisdiction in the circuit court over plaintiff's case. As noted earlier, MCL 211.78*l*(2) confers *exclusive* jurisdiction in the Court of Claims over cases arising under MCL 211.78*l*. Assuming, arguendo, that the Court of Claims mistakenly transferred a case to the circuit court, plaintiff has provided no authority for the proposition that the order of joinder would override a clear prescription of the Legislature. Further, the order of joinder was with respect to plaintiff's case against the treasurer and has no relation to plaintiff's claims against defendant. This argument is unavailing.

Plaintiff also argues that the trial court erred when it failed to provide notice of entry of the final judgment until one day before the deadline to file a timely appeal. However, plaintiff was not prejudiced by this alleged delay because this Court granted plaintiff's application for delayed leave to appeal. *River Investment Group LLC v Casab*, unpublished order of the Court of Appeals, entered June 17, 2009 (Docket No. 290645). Accordingly, this issue is moot.

Plaintiff next argues that the trial court erred when it concluded that plaintiff's motion for reconsideration was not timely filed. This issue is waived because plaintiff failed to state it in the statement of questions presented in its brief on appeal. *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Moreover, plaintiff's arguments in its motion to reconsider were identical to its other arguments on appeal, which we have concluded are unavailing.

Affirmed.

CIPRIANO v CIPRIANO

Docket Nos. 291377 and 292806. Submitted July 13, 2010, at Detroit. Decided August 10, 2010, at 9:05 a.m.

Plaintiff, Mary Cipriano, and defendant, Salvatore Cipriano, were granted a divorce in November 1993 in the Macomb Circuit Court, George C. Steeh, J. Plaintiff was awarded 55 percent of the marital property and $66,000 a year in periodic alimony to be paid in monthly installments of $5,500. Following further proceedings in the trial court and the Court of Appeals, the Court of Appeals, FITZGERALD, P.J., and SAAD and COOPER, JJ., determined that plaintiff was also entitled to 55 percent, plus interest, of the increase in the value during the marriage of defendant's interest in Peter Cipriano Enterprises (PCE). Unpublished opinion per curiam, issued July 25, 2006 (Docket No. 259818). In 2006, the trial court, Antonio P. Viviano, J., issued an amended supplemental judgment, ordering defendant to pay plaintiff $485,155 for her interest in PCE and the amount of interest that had accumulated on the asset from June 1993 to September 30, 2006, which was $456,132. In May 2007, defendant moved to amend the spousal support or the property award or to allow him to make installment payments. The parties then agreed to submit to binding arbitration. Following the parties' receipt of an excerpt of the arbitrator's proposed findings and awards, defendant sent a financial report to the arbitrator and phoned him. In September 2008, the arbitrator's final award ordered defendant to pay plaintiff $485,155 in installments, without interest on the award, and terminated defendant's spousal-support obligation effective May 2007. The arbitrator granted credit for defendant's alimony payments from May 2007 through September 2008 and determined that defendant would continue to pay $5,500 a month until he paid an additional $391,655 to satisfy the $485,155 award. Plaintiff moved to vacate, modify, or correct the arbitration award, arguing that the arbitrator had failed to follow the law-of-the-case doctrine, impermissibly modified the spousal support retroactively, and altered the award after the ex parte communications from defendant. On December 4, 2008, the trial court entered an order that denied plaintiff's motion and affirmed the arbitrator's award. The Court of Appeals granted plaintiff's delayed application for leave to appeal that

order in Docket No. 291377. In June 2009, the trial court held a hearing on defendant's May 2007 motion to amend the spousal support or property award or to allow him to make installment payments and entered an order reducing defendant's monthly payments to $3,870, but not altering the total amount awarded. Plaintiff appealed that order by leave granted in Docket No. 292806. The appeals were consolidated.

The Court of Appeals *held*:

1. The domestic relations arbitration act, MCL 600.5070 *et seq.*, contemplates that the parties will determine how they will produce the information necessary to resolve their dispute and does not impose procedural formalities that restrict this freedom. The parties' arbitration agreement in this case did not mention the topic of ex parte communication with the arbitrator. The only mention of the arbitration procedure was that the format for the arbitration would be determined by the arbitrator, with the object of expediting the hearing. Plaintiff did not show that the arbitrator exceeded his powers by receiving defendant's ex parte contacts. According to the arbitration agreement, the arbitrator retained the discretion to receive information from defendant in order to expedite the proceedings. Plaintiff did not show that any misconduct of the arbitrator prejudiced her rights or that the arbitration award was procured by undue means. The arbitrator's adjustment of his proposed award from a lump sum to installment payments and reduction of monthly spousal support to zero rather than the $250 proposed in the excerpt did not result in a substantial difference in the arbitration award by reason of a substantial error of law. Both the preliminary award excerpt sent to the parties and the final award greatly reduced the amount of spousal support, and the final award did not change the total amount of the property award. The trial court did not err by confirming the arbitrator's award despite defendant's ex parte contacts.

2. MCL 552.603(2) allows the retroactive modification of support orders from the date that notice of a petition for modification of support was given to the payer or recipient of support. The retroactivity of a modification is a matter within the court's discretion, but the modification may not take effect before the time the petition to modify was filed. Because defendant moved to modify spousal support or the property award or to allow him to make installment payments in May 2007, the arbitrator's award eliminating spousal support retroactively to May 2007 and converting the $5,500 payments to installment payments to satisfy the property award did not violate MCL 552.603(2).

3. The law-of-the-case doctrine does not apply to arbitration proceedings. The parties agreed that the arbitrator would decide the effect of the Court of Appeals' prior decisions on the equities of this matter regarding spousal support ordered and previously paid during the pendency of the appeals process. The arbitrator's award terminating spousal support at the time of plaintiff's receipt of an additional property award was within the parameters of the parties' agreement. The arbitration award must be upheld because plaintiff did not demonstrate that the arbitrator exceeded the powers that the parties' agreement granted to him. There was no error of law evident on the face of the award that was so substantial that, but for the error, the award would have been substantially different.

4. MCR 3.602 governs the procedure for modifying arbitration awards. MCR 3.602(K)(1) required that a complaint to modify the arbitration award be filed within 21 days after the date of the arbitration award because there was no pending action between these parties. Defendant moved to reduce the monthly payments awarded by arbitration several months after the award. MCR 3.602(K)(2) provides the grounds for modification of an arbitration award. Neither defendant nor the trial court referred to any of the provisions of MCR 3.602(K)(2) to justify the modification of the award. Even though the trial court did not change the total amount of the property award, the matter had been submitted to binding arbitration and the arbitrator specifically awarded plaintiff $5,500 in monthly payments. The trial court erred by modifying the arbitrator's award without a timely complaint and without reference to MCR 3.602(K)(2). The order of the trial court must be reversed, and the case must be remanded to the trial court to reinstate the $5,500 monthly payments awarded in arbitration.

Affirmed in part, reversed in part, and remanded.

1. ARBITRATION — DOMESTIC RELATIONS ARBITRATION ACT — ARBITRATION AWARDS — VACATION OF ARBITRATION AWARDS.

A court must vacate an arbitration award when a party applies under MCL 600.5081(2) if the award was procured by corruption, fraud, or other undue means; if there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights; if the arbitrator exceeded his or her powers; or if the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights; in order for a court to

vacate an arbitration award because of an error of law, the error must have been so substantial that, but for the error, the award would have been substantially different.

2. DIVORCE — SPOUSAL SUPPORT — RETROACTIVE MODIFICATION OF SPOUSAL SUPPORT.

Retroactive modification of a spousal-support order is a matter within the discretion of the trial court; retroactive modification is permissible from the date that notice of the petition for modification was given to the payer or recipient of support; the modification may not take effect before the time the petition to modify was filed (MCL 552.603[2]).

3. ARBITRATION — LAW-OF-THE-CASE DOCTRINE.

The law-of-the-case doctrine does not apply to arbitration proceedings.

4. ARBITRATION — MODIFICATION OF ARBITRATION AWARDS — COMPLAINTS TO MODIFY ARBITRATION AWARDS.

A party seeking modification of an arbitration award must file a complaint to modify the award within 21 days after the date of the award if there is no pending action between the parties (MCR 3.602[K][1]).

5. ARBITRATION — MODIFICATION OF ARBITRATION AWARDS.

A court must modify or correct an arbitration award, on motion made within 91 days after the date of the award, if (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award, (b) the arbitrator awarded on a matter not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision on the issues submitted, or (c) the award is imperfect in a matter of form, not affecting the merits of the controversy (MCR 3.602[K][2]).

Allan W. Ben, P.C. (by *Allan W. Ben* and *Joshua L. Ben*), for Mary Cipriano.

Musilli Brennan Associates, PLLC (by *John F. Brennan*), for Salvatore Cipriano.

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM. In this divorce case, plaintiff, Mary Cipriano, appeals two orders of the Macomb Circuit Court addressing an arbitrator's award of property and spousal support. In Docket No. 291377, Mary Cipriano appeals by delayed application for leave to appeal granted a December 4, 2008, order of the circuit court denying her motion to vacate, modify, or correct the arbitration award and confirming the arbitrator's award. In Docket No. 292806, Mary Cipriano appeals by leave granted a June 15, 2009, order of the circuit court reducing the amount of the monthly payment that the arbitrator ordered defendant, Salvatore Cipriano, to pay Mary Cipriano from $5,500 to $3,870, while not changing the total amount awarded by the arbitrator. Because the procedures used during arbitration and the final arbitration award did not violate the parties' arbitration agreement, we affirm the circuit court's order confirming the arbitrator's award. But because Salvatore Cipriano and the circuit court did not provide any grounds under MCR 3.602(K)(2) to modify the arbitration award, we reverse the circuit court's order reducing Salvatore Cipriano's installment payments and remand for the court to reinstate the $5,500 monthly payments.

I. BASIC FACTS

In November 1993, the trial court issued an order for divorce, awarding 55 percent of the marital property to Mary Cipriano and $66,000 a year to her in periodic alimony that was to be paid in $5,500 monthly installments. After several appeals in this Court and years of further proceedings below, this Court determined that Mary Cipriano was also entitled to 55 percent, plus interest, of the increase in the value of Salvatore Cipriano's interest in Peter Cipriano Enterprises (PCE)

during the marriage.[1] In 2006, the trial court issued an amended supplemental judgment, ordering Salvatore Cipriano to pay Mary Cipriano $485,155 for her interest in PCE and the amount of interest that had accumulated on the asset from June 1993 to September 30, 2006, which was $456,132. In May 2007, Salvatore Cipriano moved to amend the spousal support or the property award or to allow him to make installment payments. The trial court referred the matter to the friend of the court for an evidentiary hearing to determine whether the additional property award to Mary Cipriano would necessitate an adjustment in the alimony "all the way back to the beginning."

Rather than hold a hearing with the friend of the court, the parties agreed to submit to binding arbitration. In September 2008, the arbitrator's final award ordered Salvatore Cipriano to pay $485,155 (Mary Cipriano's interest in PCE) in installments, without interest on the award, and terminated his alimony obligation effective May 2007. The arbitrator granted credit for Salvatore Cipriano's alimony payments from May 2007 through September 2008, and determined that Cipriano would continue to pay $5,500 a month until he paid an additional $391,655 to satisfy the $485,155 award.

Mary Cipriano moved to vacate, modify, or correct the arbitration award, arguing that the arbitrator failed to follow the law-of-the-case doctrine, impermissibly modified spousal support retroactively, and altered the award after ex parte communications from Salvatore Cipriano. In December 2008, the trial court entered an order confirming the arbitrator's award and denying Mary Cipriano's motions. That order is the subject of

[1] *Cipriano v Cipriano*, unpublished opinion per curiam of the Court of Appeals, issued July 25, 2006 (Docket No. 259818), p 2 (*Cipriano III*).

the first appeal of these consolidated appeals. In June 2009, the trial court held a hearing on Salvatore Cipriano's motion to reduce the monthly payments. The trial court reduced his monthly payments to $3,870, but did not alter the total amount awarded. That order is the subject of the second appeal of these consolidated appeals.

II. OVERVIEW

Domestic-relations arbitration is governed by the specific statutory scheme set forth in the domestic relations arbitration act (DRAA).[2] Under the DRAA, parties to a domestic-relations proceeding may stipulate to submit their disputed issues to binding arbitration, including issues of property division, alimony, child support, custody, and visitation.[3] The purpose of arbitration is to avoid protracted litigation. Because an arbitration agreement narrows a party's legal right to pursue a claim in a particular forum,[4] the judiciary will enforce an arbitration agreement to defeat an otherwise valid claim.[5]

The DRAA delineates the circumstances in which a court must vacate an arbitration award. MCL 600.5081(2) provides:

> If a party applies under this section, the court shall vacate an award under any of the following circumstances:
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> (a) The award was procured by corruption, fraud, or other undue means.

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[2] MCL 600.5070 *et seq*.

[3] MCL 600.5071; *Harvey v Harvey*, 257 Mich App 278, 284; 668 NW2d 187 (2003).

[4] *Hendrickson v Moghissi*, 158 Mich App 290, 298; 404 NW2d 728 (1987).

[5] *NuVision v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1987).

> (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
>
> (c) The arbitrator exceeded his or her powers.
>
> (d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

In order for a court to vacate an arbitration award because of an error of law, the error must have been so substantial that, but for the error, the award would have been substantially different.[6]

III. EX PARTE COMMUNICATION

A. STANDARD OF REVIEW

Mary Cipriano argues that the trial court should have vacated the arbitrator's award because the arbitrator received communications from Salvatore Cipriano after the arbitration hearing and before the arbitrator's award. This Court reviews de novo a circuit court's decision to enforce, vacate, or modify an arbitration award.[7]

B. ANALYSIS

Mary Cipriano does not support her argument that the trial court should have vacated the arbitrator's award because of Salvatore Cipriano's ex parte contacts with the arbitrator by specifying under which subdivision of MCL 600.5081(2) the award should have been vacated. On July 28, 2008, the arbitrator sent the parties an excerpt of his

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[6] *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009).

[7] *Bayati v Bayati*, 264 Mich App 595, 597-598; 691 NW2d 812 (2004).

findings and awards in an attempt to encourage them to reach a settlement. The excerpt of the arbitrator's awards indicated that Salvatore Cipriano would pay a cash lump sum of $485,155 and that his spousal support obligation would be reduced from $5,500 a month to $250 a month effective October 3, 2008. On August 6, 2008, the arbitrator sent a letter to Salvatore Cipriano's attorney, and copies to the trial judge and Mary Cipriano's counsel, indicating that he had received a recent financial report from Salvatore Cipriano with the words "Don't kill the goose" handwritten on the cover. According to the letter, Salvatore Cipriano had also placed a three- to five-minute phone call to the arbitrator, essentially stating that he could not borrow one-half million dollars as the excerpt of the arbitrator's award provided. The arbitrator stated that he listened, without response, to Salvatore Cipriano and characterized his actions as disconcerting and inappropriate. On September 23, 2008, the arbitrator issued his final award of $485,155 to Mary Cipriano, but made it payable in monthly payments of $5,500 that began in May 2007, which is the date that the arbitrator determined that spousal support payments should stop.

Citing *Hewitt v Village of Reed City*,[8] Mary Cipriano argues that the law is "very clear" that "[a]n arbitrator's ex parte communications renders an arbitration award void regardless of whether it affected the arbitrator's partiality." In *Hewitt*, the Michigan Supreme Court did note:

> The rule is very strict in excluding any communication to an arbitrator, made *ex parte* after the case is submitted; and when such communication, which may affect the result, is made, it is not usual to enter into an inquiry as to whether the arbitrator was in fact influenced by it or not.[9]

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[8] *Hewitt v Village of Reed City*, 124 Mich 6; 82 NW 616 (1900).

[9] *Id*. at 8.

The Court went on to state, "[I]n laying down a rule easy to follow, and which will afford protection in all cases, . . . we think the safer rule is for the court to enter into no examination as to whether the arbitrator is in any way influenced by *ex parte* communications."[10] However, in that case, the Court was considering an ex parte communication that was contrary to the parties' express stipulation to exclude all legal arguments or briefs.[11] The Court concluded, "with some reluctance," that the ex parte communication was a violation of the spirit of the terms of the parties' agreement.[12] Here, the parties made no provision in their arbitration agreement regarding ex parte communications, and the ex parte contacts did not involve legal argument.

Mary Cipriano suggests that there is a rule that ex parte contact with the arbitrator must result in the award's being vacated. However, the cases she cites in support of such a rule were based on ex parte contact that violated agreements by the parties regarding the procedures for their arbitration. Further, as *Detroit v Detroit Lieutenants' & Sergeants' Ass'n*[13] alludes, it would be difficult to reconcile imposing a bright-line rule that requires the vacation of an arbitrator's award in these circumstances when, conversely, the standard of review provides that an arbitration award may not be vacated unless an error was so substantial that the award would have been substantially different without the error.[14]

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[10] *Id*. at 8-9.

[11] *Id*. at 8.

[12] *Id*.

[13] *Detroit v Detroit Lieutenants' & Sergeants' Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2005 (Docket No. 250424), pp 2-3 (MURRAY, P.J., concurring).

[14] *Washington*, 283 Mich App at 672.

To resolve Mary Cipriano's argument regarding the results of ex parte contact, the definitive question is not whether there is a bright-line rule but, rather, whether the ex parte contact violated the parties' arbitration agreement. The DRAA requires that parties first sign an agreement for binding arbitration delineating the powers and duties of the arbitrator.[15] Rather than employ the formality required in courts, parties in arbitration are able to shape the parameters and procedures of the proceeding.[16] The DRAA contemplates that the parties will determine how they will produce the information necessary to resolve their dispute.[17] The DRAA does not impose procedural formalities that restrict this freedom.[18]

In *Miller v Miller*, the Supreme Court ruled that it was permissible for an arbitrator to gather information by shuttling between the parties located in separate rooms, questioning and listening to them, and reviewing voluminous material the defendant submitted three days after the hearing, *before* the arbitrator modified the award and issued the final binding award.[19] Because the DRAA allowed the parties to determine the procedures to be used in their arbitration and the parties had specifically agreed to allow the arbitrator to conduct the hearing in two separate rooms, the Supreme Court reversed the judgment of the Court of Appeals and reinstated the arbitration award.[20]

This case is similar to *Miller* because information was obtained through contact with only one party and

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[15] MCL 600.5072(1)(e).

[16] *Miller v Miller*, 474 Mich 27, 32; 707 NW2d 341 (2005).

[17] *Id*.

[18] *Id*.

[19] *Id*. at 29, 35.

[20] *Id*. at 33, 35.

the arbitrator modified the award after receiving additional information from that party. However, the parties' arbitration agreement here made no mention of ex parte communication with the arbitrator. The only mention of the arbitration procedure was, "The format for the arbitration shall be determined by the arbitrator[s], with the objective of expediting the hearing." Mary Cipriano has not shown that the arbitrator exceeded his powers, according to the arbitration agreement, by receiving Salvatore Cipriano's ex parte contacts.[21] According to the parties' agreement, the arbitrator retained the discretion to receive information from Salvatore Cipriano in order to expedite the proceedings.

Further, Mary Cipriano has not shown that any misconduct of the arbitrator prejudiced her rights or that the arbitration award was procured by undue means.[22] A failure to disclose facts that might reasonably lead to an appearance of bias constitutes grounds for vacating an arbitration award.[23] While Salvatore Cipriano's conduct was improper, the arbitrator responded promptly and decisively to disclose the contacts and prevent further contact. The arbitrator adjusted his planned award after Salvatore Cipriano's contacts, but explained that he was in the process of "reconsideration of the overall equity and realistic effectuation of the excerpt terms" a few days *before* receiving Salvatore Cipriano's communications.

Additionally, the arbitrator was already in possession

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[21] MCL 600.5081(2)(c); see *Miller*, 474 Mich at 30 (stating that an arbitrator exceeds his or her powers if the arbitrator acts beyond the material terms of the contract from which the arbitrator derives his or her authority).

[22] MCL 600.5081(2)(a),(b), and (d); *Miller*, 474 Mich at 30-31.

[23] *Albion Pub Sch v Albion Ed Ass'n/MEA/NEA*, 130 Mich App 698, 701; 344 NW2d 55 (1983).

of annual financial reports from 2005, 2006, and 2007 when Salvatore Cipriano supplied him with the 2008 report. The arbitrator's adjustment of his award from a lump sum to installment payments and reduction of monthly spousal support from $5,500 to zero rather than $250 to begin in May 2007 rather than October 2008 did not result in a substantial difference in the arbitration award by reason of a substantial error of law.[24] Both the preliminary award detailed in the excerpt and the final award greatly reduced the amount of spousal support, and the final award did not change the total amount of the property award. Therefore, the trial court did not err by confirming the arbitrator's award despite Salvatore Cipriano's ex parte contacts.

IV. SPOUSAL-SUPPORT MODIFICATION

A. STANDARD OF REVIEW

Mary Cipriano argues that the trial court should have vacated the arbitrator's award because it was an error of law to modify retroactively the spousal-support payments beginning in May 2007 and to convert spousal-support payments that had been made from May 2007 to October 2008 into installment payments for the property award. This Court reviews de novo a circuit court's decision to enforce, vacate, or modify an arbitration award.[25]

B. ANALYSIS

An arbitrator exceeds his or her powers if the arbitrator acts in contravention of controlling law.[26] Here,

[24] *Washington*, 283 Mich App at 672.

[25] *Bayati*, 264 Mich App at 597-598.

[26] *Miller*, 474 Mich at 30.

the arbitrator's award determined that monthly $5,500 payments to Mary Cipriano throughout the pendency of the arbitration process, from May 2007 to October 2008, were installment payments for the ultimate property award and that Salvatore Cipriano's spousal-support obligation was eliminated. Mary Cipriano contends that this award was an impermissible retroactive modification of spousal support according to MCL 552.603(2). MCL 552.603(2) provides:

> Except as otherwise provided in this section, a support order that is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date the support amount is due as prescribed in [MCL 552.605c], with the full force, effect, and attributes of a judgment of this state, and is not, on and after the date it is due, subject to retroactive modification. No additional action is necessary to reduce support to a final judgment. Retroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support.

Mary Cipriano argues that the clear language of MCL 552.603(2) prohibits retroactive modification of spousal support. However, the clear language of MCL 552.603(2) also allows for the retroactive modification of support orders from the date of notice of a petition for modification of support. The retroactivity of a modification is a matter within the court's discretion; however, the modification may not take effect before the time the petition to modify was filed.[27] Salvatore Cipriano moved to modify the spousal support or the property award or to allow him to make installment payments in May 2007. Therefore, the

[27] *Varga v Varga*, 173 Mich App 411, 417; 434 NW2d 152 (1988).

arbitrator's award eliminating spousal support retroactively to May 2007 and converting the $5,500 payments to installment payments to satisfy the property award did not violate MCL 552.603(2).

V. LAW-OF-THE-CASE DOCTRINE

A. STANDARD OF REVIEW

Mary Cipriano contends that the arbitrator exceeded his powers by issuing an award in contravention of controlling law because the award violated the law-of-the-case doctrine. This Court reviews de novo a circuit court's decision to enforce, vacate, or modify an arbitration award.[28]

B. ANALYSIS

The law-of-the-case doctrine holds that an appellate court's ruling on a particular issue binds the appellate court and all lower tribunals with respect to that issue.[29] Mary Cipriano does not specify which award of the arbitrator violated the appellate decisions in the case, although it appears she is contesting modification of the spousal-support award in light of the doctrine. This Court previously upheld the trial court's award of $66,000 a year in alimony.[30] Additionally, the arbitrator's award did not provide for interest on the $485,155 property award, which was contrary to this Court's holding in *Cipriano III*.

However, the law-of-the-case doctrine does not apply to arbitration proceedings. The law-of-the-case doctrine binds the appellate court and all lower tribunals with

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[28] *Bayati*, 264 Mich App at 597-598.

[29] *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

[30] The arbitration award extinguished this obligation.

respect to issues that the appellate court decides.[31] A "tribunal" is "[a] court or other adjudicatory body."[32] Arbitration is an alternative to resolving a dispute with adjudication or litigation.[33] The purpose of arbitration is to avoid protracted litigation, and an agreement to arbitrate will be judicially enforced to defeat an otherwise valid claim.[34] The fact that the relief granted in an arbitration award could not have been granted by a trial court is not grounds for vacating the award.[35] The reason for the law-of-the-case rule is the need for finality of judgment in litigation, and, in this case, the parties agreed that arbitration was to provide a finality of judgment.[36]

Further, this Court has consistently held that arbitration is a matter of contract and that the arbitration agreement is the agreement that dictates the authority of the arbitrators.[37] The DRAA requires that the parties sign an agreement for binding arbitration delineating the powers of the arbitrator. The act also contemplates that the parties will discuss the scope of the issues with the arbitrator.[38] Here, the parties agreed that the arbitrator would decide the "effect of the appellate court decisions on the equities of this matter regarding spousal support ordered and previously paid during the pendency of the appeals process."

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[31] *Ashker*, 245 Mich App at 13.

[32] Black's Law Dictionary (8th ed).

[33] MCL 600.5001(1).

[34] *NuVision*, 163 Mich App at 684.

[35] MCL 600.5081(3).

[36] *Reeves v Cincinnati, Inc* (*After Remand*), 208 Mich App 556, 560; 528 NW2d 787 (1995).

[37] *Miller*, 474 Mich at 32, quoting *Rowry v Univ of Mich,* 441 Mich 1, 10; 490 NW2d 305 (1992).

[38] MCL 600.5072(1)(e); *Miller*, 474 Mich at 32.

The arbitrator's award terminating spousal support at the time of Mary Cipriano's receipt of an additional property award was within the parameters of the parties' agreement. Mary Cipriano agreed that the arbitrator could consider the fairness of spousal support paid in light of this Court's determination that she was entitled to an additional property award. The arbitrator's award directly addressed this scope of authority. Therefore, we uphold the arbitration award because Mary Cipriano has not demonstrated that the arbitrator exceeded the powers that the parties' agreement granted to him. There was no error of law evident on the face of the award that was so substantial that, but for the error, the award would have been substantially different.[39]

VI. MODIFICATION OF INSTALLMENT PAYMENTS

A. STANDARD OF REVIEW

Mary Cipriano argues that the trial court impermissibly modified the arbitration award by reducing the monthly amount that the arbitrator awarded. This Court reviews de novo a circuit court's decision to enforce, vacate, or modify an arbitration award.[40]

B. ANALYSIS

More than nine months after the arbitration award, the trial court, on Salvatore Cipriano's motion, reduced the monthly $5,500 payments to Mary Cipriano to $3,870 a month. Salvatore Cipriano argued that the trial court had the equitable power to modify the installment payments pursuant to MCL 600.6221 and

[39] *Washington*, 283 Mich App at 672.

[40] *Bayati*, 264 Mich App at 597-598.

that economic circumstances necessitated the modification.[41] However, MCR 3.602 governs the procedure for modifying arbitration awards. Because there was no pending action between these parties, MCR 3.602(K)(1) required that a complaint to modify the arbitration award be filed within 21 days after the date of the arbitration award. Salvatore Cipriano moved to reduce the monthly payments awarded by arbitration *several months* after the arbitration award.

Additionally, MCR 3.602(K)(2) provides the grounds for modification of an arbitration award:

> On motion made within 91 days after the date of the award, the court shall modify or correct the award if:
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> (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;
>
> (b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
>
> (c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

Salvatore Cipriano asked the trial court to invoke its equitable powers in order to modify the monthly payments. Yet the court gave no grounds as a reason for modifying the award. Significantly, neither Salvatore Cipriano nor the trial court referred to any of the provisions of MCR 3.602(K)(2) to justify modification of the award. Even though the trial court did not change the total amount of the property award, the matter had been submitted to binding arbitration, and the arbitra-

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[41] MCL 600.6221 provides, "The judge may, on motion of either party, following due notice to the other, alter the amounts and times of payment of the installments from time to time when he may deem it advisable and fair."

tor specifically awarded $5,500 in monthly payments to Mary Cipriano. The trial court erred by modifying the award of the arbitrator without a timely complaint and without reference to MCR 3.602(K)(2). We reverse this order of the trial court and remand the case to the trial court to reinstate the $5,500 monthly payments that were awarded in arbitration.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

DAWE v DR REUVEN BAR-LEVAV & ASSOCIATES, PC
(ON REMAND)

Docket No. 269147. Submitted May 11, 2010, at Lansing. Decided August 12, 2010, at 9:00 a.m.

Elizabeth Dawe brought an action in the Oakland Circuit Court against Dr. Reuven Bar-Levav & Associates, P.C., the estate of Reuven Bar-Levav, M.D., and Leora Bar-Levav, M.D., after Joseph Brooks, defendants' former psychiatric patient, shot plaintiff and others during a group-therapy session. Dawe alleged that defendants committed common-law medical malpractice by negligently placing Brooks in her therapy group when they knew or should have known that he was not a suitable candidate for group therapy. Dawe also alleged that defendants were liable under MCL 330.1946 because they had failed to warn her that Brooks had made threatening statements to defendants. Defendants moved for summary disposition, which the court, Charles W. Simon, J., denied. The court also denied defendants' later motion for a partial directed verdict. The jury returned a verdict in Dawe's favor. The court subsequently denied defendants' motions for judgment notwithstanding the verdict and for a new trial. Defendants appealed, and Dawe cross-appealed. The Court of Appeals, WHITBECK, C.J., and K. F. KELLY, J. (SMOLENSKI, P.J., dissenting), reversed with regard to the trial court's denial of the motion for a directed verdict, vacated the judgment, and remanded the case for entry of an order dismissing Dawe's claims. The Court of Appeals reasoned that MCL 330.1946 limited a mental-health professional's duty to warn and protect third parties and, therefore, abrogated common-law claims for failure to warn or protect. The Court of Appeals further held that Dawe had failed as a matter of law to establish her claim that defendants violated MCL 330.1946. 279 Mich App 552 (2008). Dawe sought leave to appeal, and defendants sought leave to cross-appeal. The Supreme Court granted Dawe's application and reversed, holding that MCL 330.1946 did not abrogate a plaintiff-patient's common-law medical malpractice claim when the mental-health professional's separate duty arising out of his or her special relationship with the patient would apply and no threat as

described in the statute had been communicated to the mental-health professional. In lieu of granting defendants' application for leave to cross-appeal, the Supreme Court remanded the case to the Court of Appeals for consideration of the remaining issues raised on appeal in that court. 485 Mich 20 (2010).

On remand, the Court of Appeals *held*:

1. Defendants had a psychiatrist-patient relationship with Dawe that imposed on them duties to protect her from harm by a third party and to treat her within the standard of care applicable to medical professionals. Because Dawe was among the class of persons who could foreseeably be harmed by defendants' decision to place Brooks in group therapy, defendants owed Dawe a duty to take reasonable precautions to ensure that patients assigned to the group were suitable for group therapy. A reasonable jury could have concluded that defendants proximately caused Dawe's injury by placing Brooks in the therapy group in breach of the applicable standard of care. The trial court did not err by denying defendants' motion for judgment notwithstanding the verdict.

2. The trial court did not err by allowing Dawe to present evidence that permitted an inference that defendants failed to properly treat Brooks because the evidence was relevant to Dawe's theory of the case.

3. The trial court's erroneous instructions to the jury, which intertwined Dawe's statutory and common-law claims, did not unfairly prejudice defendants in light of the strong evidence supporting Dawe's common-law claim, which made it unlikely that the jury relied on a purported violation of MCL 330.1946 to conclude that defendants breached the standard of care owed to Dawe.

4. The verdict against Leora Bar-Levav was not against the great weight of the evidence. There was evidence from which a reasonable jury could have concluded that she participated to some extent in placing Brooks in group therapy and breached the standard of care by failing to perform additional assessments of Brooks and his suitability for group therapy.

5. MCL 600.1483 caps the amount of noneconomic damages a plaintiff may receive, but the cap is adjusted annually for inflation. The trial court correctly applied the noneconomic damages cap in effect on the date that the judgment for Dawe was entered rather than the cap in effect when she filed suit.

6. The trial court did not abuse its discretion by refusing to admit into evidence a manuscript written by Brooks given that the manuscript arrived at defendants' office several months after

defendants' treatment of Brooks had ended. Because there was no evidence that the manuscript was written while Brooks was in defendants' care, it was not relevant to defendants' decision to place Brooks in group therapy. Moreover, the limited references to the manuscript that Dawe's counsel made during the trial were minimally prejudicial and could not have had a controlling influence on the verdict.

7. The trial court erred when it concluded that Dawe was only entitled to interest on a portion of the past noneconomic damages found by the jury. The jury awarded Dawe past noneconomic damages and future noneconomic damages in excess of the applicable cap under MCL 600.1483. MCL 600.6013(1) excludes prejudgment interest on future noneconomic damages. The trial court determined that Dawe was entitled to prejudgment interest on the portion of her capped damages equal to the ratio of past noneconomic damages to future noneconomic damages found by the jury. MCL 600.1483(1), however, must be construed as requiring the reduction of future noneconomic damages before past noneconomic damages. When a jury finds that a plaintiff has past noneconomic damages in excess of the applicable cap, the plaintiff is entitled to prejudgment interest on the full amount of the capped award under MCL 600.6013(1).

Award of prejudgment interest vacated and remanded for recalculation of interest; affirmed in all other respects.

1. NEGLIGENCE — MENTAL-HEALTH PROFESSIONALS — PATIENTS — COMMON-LAW DUTIES TO PATIENTS — DUTY TO WARN OR PROTECT PATIENTS.

A psychiatrist-patient relationship is a special relationship that imposes a duty on the psychiatrist to protect the patient from harm by a third party and to treat the patient within the standard of care applicable to medical professionals; when the patient is among the class of persons who could foreseeably be harmed by the psychiatrist's decision to place a third party in group therapy, the psychiatrist owes the patient a duty to take reasonable precautions to ensure that the third party is suitable for group therapy.

2. DAMAGES — INTEREST — MEDICAL MALPRACTICE — PAST NONECONOMIC DAMAGES — FUTURE NONECONOMIC DAMAGES — CAP ON NONECONOMIC DAMAGES.

A plaintiff is entitled to prejudgment interest on an award for past noneconomic damages, not on an award for future noneconomic damages; when the jury finds that the plaintiff has past noneconomic damages in excess of the applicable cap on noneconomic damages in a medical malpractice action, the plaintiff

> is entitled to prejudgment interest on the full amount of the capped award, regardless of whether the jury also awarded the plaintiff future noneconomic damages; if the past noneconomic damages do not exceed the cap, the plaintiff is entitled to interest on the actual amount of past noneconomic damages awarded (MCL 600.1483, MCL 600.6013).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Haas & Goldstein, P.C.* (by *Justin Haas*), for plaintiff.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank*), for defendants.

ON REMAND

Before: WHITBECK, P.J., and FITZGERALD and K. F. KELLY, JJ.

PER CURIAM. This medical malpractice action returns to this Court on remand from the Michigan Supreme Court[1] with the direction that we evaluate the remaining issues raised in defendants' original appeal and plaintiff's cross-appeal.[2] In the original appeal, defendants, Dr. Reuven Bar-Levav & Associates, the estate of Dr. Reuven Bar-Levav, and Dr. Leora Bar-Levav, appealed as of right the jury verdict in favor of plaintiff, Elizabeth Dawe, on various grounds. On cross-appeal, Dawe appealed the trial court's calculation of prejudgment interest on the jury's award and the trial court's refusal to permit the admission of certain evidence. We vacate the award of prejudgment interest and remand for recalculation of the interest consistently with this opinion. In all other respects, we affirm.

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[1] *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20; 780 NW2d 272 (2010).

[2] This case was originally submitted to Judges SMOLENSKI, WHITBECK, and K. F. KELLY. Judge FITZGERALD has been substituted as a panel member for these proceedings on remand.

I. BASIC FACTS

The basic facts were set out in our previous opinion[3] as follows:

> This medical malpractice action arises out of a shooting incident at defendants' psychiatric office where Dawe received treatment. On June 11, 1999, Joseph Brooks, who was a former patient of Dr. [Reuven] Bar-Levav,[1] came to the office, drew a handgun, and shot and killed Dr. Bar-Levav. Brooks then proceeded to the back of the office and fired into Dawe's group therapy room. Brooks killed one patient and wounded others, including Dawe. After firing dozens of rounds into the room, Brooks committed suicide.
>
> Dawe sued defendants, alleging that Brooks made threatening statements to defendants in which he indicated that he "fantasized about murdering" and that he demonstrated his ability to carry out threats by coming to defendants' office with a handgun. Dawe further alleged that a "manuscript" that Brooks delivered to defendants in June 1999 "could be reasonably construed as a threat of violence against other members who participated in his group therapy sessions, including [Dawe]." Accordingly, Dawe alleged that defendants were liable under two theories: statutory liability for failure to warn under MCL 330.1946, and common-law medical malpractice. With respect to her common-law medical malpractice claim, Dawe alleged that defendants breached their applicable standard of care, which included "informing the police, warning patients or others, and taking reasonable precautions for the protection of patients when a doctor or health care provider has information which could reasonably be construed as a threat of violence against a patient or others," when defendants failed to warn Dawe and the police of Brooks's "threats" or take reasonable steps to protect Dawe. Dawe also filed an affidavit of Meritorious Claim in support of her complaint.[2]

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[3] *Dawe v Dr Reuvan Bar-Levav & Assoc, PC*, 279 Mich App 552, 554-557; 761 NW2d 318 (2008), rev'd 485 Mich 20 (2010). We note that Dr. Reuven Bar-Levav's first name was misspelled in the previous opinion.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that there was no evidence that Brooks expressed a threat to defendants about Dawe specifically and, therefore, defendants owed no duty to warn or protect Dawe under MCL 330.1946. Defendants also noted that Dawe was not alleging malpractice with regard to her individual care; rather, her only allegation was a failure to fulfill the duty to warn, which was derived solely from the statute.

In response, Dawe argued that it was significant that she was defendants' patient rather than merely a "third person" to whom the statute applied. Dawe argued that her special physician-patient relationship with defendants also required them to treat her within the applicable standard of care stated in her complaint. In other words, Dawe argued that defendants owed both statutory and common-law duties. Dawe further argued that she had presented a genuine issue of material fact that defendants violated that standard of care. In support of her motion, Dawe submitted the affidavit of Dr. Mark Fettman, Dawe's psychiatric expert, who attested that a psychiatrist has a duty to take reasonable precautions for the protection of patients. According to Dr. Fettman, included within this duty is the requirement that the psychiatrist assess a patient to determine if the patient is a suitable candidate for group therapy before placing the patient in a group. Dr. Fettman averred that once a patient has been placed in group therapy, the psychiatrist has a further duty to continually assess the patient to ensure that the patient remains suitable for group therapy. Dr. Fettman attested that defendants violated the applicable standard of care by placing Brooks in a group session with Dawe and other patients.

The trial court ruled that summary disposition was not appropriate because Dawe had stated a prima facie case and there were genuine issues of material fact regarding whether defendants violated MCL 330.1946 or the applicable standard of care. Accordingly, the trial court denied defendants' motion.

At trial, Dawe argued that defendants breached their duty to warn and that defendants breached their duty to provide

Dawe with a safe clinical environment for her treatment. Specifically, Dawe contended that defendants breached the standard of care by placing Brooks in Dawe's group therapy sessions when they knew or should have known that Brooks was a danger to the other group members.

After the close of Dawe's proofs, defendants moved for a partial directed verdict on Dawe's claim of failure to warn under MCL 330.1946, arguing that Dawe failed to establish that Brooks communicated to defendants a threat of violence specifically against Dawe. Defendants also argued that Dawe failed to present expert testimony concerning the standard of care applicable under the statute; that is, defendants noted that Dr. Fettman's testimony applied solely to defendants' alleged duties when placing Dawe in group therapy, not to defendants' duty to warn. In response, Dawe again argued that it was significant that she was defendants' patient, apparently on the basis that MCL 330.1946 did not even apply in cases where the victim was a patient.[3] Nevertheless, the trial court denied the motion on the ground that Dawe had stated a prima facie case sufficient to survive a directed verdict.

After the six-day trial in September 2005, the jury returned a verdict in favor of Dawe. Defendants moved for a judgment notwithstanding the verdict (JNOV) and for a new trial, raising several of the same issues now raised on appeal; however, the trial court denied the motions. Defendants now appeal.

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[1] Defendants discharged Brooks from their care on March 19, 1999.

[2] See MCL 600.2912d.

[3] Dawe's counsel specifically stated: "[T]his statute that [defendants are] referring to is talking—it's in establishing a duty by someone that isn't normally a patient. That doesn't exist here because Elizabeth Dawe was [a patient]. . . . This other statute is talking about if Elizabeth Dawe wasn't a patient[.]"

In their appeal, defendants argued: (1) that because the record was devoid of evidence that Brooks communicated to defendants a specific threat of physical violence against Dawe, defendants had no duty to protect Dawe from Brooks and Dawe's claim under MCL 330.1946 failed as a matter of law, (2) that MCL 330.1946 preempted the common law and provided the only basis for finding that defendants had a duty to warn or protect Dawe, (3) that even if a common-law duty survived the enactment of MCL 330.1946, defendants had no duty in this case because Brooks's actions were unforeseeable, (4) that admission of irrelevant testimony regarding Brooks's own treatment confused the jury and prejudiced defendants, (5) that the trial court's erroneous intertwining of Dawe's statutory and common-law claims contaminated the verdict, (6) that Dawe's lack of expert testimony required dismissal of her statutory claim, (7) that the verdict against Dr. Leora Bar-Levav was against the great weight of the evidence, (8) that the mention of a manuscript written by Brooks compromised the fairness of the trial, and (9) that the trial court applied the incorrect noneconomic damages cap. Dawe cross-appealed, arguing (1) that the trial court erred when calculating prejudgment interest and (2) that the trial court abused its discretion by refusing to admit Brooks's manuscript into evidence.

A majority of this Court (WHITBECK, C.J., and K. F. KELLY, J.) held that MCL 330.1946 abrogated a mental-health professional's common-law duty to warn or protect third parties from dangerous patients. According to the majority, the statute also abrogated the common-law duty to treat other patients within the standard of care to the extent that that standard of care required a mental-health professional to provide a safe clinical environment for treatment. The majority held that the term "third person," as used in MCL 330.1946,

refers to any person who is not the dangerous patient or the mental-health professional, including the mental-health professional's other patients.[4] In sum, the majority concluded that the trial court erred by failing to grant defendants a directed verdict because Dawe had failed to present evidence from which a reasonable fact-finder could have concluded that Brooks communicated a threat of physical violence against Dawe to defendants.[5] The majority reversed the trial court's denial of defendants' motion for a directed verdict, vacated the judgment against defendants, and remanded the matter for entry of an order dismissing Dawe's claims. The majority did not address defendants' remaining issues or those issues raised by Dawe on cross-appeal.[6]

In dissent, Judge SMOLENSKI concluded that MCL 330.1946 applies to patients who are "recipients," as that term is defined in MCL 330.1100c(12),[7] and because Brooks was not a recipient, MCL 330.1946(1) did not abrogate or modify defendants' common-law duty to protect a third party from Brooks. Thus, Judge SMOLENSKI concluded that the statute did not abrogate or modify Dawe's common-law claim against defendants.[8]

Dawe sought leave to appeal in the Michigan Supreme Court, and defendants sought leave to cross-appeal. The Supreme Court reversed this Court's decision, holding as follows:

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[4] *Id.* at 564-568.

[5] *Id*. at 570-571.

[6] *Id*. at 571.

[7] A "recipient" is "an individual who receives mental health services from the [Department of Community Health], a community mental health services program, or a facility or from a provider that is under contract with the department or a community mental health services program." MCL 330.1100c(12).

[8] *Dawe*, 279 Mich App at 575-576 (SMOLENSKI, P.J., dissenting).

> Although the Legislature partially abrogated a mental health professional's common-law duties, the language of the statute expressly limits its own scope. The final sentence of MCL 330.1946(1) states that "[e]xcept as provided in this section, a mental health professional does not have a duty to warn a third person of a threat *as described in this subsection* or to protect the third person." (Emphasis added.) The type of threat described in subsection (1) is "a threat of physical violence against a reasonably identifiable third person . . . ." MCL 330.1946(1). Further, the patient making the threat must have "the apparent intent and ability to carry out that threat in the foreseeable future" before a mental health professional's duty under MCL 330.1946(1) is triggered. Therefore, MCL 330.1946(1) only modified a mental health professional's common-law duty to warn or protect a *third person* when a "threat as described in [MCL 330.1946(1)]" was communicated to the mental health professional because the statute only places a duty on mental health professionals to warn third persons of or protect them from the danger presented by a threat "as described" in MCL 330.1946(1). This statutory duty only arises if three criteria are met: (1) a patient makes a threat of physical violence, (2) the threat is against a reasonably identifiable third person, and (3) the patient has the apparent intent and ability to carry out the threat. If these three criteria are not met, the mental health professional's duty under the statute is not triggered. Thus, on its face, the statute does not completely abrogate a mental health professional's separate common-law special relationship duty to protect his or her patients by exercising reasonable care.[9]

In lieu of granting defendants' application for leave to cross-appeal, however, the Supreme Court remanded the matter to this Court for consideration of the remaining issues raised on appeal.[10] The Supreme Court directed this Court's "attention to the jury instructions,

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[9] *Dawe*, 485 Mich at 29-30.

[10] *Id*. at 33-34.

which may not have properly distinguished between the statutory and common-law claims in this case."[11]

II. COMMON-LAW DUTY

A. STANDARD OF REVIEW

Defendants note that Dawe's medical malpractice claim was based on an alleged duty to protect her from Brooks by not placing them in group therapy together. Defendants argue that they did not have a common-law duty to protect Dawe from Brooks's criminal acts because (1) defendants' relationship with Brooks ended three months before the shooting and (2) their psychiatrist-patient relationship with Dawe did not give rise to a duty to protect her from the unforeseen acts of third parties. Defendants also argue that they cannot be liable for Brooks's criminal acts because his criminal acts were not the proximate cause of any breach of duty on their part. Whether a defendant owes a duty to a plaintiff is a question of law, which this Court reviews de novo.[12]

B. DEFENDANTS' PROFESSIONAL DUTY TO DAWE

It is undisputed that defendants had an established psychiatrist-patient relationship with Dawe, and a psychiatrist-patient relationship is a "special" relationship that imposes a duty to protect another from harm by a third party.[13] In light of this relationship, defendants owed a duty to treat Dawe within the standard of

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[11] *Id*. at 34 n 8.

[12] *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

[13] *Dawe*, 485 Mich at 22, 26-27; *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997); *Graves v Warner Bros*, 253 Mich App 486, 493-494; 656 NW2d 195 (2002).

care applicable to medical professionals[14] and to protect her from harm by a third party. In *Williams v Cunningham Drug Stores, Inc*,[15] the Michigan Supreme Court explained the rationale for the exception to the general rule that there is no duty to aid or protect someone from harm by a third party:

> Social policy, however, has led the courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. Thus, a common carrier may be obligated to protect its passengers, an innkeeper his guests, and an employer his employees. The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.

At some point in the course of Dawe's treatment, defendants decided to treat Dawe with group therapy and to include Brooks in Dawe's therapy group. The decision to pursue a particular course of treatment involves considerations of professional medical judgment that implicate the duty to provide proper medical care to a patient.[16] Moreover, while participating as a patient in group therapy, Dawe entrusted her well-being to defendants. Defendants alone controlled the clinical environment; defendants determined when and where the group would meet and determined which patients, doctors, and therapists would participate in the group. Dawe had neither the training nor access to the relevant background information to evaluate

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[14] See *Dyer v Trachtman*, 470 Mich 45, 49-50, 54; 679 NW2d 311 (2004).

[15] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).

[16] See *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46-47; 594 NW2d 455 (1999).

whether a particular patient posed a danger to her. Instead, Dawe had to trust that defendants were acting in her best interests and would use their training and experience to ensure that each patient in the group was suitable for group therapy. This is precisely the kind of special relationship that gives rise to a duty to protect the victim from harms inflicted by third parties.[17] Likewise, it is foreseeable that a patient who is not healthy enough to participate in group therapy may be or may become a danger to the other members of the group. Therefore, because Dawe was among the class of persons who could foreseeably be harmed by defendants' decision to place Brooks into group therapy, defendants owed Dawe a duty to take reasonable precautions to ensure that the patients assigned to the group were sufficiently healthy to participate in group therapy.[18]

Although it is for a court to decide the existence of a duty,

> the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care, including . . . whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable.[19]

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[17] See *Williams*, 429 Mich at 498-499.

[18] *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977) (noting that a duty will not be imposed unless "it is foreseeable that the actor's conduct may create a risk of harm to the victim"); *Graves*, 253 Mich App at 494-495 (noting that the duty of reasonable care extends to those parties who are readily identifiable as being foreseeably endangered); see also *Bryson v Banner Health Sys*, 89 P3d 800, 805 (Alas, 2004) (holding that a treatment center, which placed a female client into a substance abuse treatment group with another patient with known propensities to commit violent sexual assaults, had a duty to protect its female client "from danger in the course of her treatment—including foreseeable danger from her fellow patients").

[19] *Moning*, 400 Mich at 438.

Accordingly, it was for the jury to decide whether defendants' decision to place Brooks into group therapy with Dawe fell below the general standard of care applicable to medical professionals and whether that decision was the cause of Dawe's injuries.

C. FORESEEABILITY AS AN ELEMENT OF PROXIMATE CAUSE

Defendants also argue that Dawe failed to prove proximate cause as a matter of law. Specifically, defendants contend that criminal acts are not foreseeable and that Brooks's criminal acts in particular were too remote in time from defendants' alleged breach to constitute a proximate cause of Dawe's injuries.

In a medical malpractice action, the plaintiff must prove that the defendant's breach of the applicable standard of care proximately caused the plaintiff's injuries.[20] Proximate cause is usually a factual issue to be decided by the trier of fact, but if the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, the issue is one of law for the court.[21] "[L]egal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences."[22] In order for negligence to be the proximate cause of an injury, " 'the injury must be the natural and probable consequence of a negligent act or omission, which under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably

[20] *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).

[21] *Jones v Detroit Med Ctr*, 288 Mich App 466; 794 NW2d 55 (2010).

[22] *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) (citation omitted).

occur as a result of his negligent act.' "[23] "There may be more than one proximate cause of an injury."[24]

Courts in Michigan have long recognized that criminal acts by third parties can be foreseeable.[25] Further, although the length of time between the shooting and Brooks's departure from defendants' care is relevant to whether defendants' placement of Brooks into Dawe's group constituted a proximate cause of Dawe's injuries, it is not dispositive.[26] As Judge SMOLENSKI concluded in his dissent from the original opinion, Dawe

> presented evidence that defendants knew or should have known that Brooks would form improper emotional attachments to persons in his group therapy and that he might seek out those persons long after the termination of his participation in the group. Given this evidence, a reasonable jury could conclude that defendants' breach of the

[23] *Paparelli v Gen Motors Corp*, 23 Mich App 575, 577; 179 NW2d 263 (1970), quoting *Nielsen v Henry H Stevens, Inc*, 368 Mich 216, 220; 118 NW2d 397 (1962).

[24] *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997).

[25] See *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 406-409, 409; 224 NW2d 843 (1975) (stating that whether the criminal acts of a patient-visitor to the landlord's premises were foreseeable was properly a jury question); *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 415; 189 NW2d 286 (1971) (stating that whether the defendant employer knew or should have known of its employee's dangerous propensities, and therefore should be held liable for the employee's criminal assault, was a question for the jury); *Davis v Thornton*, 384 Mich 138, 149; 180 NW2d 11 (1970) (stating that reasonable persons might conclude that the defendant's act of leaving his keys in an unlocked car, which was later stolen and involved in an accident, was "not too remote a cause of the plaintiff's injuries and that the joyrider's intervention did not sever that causal connection"); *Ross v Glaser*, 220 Mich App 183; 559 NW2d 331 (1996) (holding that a father may be held civilly liable for a murder committed by his son, who had a history of mental illness, when the father provided a loaded gun to his son while the son was in an agitated state).

[26] See *Mich Sugar Co v Employers Mut Liability Ins Co of Wisconsin*, 107 Mich App 9, 15; 308 NW2d 684 (1981) ("Lapse of time does not foreclose the cause of an injury from being its proximate cause.").

> standard of care foreseeably included the possibility that Brooks would return long after the conclusion of his participation in group therapy and harm persons with whom he formed these attachments. Therefore, the lapse of time alone was insufficient to render Brooks's actions unforeseeable as a matter of law.[27]

A reasonable jury could have concluded that defendants proximately caused Dawe's injury by placing Brooks in the therapy group in breach of the applicable standard of care; therefore, the trial court did not err by refusing to grant defendants' motion for JNOV on this basis.[28]

III. DUTY OF CARE OWED TO BROOKS

Defendants argue that the trial court erred when it permitted Dawe to elicit testimony concerning the duty of care they owed to Brooks. Defendants point out that Dawe's medical malpractice claim was based on allegations that *she* received substandard treatment by virtue of Brooks's inclusion in her group-therapy session. Therefore, according to defendants, evidence regarding their alleged improper treatment of Brooks likely confused the jury and prejudiced defendants and they are entitled to a new trial. We disagree.

Although Dawe initially argued that defendants had a common-law duty to warn or protect her in light of defendants' relationship with Brooks, by the time of the trial Dawe limited her claims to a statutory violation of the duty imposed by MCL 330.1946 and a breach of the duty arising out of defendants' psychiatrist-patient relationship with Dawe. As Judge SMOLENSKI concluded in his dissent from the original opinion, Dawe

> did not present evidence or argue that defendants failed to properly treat Brooks. [Dawe] presented evidence that

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[27] *Dawe*, 279 Mich App at 589 (SMOLENSKI, P.J., dissenting).

[28] See *Nichols v Dolber*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

> Brooks had symptoms and exhibited behavior that indicated that Brooks was not suitable for group therapy. [Dawe] further presented evidence that Brooks was placed in group therapy without first requiring him to go through a lengthy period of individual treatment and taking proper medication. Although this evidence permits an inference that defendants failed to properly treat Brooks, the evidence was relevant to [Dawe's] theory of the case. MRE 401; MRE 402.[29]

Therefore, there was no error warranting a new trial.

IV. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

Defendants note that this Court has held that Dawe's statutory claim failed as a matter of law[30] and argue that the trial court erroneously intertwined the statutory and common-law claims when instructing the jury. Therefore, defendants contend that a new trial is required because an erroneous theory of liability was submitted to the jury and the general verdict made it impossible to know how the error affected the verdict. On appeal, this Court reviews de novo claims of instructional error.[31] Reversal is not required unless the failure to reverse would be inconsistent with substantial justice.[32]

B. ANALYSIS

Dawe originally sued under two separate theories of liability: statutory liability for failure to warn under

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[29] *Dawe*, 279 Mich App at 590 (SMOLENSKI, P.J., dissenting).

[30] *Id. at* 569-570 (WHITBECK, C.J.).

[31] *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002); *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2007).

[32] MCR 2.613(A); *Ward v Consolidated Rail Corp*, 472 Mich 77, 84, 87; 693 NW2d 366 (2005).

MCL 330.1946 and common-law medical malpractice for failure to warn. But although Dawe presented MCL 330.1946 as a separate theory supporting liability, the trial court did not instruct the jury that a breach of the duty imposed by MCL 330.1946 could alone support a verdict against defendants. Instead, the trial court instructed the jury, "If you find that any of the Defendants violated this statute before or at the time of the occurrence, *such violation is evidence of negligence* which you should consider, together with all of the evidence, in deciding whether the Defendant was negligent."[33] Further, the trial court instructed the jury that "professional negligence or malpractice" means

> the failure to do something which a psychiatrist of ordinary learning, judgment or skill in this community or a similar one would do, or the doing of something which is—a psychiatrist of ordinary learning, judgment or skill would not do under the same or similar circumstances you find to exist in this case.

The only theory of liability before the jury was medical malpractice. And the relevant inquiry, therefore, is whether the trial court's instruction caused such prejudice that it would be "inconsistent with substantial justice" to refuse to grant defendants a new trial.[34]

As Judge SMOLENSKI set forth in his dissent from the original opinion,

> [i]n his video trial deposition, Dr. Mark Fettman, who [was Dawe's] psychiatric expert, testified that a psychiatrist has a duty to take reasonable precautions for the protection of patients. Included within this duty is the requirement that the psychiatrist assess a patient to determine if the patient is a suitable candidate for group therapy before placing him

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[33] Emphasis added.

[34] MCR 2.613(A); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

or her into a group. Once a patient has been placed in group therapy, the psychiatrist has a further duty to continually assess the patient to ensure that the patient remains suitable for group therapy. Consistent with this testimony, [Dawe's] proofs largely consisted of evidence concerning what defendants knew or should have known about Brooks's mental health and how defendants used that information.

Testimony and records submitted to the jury established that Brooks was institutionalized after he attempted suicide in 1992. Dr. Joseph Gluski testified that Brooks was referred to his practice after Brooks left the group home. Gluski stated that he treated Brooks from April 1994 to October 1995. Gluski testified that Brooks was on antipsychotic medications when he arrived at the practice and that he determined that Brooks should remain on antipsychotic medications during treatment. Gluski acknowledged that he wrote in Brooks's chart that Brooks had mentally slipped back into 1992, which was the year he tried to commit suicide, around the time that he ceased taking his medications. Gluski also testified that Brooks appeared to misunderstand how he was being treated in group therapy and thought that the others were conspiring against him. Gluski stated that Brooks abruptly stopped treatment in October 1995.

Gluski also described two incidents with Brooks returning to his office after treatment was over. Gluski testified that in the summer of 1996, Brooks called and asked to have a meeting with Gluski and Anika Kirby, the therapist who led Brooks's group therapy sessions. At the meeting, Brooks asked questions about Kirby's ethnic background, which was Finnish. Brooks had even brought a map of Finland with him.

Gluski also testified about an incident that occurred in the summer of 1997 or 1998. Gluski testified that Brooks barged into his office before normal office hours and began searching the office for Kirby. Gluski stated that Brooks seemed agitated and thought he might get physical. Gluski testified that Brooks seemed furious and made comments about his treatment in group therapy. Gluski left the office

and walked to a nearby restaurant, but Brooks followed him and did not leave until Gluski called the police. Gluski acknowledged that the police report indicated that Gluski told the officer that Brooks had said, "You better run." The report also indicated that Brooks told him, "I want to get your partner."

Gluski testified that, after Brooks began treating with defendants, [Dr. Reuven Bar-Levav] called about Brooks. Gluski said he told [Bar-Levav] about the incidents with Brooks and warned him that Brooks was dangerous. Gluski said he also told [Bar-Levav] that, if [Bar-Levav] decided to treat Brooks, Brooks should be in individual treatment for one full year and needed to be on medication. Gluski stated that he was so concerned that he called [Bar-Levav] the next day to reiterate that [Bar-Levav] should be careful.

In addition to Gluski's testimony, [Dawe] presented evidence that, on October 19, 1998, Brooks came to defendants' office and told Joseph Froslie, who was a therapist at the practice, that he had obtained a gun and driven to New Hampshire with an intent to kill his ex-girlfriend's mother and then commit suicide. In response to this revelation, Froslie asked Brooks to bring the gun in to the office, which Brooks did. After Brooks brought the gun to the office, Froslie contacted Dr. Leora Bar-Levav . . . , who was [Dr. Reuven Bar-Levav's] daughter and also a psychiatrist at [Dr. Reuven Bar-Levav's] practice. [Dr. Leora Bar-Levav] performed a general mental-status examination of Brooks. Although [she] prescribed a two-week supply of medication after this incident and claimed to have performed further assessments of Brooks, the jury heard evidence that these subsequent assessments were not documented and that no one at defendants' practice recalled ever having a specific discussion about Brooks. Hence, the jury could have concluded that no other steps were taken to ensure that Brooks was not a danger to himself or others. Notwithstanding these prior incidents, in December 1998, [Dr. Reuven Bar-Levav] decided to place Brooks in group therapy. Testimony established that [Bar-Levav] made the decision after consulting with the other staff members.

> Froslie testified that Brooks exhibited some narcissistic behavior and also had disturbances in social functioning. James Stanislaw, another group therapist at the practice, testified that Brooks had some symptoms that were consistent with paranoid schizophrenia, including confused thinking and suspiciousness, and that he was not always appropriate or responsive in group therapy. Froslie also indicated that Brooks sometimes did not appear to understand the group therapy process. Brooks was finally discharged from the practice in March 1999 after [Dr. Reuven Bar-Levav] prescribed medication to Brooks, which Brooks refused to take.[35]

The evidence provided compelling proof that defendants knew or should have known that Brooks posed a danger to the other patients in his therapy group and that, therefore, defendants should not have placed Brooks in the group. In contrast, the evidence tending to support Dawe's claim under MCL 330.1946 was quite limited. It is unlikely that the jury relied on a purported violation of MCL 330.1946 to conclude that defendants breached the standard of care. Consequently, the erroneous instruction did not unfairly prejudice defendants, and a new trial is not warranted on that basis.[36]

V. VERDICT AGAINST DR. LEORA BAR-LEVAV

A. STANDARD OF REVIEW

Defendants argue that the evidence at trial indicated that Dr. Leora Bar-Levav had limited interaction with Brooks and did not participate in the decision to place Brooks into group therapy. Even Dawe's expert recognized that Dr. Reuven Bar-Levav alone made the decision to place Brooks into group therapy. Therefore, defendants argue that the verdict against Dr. Leora Bar-Levav was against the great weight of the evidence and that this

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[35] *Dawe*, 279 Mich App at 580-583 (SMOLENSKI, P.J., dissenting).

[36] *Case*, 463 Mich at 6.

Court should grant a new trial for each defendant or, at least, JNOV for Dr. Leora Bar-Levav.

This Court may overturn a jury verdict that is against the great weight of the evidence.[37] But a jury's verdict should not be set aside if there is competent evidence to support it.[38] Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs.[39] The issue usually involves matters of credibility or circumstantial evidence,[40] but if there is conflicting evidence, the question of credibility ordinarily should be left for the fact-finder.[41] Similarly, the weight to be given to expert testimony is for the jury to decide.[42]

B. ANALYSIS

As Judge SMOLENSKI set forth in his dissent from the original opinion,

> [a]t trial, Fettman testified that the applicable standard of care required defendants to take steps to ensure that the clinical environment was safe for [Dawe's] treatment. Fettman stated that this required defendants to assess Brooks's suitability for group therapy before placing him in a therapy group and to continuously assess him thereafter to determine whether he remained suitable for group therapy. Fettman testified that defendants breached the standard of care by placing Brooks into a therapy group when there were clear

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[37] MCR 2.611(A)(1)(e); *Wischmeyer v Schanz*, 449 Mich 469, 485; 536 NW2d 760 (1995).

[38] *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003).

[39] *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds by *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

[40] *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989).

[41] *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 519; 679 NW2d 106 (2004).

[42] *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008).

> signs that he was not suitable for group therapy and by failing to continually assess and communicate about Brooks's continued suitability for group therapy.
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> Although Fettman indicated that he understood the evidence to show that [Dr. Reuven Bar-Levav] had the final decision regarding the placement of Brooks in group therapy, there was testimony that this decision was made after receiving input from all the staff members. The jury also heard evidence that [Dr. Leora Bar-Levav] performed the assessment of Brooks after he disclosed that he had traveled to New Hampshire to kill his ex-girlfriend's mother. There was also evidence that suggested that [Dr. Leora Bar-Levav] failed to make any subsequent assessments. Finally, evidence indicated that [she] participated in several of Brooks's group therapy sessions and yet failed to make any of the continuing assessments that Fettman testified would be required with a patient like Brooks.[43]

From this evidence, a reasonable jury could have concluded that Dr. Leora Bar-Levav did participate to some extent in Brooks's placement in group therapy. A reasonable jury could also have concluded that Dr. Leora Bar-Levav breached the standard of care by failing to perform additional assessments of Brooks and by failing to continuously reevaluate whether Brooks should be in group therapy. Finally, a reasonable jury could have concluded that these breaches of the standard of care proximately caused Dawe's injuries. Therefore, there was competent evidence to support the jury verdict against Dr. Leora Bar-Levav.

VI. ADJUSTED DAMAGES CAP

A. STANDARD OF REVIEW

Under MCL 600.1483, Dawe's noneconomic damages are capped. However, the cap is adjusted annually for

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[43] *Dawe*, 279 Mich App at 590-591 (SMOLENSKI, P.J., dissenting).

inflation, and defendants argue that the trial court erred by applying the adjusted cap that was applicable on the date of the verdict rather than the adjusted cap that was applicable on the date Dawe commenced her suit. The amount of the cap applicable to an award of noneconomic damages is a matter of statutory interpretation that this Court reviews de novo.[44]

B. ANALYSIS

As Judge SMOLENSKI set forth in his dissent from the original opinion,

> MCL 600.1483(1) limits the total amount of noneconomic damages that may be recovered by all plaintiffs as a result of negligence arising out of an action alleging medical malpractice. The cap was initially set at $280,000 for injuries, such as those at issue in this case, that do not meet the exceptions stated under MCL 600.1483(1)(a) to (c). However, under MCL 600.1483(4), the state treasurer is required to adjust this amount annually to reflect changes in the consumer price index. Although the statute provides for the annual adjustment of the cap, it does not address how this adjustment affects suits that are pending but have not yet been reduced to judgment.
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> In examining the applicability of the damages cap to wrongful death actions arising from medical malpractice, [the Michigan] Supreme Court noted that "[o]nly after the court or jury has, in its discretion, awarded damages as it considers fair and equitable does the court, pursuant to [MCL 600.6304(5)], apply the noneconomic damages cap of [MCL 600.1483]." *Jenkins v Patel*, 471 Mich 158, 172; 684 NW2d 346 (2004), citing MCL 600.6098(1) and MCL 600.6304(5). The Court further noted that the damages cap does not impinge on the jury's right to determine the amount of damages, but rather only limits the legal conse-

[44] *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004).

> quences of the jury's finding by limiting the amount of the judgment on the verdict. *Id.* at 173.[45]

Therefore, the cap only applies to a judgment rendered after a verdict.[46] The amount of the cap is the amount in effect on the date the judgment is entered.[47] Accordingly, the trial court did not err by applying the 2005 cap.

VII. THE MANUSCRIPT

A. BACKGROUND

As Judge SMOLENSKI set forth in his dissent from the original opinion,[48]

> [b]efore trial, defendants moved in limine to preclude [Dawe] from eliciting testimony about or referring to a document that the parties referred to as the "manuscript." The manuscript contained Brooks's ramblings about [Dr. Reuven Bar-Levav's] therapy techniques and Brooks's belief that his therapists "used" him to benefit the other members of the therapy group. In the manuscript, Brooks wrote about his desire to seek revenge, but did not directly threaten any one person or group. Brooks mailed the manuscript to [Dr. Reuven Bar-Levav] one day before the shooting. In their motion, defendants argued that evidence and arguments concerning the manuscript should be precluded because the manuscript was not relevant. Specifically, defendants noted that the manuscript arrived after Brooks's placement in group therapy and contained no threat within the meaning of MCL 330.1946. Defendants

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[45] *Dawe*, 279 Mich App at 596 (SMOLENSKI, P.J., dissenting).

[46] *Shivers v Schmiege*, 285 Mich App 636, 650; 776 NW2d 669 (2009); *Velez v Tuma*, 283 Mich App 396, 417; 770 NW2d 89 (2009).

[47] *Shivers*, 285 Mich App at 650; *Velez*, 283 Mich App at 417; see also *Wessels v Garden Way, Inc*, 263 Mich App 642, 652-654; 689 NW2d 526 (2004) (holding that the cap applicable to product liability actions is determined by the date of the judgment).

[48] *Dawe*, 279 Mich App at 592-594 (SMOLENSKI, P.J., dissenting).

also contended that there was no evidence that [Bar-Levav] read it. For these reasons, defendants argued, it could not be used to support any of [Dawe's] claims and should not be referred to or admitted into evidence. The trial court denied defendants' motion in limine.

At trial, defendants again moved to have the manuscript excluded. The trial court agreed that the manuscript was not relevant and also concluded that it was more inflammatory than probative. Therefore, the trial court excluded the manuscript. In addition, the trial court specifically precluded Dawe's counsel from asking any questions about the manuscript.

Although the trial court excluded the manuscript, [Dawe's] counsel had already commented on the manuscript during his opening statement. Specifically, [Dawe's] counsel stated that Brooks sent

"a manuscript, priority mail, addressed to Dr. Bar-Levav. It was received the next day. Maria Attard will tell you she handed the package to Dr. Bar-Levav. She's unsure if she opened it or he opened it, but she is certain of one thing, nobody reads his mail but him.

"At a later point in the day, Dr. Bar-Levav gave the manuscript back to Maria and said he's [sic] read it over the weekend. The defendants will tell you that Dr. Bar-Levav didn't have any idea what was inside the package. However, before the shooting took place, Mr. Baker will tell you that he recalls hearing that a manuscript had been received and he was advised that it was a confused document based on something Brooks had read in Dr. Bar-Levav's book.

"This is not something he was advised of in a formal meeting, Mr. Baker will tell you, but there was a buzz around the office, people were talking about the manuscript. What was in this manuscript, all the experts agree, is a very troubled, very confused writing that demonstrated a psychotic episode. The manuscript talks about revenge. The manuscript talks about Brooks feeling that he was being used in therapy."

[Dawe's] counsel also stated that defendants "failed to warn [plaintiff] that Brooks had made threats against her group after receiving the manuscript . . . ."[4]

After the trial court's ruling to preclude testimony concerning the manuscript, there were two brief references to the manuscript. First, a witness who testified by deposition referred to the timing of the arrival of the package. Second, [Dawe's] counsel referred to the fact that the manuscript had not been submitted to the jury. He stated:

"[B]ut you may have a question in your mind, where[']s] the manuscript, and you have heard reference throughout the trial, but it hasn't come into evidence.

"Those are the decisions, as the Judge instructed you at the beginning, he's going to tell you at the end, were made outside of your presence, and that's without respect to whether or not an attorney or myself wanted to actually present this certain evidence. For legal reasons, sometimes it doesn't come into evidence. You can't hold that against us. And at the time when we thought it was coming in, we told you you were going to see it, but that changed. But as the Judge will tell you, if he makes certain decisions on things, its not to be held against the attorneys."

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[4] [Dawe's] counsel also noted that if the jury found that there was "no duty to warn about the manuscript," but nevertheless concluded that defendants had a "duty to keep the clinic safe, then you must enter a decision of negligence."

B. DAWE'S CROSS-APPEAL

On cross-appeal, Dawe argues that the trial court erred when it refused to permit admission of Brooks's manuscript because it was relevant. We review for an abuse of discretion a trial court's decision to admit or exclude evidence.[49]

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[49] *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Generally, all relevant evidence is admissible at trial. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.[50] "Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point."[51]

It is undisputed that the manuscript at issue arrived long after the termination of Brooks's relationship with defendants' practice. Therefore, the manuscript could not serve as evidence that defendants breached the applicable standard of care by placing Brooks into Dawe's therapy group or permitting him to remain in the group. That is, because there was no evidence that the manuscript was written while Brooks was under defendants' care, it may not have reflected Brooks's mental health at the time he was being treated. Hence, it was not relevant to defendants' decision to place Brooks in group therapy. Therefore, the trial court did not abuse its discretion by concluding that the manuscript was not relevant.

C. DEFENDANTS' APPEAL

Although the trial court excluded the manuscript from evidence, defendants argue that they were prejudiced by the references to Brooks's manuscript that Dawe's counsel made at trial. As Judge SMOLENSKI recognized in his dissent from the original opinion,

> defendants did not object to [Dawe's] opening or closing remarks. Further, when redacting the deposition testimony of the witness at issue, defendants' counsel specifically

[50] MRE 401; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998).

[51] *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

> asked to have certain references to the manuscript removed, which the trial court granted. . . .
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> * * *
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> [T]aken as a whole, [Dawe's] attorney's remarks were minimally prejudicial and could not have had a controlling influence on the verdict. *Wiley*, [*v Henry Ford Cottage Hosp*, 257 Mich App 488, 505; 668 NW2d 402 (2003)]. Furthermore, the trial court instructed the jury that the attorneys' comments were not evidence. This instruction cured any minimal prejudice that these comments may have had. *Tobin* [*v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001)]. There was no error warranting the requested relief.[52]

VIII. PREJUDGMENT INTEREST

A. STANDARD OF REVIEW

On cross-appeal, Dawe argues that the purpose of awarding a plaintiff prejudgment interest is to compensate the plaintiff for the loss of the use of funds. Therefore, she contends, when, as in this case, the jury awards the plaintiff past noneconomic damages that exceed the applicable statutory cap, the plaintiff is entitled to prejudgment interest on the entire capped amount. This Court reviews de novo questions of statutory interpretation such as the proper application of MCL 600.6013 and MCL 600.1483.[53]

B. ANALYSIS

As Judge SMOLENSKI set forth in his dissent from the original opinion,[54]

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[52] *Dawe*, 279 Mich App at 594-595 (SMOLENSKI, P.J., dissenting).

[53] *Shinholster*, 471 Mich at 548.

[54] *Dawe*, 279 Mich App at 597-602 (SMOLENSKI, P.J., dissenting).

[w]hen rendering its verdict, the jury had to make specific findings of fact regarding the amount of past economic damages, past noneconomic damages, future economic damages, and future noneconomic damages for [Dawe]. MCL 600.6305(1). Future damages are defined to be "damages arising from personal injury which the trier of fact finds will accrue after the damage findings are made . . . ." MCL 600.6301(a). Noneconomic damages are defined as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss." MCL 600.1483(3). In the present case, the jury found that [Dawe] suffered a total of $600,000 in past medical expenses[5] and $400,000 in past noneconomic damages. The jury also found that [Dawe] would suffer $1,040,000 in future noneconomic damages. The verdict form did not provide for future economic damages.

Once the jury awarded damages, [Dawe] was entitled to interest on her money judgment. MCL 600.6013(1). Although MCL 600.6013(8) provides that interest "is calculated on the entire amount of the money judgment, including attorney fees and other costs" from the filing of the complaint, MCL 600.6013(1) specifically excludes interest "on future damages from the date of filing the complaint to the date of entry of the judgment." Hence, under a plain reading of MCL 600.6013, [Dawe] would normally be entitled to interest on the full amount of her past noneconomic damages. However, in a medical malpractice action, the trial court is required to reduce an award of damages to "the amount of the appropriate limitation set forth in [MCL 600.1483]." MCL 600.6304(5). Under MCL 600.1483(1), the total noneconomic damages recoverable by [Dawe] could not exceed $371,800. Because the jury found that [Dawe] suffered more than $1.4 million in total noneconomic damages, the trial court had to reduce the total award for noneconomic damages to $371,800. By its plain terms, MCL 600.1483(1) applies to "the total amount of damages for noneconomic loss recoverable by all plaintiffs . . . ." However, the Legislature failed to address how MCL 600.1483(1) should be applied to separate awards of past and future noneconomic damages. This legislative

silence poses no problem in cases where the jury finds either past or future noneconomic damages but not both, or where the combined total of past and future noneconomic damages does not exceed the applicable cap.[6] However, where the jury finds both past and future noneconomic damages whose combined total exceeds the cap provided by MCL 600.1483, it becomes essential to a proper determination of prejudgment interest under MCL 600.6013(1) to first determine how the cap applies to the individual awards of past and future noneconomic damages.

Because MCL 600.1483 and MCL 600.6013 both relate to the trial court's entry of a judgment after a jury renders a verdict, they must be read together as though constituting one law. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Nevertheless, it is clear that the statutes serve distinct purposes. The Legislature enacted MCL 600.1483 to control increases in health care costs by limiting the liability of medical care providers. *Zdrojewski v Murphy*, 254 Mich App 50, 80; 657 NW2d 721 (2002). This purpose is accomplished by *limiting* the amount of compensation that a plaintiff may obtain for noneconomic damages. In contrast, MCL 600.6013 serves two purposes: (1) to compensate the prevailing party for the loss of the use of funds awarded as a money judgment and for the costs of bringing a court action and (2) to provide an incentive for prompt settlement. *Old Orchard by the Bay Assoc v Hamilton Mut Ins Co*, 434 Mich 244, 252-253; 454 NW2d 73 (1990), overruled on other grounds by *Holloway Constr Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608, 615-616 (1996). With regard to the latter purpose, [the Michigan] Supreme Court explained that the "award of statutory prejudgment interest . . . serves a distinct deterrent function by both encouraging settlement at an earlier time and discouraging a defendant from delaying litigation solely to make payment at a later time." *Old Orchard*, [434 Mich] at 253. These purposes are accomplished under MCL 600.6013 by *increasing* the costs that a defendant will have to pay if the plaintiff prevails. Although these statutes appear to conflict, they can be construed together in a way that substantially preserves the purpose of each.

It must be noted that MCL 600.1483 does not limit all forms of compensation that a defendant may be required to pay after a verdict in favor of the plaintiff. The statute does not limit economic damages and does not purport to limit interest, attorney fees, or other costs. In contrast, MCL 600.6013 clearly requires compensation in the form of interest on the entire amount of the money judgment, which excludes future damages, but includes attorney fees and other costs. See MCL 600.6013(8). Thus, MCL 600.6013 has broader application than MCL 600.1483. Further, application of the cap provided by MCL 600.1483 directly and substantially affects the compensatory and deterrent effects of MCL 600.6013, while application of MCL 600.6013, which is based on the total damages, attorney fees, and costs, only indirectly affects the purpose of MCL 600.1483. Therefore, absent any guidance from the statutory language, I conclude that MCL 600.1483 should be construed in a way that minimizes its overall effect on a plaintiff's ability to receive the compensation required by MCL 600.6013. See *Denham v Bedford*, 407 Mich 517, 528-529; 287 NW2d 168 (1980) (examining a prior version of MCL 600.6013 and noting that the prejudgment interest statute is remedial and entitled to liberal interpretation).

In the present case, the trial court determined that [Dawe] would not be entitled to prejudgment interest on the full amount of the capped noneconomic damages award. Instead, the trial court determined that [Dawe] would be entitled to interest on that portion of the capped damages equal to the ratio of past noneconomic damages to future noneconomic damages found by the jury. Applying this formula to the $371,800 noneconomic damages cap, the trial court concluded that $140,949.38 of the capped amount represented past noneconomic damages and $230,850.62 represented future noneconomic damages.

Although this solution appears equitable on its face, it is clear from its application that it significantly undermines the remedial purposes of MCL 600.6013. Future damages include damages for harm that a plaintiff will suffer during his or her remaining life. See *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 469; 633 NW2d 418 (2001); MCL

600.6305(2). Further, future damages are reduced to a present cash value and payable with the judgment. MCL 600.6306(1). Hence, a plaintiff will invariably receive timely compensation for his or her future losses. In contrast, past damages reflect losses that the plaintiff has already incurred and for which he or she has not yet received any compensation. Yet, under the trial court's method, [Dawe] would receive less compensation for the injuries she has already suffered solely on the basis that she would at some point in the future suffer further losses. Indeed, on this basis, the trial court more than halved the amount of interest to which [Dawe] was entitled under MCL 600.6013(1) for her past damages. This method of applying MCL 600.1483 defeats the purpose of MCL 600.6013 without substantially furthering the purposes of the damages cap.

This problem can be avoided only by construing MCL 600.1483 in such a way as to minimize its effect on the application of MCL 600.6013. Hence, I construe MCL 600.1483(1) to reduce future noneconomic damages before past noneconomic damages. Where the jury finds that the plaintiff has past noneconomic damages in excess of the applicable cap, as is the case here, the plaintiff will be entitled to prejudgment interest on the full amount of the applicable cap under MCL 600.6013(1). However, where the past noneconomic damages do not rise to the level of the applicable cap, the plaintiff will only be entitled to interest on the actual amount of the past noneconomic damages found by the jury. In this way, the plaintiff will be fully compensated for the losses already suffered.

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[5] This amount was reduced by the trial to $44,338.28, which was the amount of medical expenses for which [Dawe] presented evidence at trial.

[6] In cases where the jury finds only past noneconomic damages, the plaintiff would clearly be entitled to prejudgment interest on the full amount. MCL 600.6013(1). Likewise, in cases where the jury finds only future noneconomic damages, the plaintiff would clearly not be entitled to any prejudgment interest on that amount. *Id.* Finally, where a

> jury finds both past and future noneconomic damages, but the combined total does not exceed the cap provided by MCL 600.1483, the trial court would not reduce the either the past or future economic damages and the plaintiff would be entitled to prejudgment interest on the full amount of the past noneconomic damages.

In light of the foregoing, we conclude that the trial court erred when it concluded that Dawe was only entitled to interest on a portion of the past noneconomic damages found by the jury. Therefore, we vacate the award of interest and remand this case to the trial court for recalculation of the interest.

IX. EXPERT TESTIMONY REGARDING DUTY UNDER MCL 330.1946

Because the Supreme Court did not disrupt our decision that Dawe failed to present sufficient evidence to establish a breach of duty imposed under MCL 330.1946,[55] we need not address defendants' argument that Dawe had the burden of presenting expert testimony regarding that duty.

We vacate the award of prejudgment interest and remand for recalculation of the interest consistent with this opinion. In all other respects, we affirm. We do not retain jurisdiction.

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[55] *Id.* at 569-570 (WHITBECK, C.J.).

DEPARTMENT OF ENVIRONMENTAL QUALITY v
WORTH TOWNSHIP

Docket No. 289724. Submitted March 9, 2010, at Lansing. Decided August 17, 2010, at 9:00 a.m.

The Department of Environmental Quality and the Director of the Department of Environmental Quality brought an action seeking injunctive relief in the Ingham Circuit Court against Worth Township. Plaintiffs alleged that defendant lacked a sanitary-sewerage system; that defendant relied on private septic systems; that many of those septic systems were failing; and that as a result of the failed septic systems, sewage with high levels of fecal coliform and *E. coli* bacteria was being discharged into the waters of the state, including Lake Huron. Plaintiffs claimed that defendant was responsible for the discharges under part 31 of the Natural Resources and Environmental Protection Act, MCL 324.3101 *et seq*., and asked the court to require defendant to construct a sanitary-sewerage system. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). The court, Joyce Draganchuk, J., denied the motion. Defendant sought interlocutory leave to appeal. The Court of Appeals denied the application in an unpublished order, entered July 2, 2008 (Docket No. 282183). The parties subsequently filed cross-motions for summary disposition under MCR 2.116(C)(10). The circuit court granted plaintiffs' motion for summary disposition and denied defendant's motion for summary disposition. The circuit court ordered defendant to take corrective action to cease the discharges and set forth a time frame for defendant to design and construct the project that defendant selected for the corrective action. Defendant appealed.

The Court of Appeals *held*:

MCL 324.3109(2) does not impose liability on a municipality for any unauthorized discharge that occurs within its jurisdiction, but merely creates a rebuttable presumption that the municipality was the source of the discharge. The statute imposes responsibility on the municipality when the municipality's actions lead to the discharge. In this case, defendant rebutted the presumption by

establishing that it could not have been the source of the discharge because it did not operate a sanitary-sewerage system.

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

O'CONNELL, J., dissenting, stated that he would affirm the decision of the circuit court. Townships have historically been entrusted to oversee the proper disposal of sewage within their boundaries, and MCL 324.3109(2) continues to hold townships responsible for the unauthorized discharge of raw human sewage into state waters. If the majority's interpretation were correct, MCL 324.3109(2) would be unnecessary in light of MCL 324.3109(1), which separately prohibits a municipality from directly or indirectly discharging raw human sewage into the waters of this state. MCL 324.3109(2) applies in this case because the discharge occurred as a result of defendant's failure to construct a sanitary-sewerage system.

ENVIRONMENT — WATER POLLUTION — MUNICIPAL CORPORATIONS — DISCHARGES OF RAW HUMAN SEWAGE — REBUTTABLE PRESUMPTIONS — SOURCES OF A DISCHARGE.

The unauthorized discharge of raw human sewage into the waters of this state creates a rebuttable presumption that the municipality in which the discharge originated was the source of the discharge; the presumption is rebutted by evidence that the discharge did not occur through the agency of the municipality or as a result of the municipality that is, that no action of the municipality led to the discharge (MCL 324.3109[2]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Alan F. Hoffman*, Assistant Attorney General, for the Department of Environmental Quality and the Director of the Department of Environmental Quality.

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

Amici Curiae:

The Hubbard Law Firm, P.C. (by *Mark T. Koerner* and *Peter A. Teholiz*), for Citizens Voice for Property Owners, Inc.

Bauckham, *Sparks*, *Lohrstorfer*, *Thall & Seeber*, *P.C.* (by *John H. Bauckham*), for the Michigan Townships Association.

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

SAWYER, J. In this case, we are asked to determine whether Michigan's Natural Resources and Environmental Protection Act (NREPA)[1] empowers the Department of Environmental Quality to require a township to install a sanitary-sewerage system when there is a widespread failure of private septic systems resulting in contamination of lake waters. We hold that it does not.

Defendant is a common-law township in Sanilac County along the shores of Lake Huron. It does not operate a public sanitary-sewerage system. All the residences and businesses within the township rely on private septic systems for waste disposal. A problem has developed with a number of those private septic systems located on a strip of land approximately five miles long that is between highway M-25 and Lake Huron. Some of these septic systems are failing, resulting in effluent being discharged into Lake Huron and its tributaries. For the past several years, plaintiff DEQ, as well as the county health department, has been pushing for defendant to install a public sanitary-sewerage system. Defendant has declined to do so, concluding that such a project would not be financially feasible.

Defendant's refusal to pursue a sanitary-sewerage project has resulted in the instant litigation to force it to do so. The parties pursued cross-motions for summary disposition, resulting in an order of the circuit court granting summary disposition to plaintiffs, establishing a time frame for defendant to design, begin construc-

[1] MCL 324.101 *et seq.*

tion on, and begin operating a sewerage system intended to remedy the failing septic systems and resulting discharges.[2] The order also imposed a $60,000 fine and awarded attorney fees. Defendant appeals this order and we reverse.

The resolution of this case rests on the proper interpretation and application of MCL 324.3109(2) and MCL 324.3115. Like a motion for summary disposition, we review a question of statutory interpretation de novo. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009). Plaintiffs depend on the first statute to establish defendant's responsibility for the discharge from the private septic systems into the waters of Lake Huron and then rely on MCL 324.3115 for the remedy of requiring defendant to install and operate a public sanitary-sewerage system. We are not persuaded that MCL 324.3109(2) imposes the responsibility on defendant that plaintiffs suggest it does.

MCL 324.3109 provides in pertinent part as follows:

> (2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or

[2] Technically speaking, the circuit court's order does not specifically compel the construction of a sanitary-sewerage system. Rather, it refers to defendant's obligation "to take necessary corrective action" and then establishes a time frame for that action. The time frame refers to a deadline for defendant to submit for the DEQ's approval a "proposed service area," as well as deadlines for the design, approval by the DEQ, construction, and the beginning of operations of "the project." But, in light of plaintiffs' explicit statement that they view as the only practical option the construction of a municipal-sewerage system, it seems rather apparent that "the project" is a sanitary-sewerage system constructed and operated by defendant. In any event, as discussed later in this opinion, we conclude that no statutory authority grants plaintiffs the power to determine the appropriate remedy.

> rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in section 3115. If the discharge is the subject of a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties prescribed in section 3115.
>
> (3) Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in section 3115 for an unauthorized discharge from a sewerage system as defined in section 4101 that is permitted under this part and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system and, with respect to the civil fine and penalty under section 3115, the municipality has been notified in writing by the department of its responsibility for the sewerage system.

Defendant argues that MCL 324.3109 does not impose responsibility on a municipality for any discharge that occurs within its jurisdiction, but merely creates a rebuttable presumption that the municipality was the source of the discharge. We agree.

First, we must look to the meaning of "prima facie evidence." Because this is a legal term not defined by the statute, we may consult a legal dictionary.[3] Black's Law Dictionary (5th ed), defines "prima facie evidence" as follows:

> Evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. Prima facie evidence is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.

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[3] *Nuculovic v Hill*, 287 Mich App 58, 67; 783 NW2d 124 (2010).

> Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of fact in issue; "prima facie case" is one that will entitle party to recover if no evidence to contrary is offered by opposite party. Evidence which suffices for the proof of a particular fact until contradicted and overcome by other evidence. Evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference. [Citations omitted.]

This definition makes it abundantly clear that prima facie evidence is rebuttable. Thus, MCL 324.3109(2) clearly does not make a municipality automatically and conclusively responsible for a discharge of raw sewage. Rather, it merely creates the presumption that the municipality is responsible until and unless the municipality is able to establish that it did not violate part 31 of NREPA, MCL 324.3101 *et seq*., which deals with the protection of water resources. Defendant advances a particularly compelling argument that it is not the source of the violation: it does not operate a sanitary-sewerage system that could be the source of the discharge.

Second, we look to the meaning of the phrase "by the municipality." This phrase is key because it answers plaintiffs' contention that MCL 324.3109(2) imposes responsibility for a discharge on a municipality without regard to the source of the discharge. That is, plaintiffs argue that any discharge of raw sewage within a municipality constitutes prima facie evidence of a violation by the municipality even if the municipality is not the source of the discharge. We disagree. The word "by" has many meanings. For its meaning as a nonlegal term, we look to a layman's dictionary rather than a legal one. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). We find these definitions from the *Random*

House Webster's College Dictionary (1997) to be particularly helpful: "10. through the agency of" and "12. as a result or on the basis of[.]" Thus, MCL 324.3109(2) imposes responsibility on the municipality not when the violation merely occurs within the boundaries of the municipality, but when the violation occurs "through the agency of" the municipality or "as a result" of the municipality, that is to say, when it is the actions of the municipality that lead to the discharge.

The argument that the municipality must actually cause the discharge is further buttressed by a third factor. MCL 324.3109(3) explicitly states that a municipality is not responsible for a discharge from a sewerage system that is not operated by the municipality unless the municipality has accepted responsibility in writing for the sewerage system. If the purpose of subsection (2) were to impose liability on a municipality merely because a discharge occurred within its boundaries, then subsection (3) would be contradictory.

Indeed, an argument advanced by plaintiffs in an issue that we need not reach, whether the state is obligated to fund the sewerage system under the Headlee Amendment[4] if defendant is compelled to construct one, further reinforces this argument. Plaintiffs argue that the obligation of a township to install a sanitary-sewerage system predates the Headlee Amendment and, therefore, does not constitute a new local obligation that the Headlee Amendment compels the state to fund. In making this argument, plaintiffs look to the former statute, MCL 323.6, which stated in pertinent part that any

> city, village or township which permits, allows or suffers the discharge of such raw sewage of human origin into any

[4] See Const 1963, art 9, §§ 25 and 29.

> of the waters of the state by any of its inhabitants or persons occupying lands from which said raw sewage originates, shall be subject only to the remedies provided for in [MCL 323.7].

Assuming for the sake of argument that such a remedy included the compulsory installation of a sanitary-sewerage system,[5] while it would perhaps save the state from being obligated to fund a sewerage system in Worth Township if the current statute were to continue to impose such an obligation, it only serves to underscore that no such obligation exists. While part 31 of NREPA parallels the former act in many respects, there are some very noticeable differences. First, while former MCL 323.6(b) specifically referred to a "city, village or township," current MCL 324.3109 refers more generally to "municipality," a word that, as will be discussed later in this opinion, carries a much broader definition. But even more importantly, while former MCL 323.6(b) specifically addressed the issue of a city, village, or township that allowed a discharge to occur by any of its inhabitants, there is no such language in the current statute that links responsibility for the actions of an inhabitant to a particular governmental body. It is a basic rule of statutory construction that a change in the use of words by the Legislature is intentional and reflects a similar change in meaning.[6] So if, as plaintiffs

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[5] Given the lack of any clear mandate in former MCL 323.7 of such a remedy, this would seem to be a great assumption indeed, particularly in light of the failure of past panels of this Court to find any such obligation. See, e.g., *McSwain v Redford Twp*, 173 Mich App 492, 499-500; 434 NW2d 171 (1988) (stating that "we do not believe defendant was required by statute to install a sanitary sewer system under the instant circumstances"); *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 494-495; 597 NW2d 858 (1999) (concluding that just because a township has provided sanitary sewer service does not mean that it is under a continuing duty to do so).

[6] *Bush,* 484 Mich at 167.

argue, the old statute did impose an obligation on a township to install a sanitary-sewerage system in response to an inhabitant discharging sewage, then it follows that the change in wording of the statute reflects an intent by the Legislature to remove such an obligation.[7]

For these reasons, we agree with defendant's interpretation of subsection (2). When an unauthorized discharge occurs, the presumption arises that the municipality within whose boundaries the event occurs is responsible for the violation unless the municipality can establish that the discharge did not occur as the result of actions by the municipality. When, as here, the municipality could not have been the source of the discharge because it did not operate a sanitary-sewerage system, it has overcome that presumption and is not subject to the statutory remedies for a discharge.

In any event, even if we were to agree with plaintiffs that MCL 324.3109(2) creates a responsibility by a municipality for an unauthorized discharge of raw sewage and the municipality is thus subject to the remedies of § 3115, plaintiffs face another hurdle: the definition of "municipality." For purposes of part 31 of NREPA, MCL 324.3101(m) supplies a particular definition of "municipality": "this state, a county, city, village, or township, or an agency or instrumentality of any of these entities." Thus, the state is as much a municipality as is defendant. And, by extension, the state bears as

[7] Indeed, plaintiffs' argument in this respect places them in a logical corner. If the prior statute did impose a duty on a township to install a sanitary-sewerage system in these circumstances, then the change in statutory language of necessity did away with that duty. But if no such duty existed under the previous statute and the current statute does impose one, then the Headlee Amendment obligates the state, of which the DEQ is an agency, to provide the funding in order for plaintiffs to compel defendant to install such a system.

much responsibility for the unauthorized discharges at issue in this case as does defendant. And the state is as liable to the remedies of § 3115 as is defendant. Thus, even if we were to agree with plaintiffs that MCL 324.3109(2) imposes on a "municipality" the responsibility of installing a sanitary-sewerage system to abate a problem with the discharge of raw sewage, plaintiffs offer no compelling reason why they should be permitted to shift their own responsibility to install a sanitary sewer onto defendant. Or, to put it another way, if plaintiffs are entitled to prevail in this action, then we see no reason why defendant could not counterclaim against plaintiffs and prevail in a claim seeking to require plaintiffs install the sewerage system.

Indeed, if the purpose of § 3109(2) is to impose responsibility on a governmental unit, it would seem that the legislative intent would be to make the DEQ the primary responsible agency because the Legislature had available to it the use of a term that did not include the state, namely "local unit." MCL 324.3101(*l*), defines "local unit" to mean "a county, city, village, or township or an agency or instrumentality of any of these entities." The only difference between the definition of "local unit" and "municipality" in § 3101 is the inclusion of the phrase "this state" in the definition of "municipality" and not in the definition of "local unit." The Legislature's choice of "municipality" rather than "local unit" in § 3109(2) must have been intentional,[8] and it must have been for the purpose of imposing liability on the state as well as a local unit.

But the more logical explanation is that § 3109(2) simply is not designed to establish responsibility for a discharge without causation. If the Legislature intended to, as plaintiffs suggest, impose responsibility on

[8] See *Bush,* 484 Mich at 167.

a governmental unit when an inhabitant causes a discharge, why would it use a term that would simultaneously impose such responsibility on three or four units of government[9] without any clear mandate about which of those units had primary responsibility? But if we interpret the statute as suggested by defendant, then the statute creates the presumption that each of those units of government is the cause of the discharge and each avoids responsibility when it establishes that it was not the source of the discharge.

In sum, we hold that MCL 324.3109(2) does not impose blanket responsibility on a municipality for any sewage discharge that occurs within its jurisdiction and a corresponding obligation to remedy such discharges without regard to cause. Rather, it merely creates the presumption that such a discharge originated with the municipality. But when, as here, the municipality, defendant in this case, cannot have been the cause of the discharge, it holds no responsibility for the discharge. And, therefore, there is no basis to impose on defendant the obligation to pursue the remedy desired by plaintiffs, the installation of a public sanitary-sewerage system. The trial court should have granted summary disposition to defendant, not to plaintiffs.

In light of our resolution of this issue, we need not address the remaining issues raised by defendant.

The order of the circuit court granting summary disposition to plaintiffs is reversed. The matter is remanded to the circuit court with instructions to enter an order of summary disposition in favor of defendant. We do not retain jurisdiction. Defendant may tax costs.

OWENS, P.J., concurred.

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[9] Under the term "municipality," the state and the county would always be responsible, as well as the city, village, or township.

O'CONNELL, J. (*dissenting*).

I would affirm the well-reasoned decision of the learned trial judge.

I. FACTS

Defendant Worth Township is located in Sanilac County along the western shore of Lake Huron. Because of its proximity to Lake Huron, the township has long been a haven for vacationers. Years ago, significant portions of the land in the township were divided into small lots, and cottages were built on them. Increasingly, these cottages are being upgraded to permanent, year-round residences. Although the lots are small and crowded, the township has never installed a sewerage system. Instead, homeowners have relied on individual septic systems to dispose of household sewage, even though the lots are too small to safely and effectively accommodate these systems. Unfortunately, after being forced to rely for years on aging systems located on small lots in an area with a high groundwater table, many residents find that their septic systems are failing.[1]

Both the township and the Michigan Department of Environmental Quality (DEQ)[2] concede that a majority of the septic systems in a three-to-five-mile area along

[1] A septic system works by providing an area for household and human waste to be broken down and disposed of safely in the soil. Waste initially travels to a septic tank, where it is held for a couple of days to allow solids, oils, water, and other particles to separate and to give bacteria an opportunity to break down waste. Solids and sludge remain in the tank, while partially treated wastewater flows out of the tank to a drainfield. The drainfield consists of a series of perforated, interconnected pipes lying in sand or gravel-filled trenches. The wastewater seeps out of the perforations and into the soil, which acts as an additional filter to break down and remove any remaining toxins in the water.

[2] References herein to the DEQ include the Director of the DEQ.

the shore of Lake Huron are old, undersized, and failing. As a result, raw sewage from the failed septic systems has been emptying into roadside ditches, storm sewers, streams, and outfalls that empty into Lake Huron. An approximately three-mile strip of the township's Lake Huron shoreline has been included on Michigan's list of impaired waters because of the presence of raw human sewage in the water. Numerous officials have testified that raw sewage in the township is a risk to the health, safety, and welfare of the local citizens and anyone who attempts to use the beaches or drink the ground water in this distressed area.

Since being made aware of the problem, the DEQ has attempted to work with the township to resolve it. In April 2004, the township entered into a district-compliance agreement with the DEQ. In the signed contract, the township agreed to construct a municipal-sewerage system by June 1, 2008. However, because of a lack of funds, the township refused to honor the agreement.[3] Consequently, sewage conditions in the township remain a serious health hazard and an environmental nightmare for those who live, travel, and swim in the affected area. As a result of the township's refusal to honor its agreement with the DEQ and to take responsibility for the discharge into Lake Huron of raw sewage generated in the township, the DEQ filed this case.

In its complaint, the DEQ alleges that these illegal discharges are the result of the township's refusal to take responsibility for numerous failing on-site septic

[3] One issue not properly raised before this Court is the township's breach of this agreement. I note that by signing the agreement, the township admitted its responsibility to fix the problem. Further, it seems obvious that enforcement of the agreement is one solution to this persistent problem.

systems in its jurisdiction. It claims that the township is responsible for the discharge of human waste within its boundaries under part 31 of the National Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*. The DEQ requested that the court grant injunctive relief to eliminate the discharges of raw and partially treated sewage into the state's waterways. Specifically, it requested that the court order the township to build and operate a sewerage system.

The township claimed that neither the courts nor the DEQ could impose liability on it for failing to provide a municipal-sewerage system. Yet despite the township's insistence that it has no obligation to install a sewerage system in the affected area, the township and the DEQ agree that a comprehensive solution for this problem is needed. Because of the pervasive number of failing septic systems and the severity of the public-health impact, merely requiring individual homeowners to repair or replace the on-site septic systems would not solve the problem. The lots are too small, and the area too developed, to maintain a large number of septic systems. Instead, it is clear that the municipality needs to formulate a comprehensive plan to address the issue.[4]

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[4] It is also clear that the only comprehensive solution to the problem is the construction and installation of a sewerage system. In fact, this is the solution that the township decided to take to abide by the trial court's order to "take necessary corrective action to cease the illegal discharges and comply with Part 31 . . . ." Further, it is clear that the township's reticence regarding the construction and installation of a sewerage system does not stem from a philosophical objection to governmental provision of utilities. Instead, the township fears that it cannot pay for the construction and installation of a sewerage system, and it wants the state or some other entity to foot the bill. It has indicated that it would prefer to simply require individual landowners to use pump-and-haul systems to dispose of their sewage and to condemn properties if the landowners are unable to stop the leaching of sewage from their septic

Following the filing of the complaint, the township moved for summary disposition, asserting that under MCL 324.3109 the township cannot be held liable for the discharge of raw sewage of human origin from private residences into state waters. In essence, the township claimed that neither the court nor the DEQ has the authority to order it to remedy the situation. The trial court rejected the township's arguments and denied the motion, holding that although the state has enforcement authority over water pollution, "that does not eliminate the liability under [MCL 324.3109] that falls squarely on the municipality in which the discharge originated." The court then continued:

> The Plaintiff may indeed have exclusive enforcement, [sic] authority or regulatory authority. But that does not equate with the liability, and it doesn't alter the clear and unambiguous language of the statute that imposes liability.
>
> Likewise, the Health Department may have jurisdiction with respect to some aspects of the septic systems. But as to enforcement and regulation of [MCL 324.3109], that power lies with the Plaintiff with liability falling under the statute on the Defendant.[5]

The DEQ then filed a motion before the trial court for summary disposition pursuant to MCR 2.116(C)(10), claiming that the undisputed facts entitled it to judgment as a matter of law against the township for violating MCL 324.3109 and MCL

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systems into the environment instead of paying for a sewerage system. Yet given the pervasiveness of this problem, the inadequacy of using pump-and-haul systems to address it indefinitely, and the lack of any other feasible homeowner-initiated solution, it is conceivable that many of the affected properties would be condemned if the township's preferred method of dealing with this situation were implemented.

[5] Although the township applied for leave to appeal this ruling, this Court denied the application. *Dep't of Environmental Quality v Worth Twp*, unpublished order of the Court of Appeals, entered July 2, 2008 (Docket No. 282183).

324.3112. The trial court granted the DEQ's motion, finding that the uncontroverted evidence indicated that numerous residences in the township had failing septic systems, which caused raw human sewage to discharge into state waters. The trial court also found that the discharges violated part 31 of NREPA and that the township was liable for the discharges under MCL 324.3109(2). The trial court's excellent opinion from the bench, which it adopted in its accompanying written order, bears repeating in its entirety:

> Well, really, when I look at these cross-motions together, I see issues, there are legal issues, then there's [sic] issues that are factual issues. And I'm going to try to address all of them. And starting first with the legal issues, several of the arguments that are raised by the Defendant in its motion for summary disposition are indeed arguments that were previously made and ruled on by this Court in September of 2007, when this Court ruled on the Defendant's motion for summary disposition at that time. And the arguments were rejected at that time, and were rejected again when this Court denied the Defendant's motion for reconsideration. Nevertheless, I will revisit them.
>
> For purposes of clarification, [MCL 324.3109(1)] provides that a person shall not, directly or indirectly, discharge into the waters of this state, a substance that is or may become injurious to the — and then it lists the public health, safety, welfare, the uses made of the water, the value of the riparian lands, etcetera, etcetera.
>
> [MCL 324.3109(2)] provides that if raw sewage of human origin is discharged, it is prima facie evidence of a violation by the municipality in which the discharge originated. I agree with the Defendant, that a prima facie case is the same as a rebuttable presumption. But what [MCL 324.3109(2)] does is it creates a presumption that raw human sewage is injurious to public health, the uses of water, etcetera, all of the things that are listed. And it clearly imposes liability on the municipality in which the discharge originated.

Now, why would it do that? Well, probably because local governments have the ability to construct and maintain wastewater treatment systems to require home owners to hook up to those systems, to adopt public health ordinances, to institute condemnation proceedings, etcetera, etcetera.

And the Plaintiff points out, and I agree, that this is evidence in Judge O'Connell's dissent in [*Lake Isabella Dev, Inc v Village of Lake Isabella*, 259 Mich App 393; 675 NW2d 40 (2003)], where he observed that there have been 40 years of legislation designed to require local government to manage its sewage because local government possesses the resources, the information and the local accountability to do so.

In my view, the plain language of the statute puts liability on the municipality where the discharge originated. And had the legislature wanted to impose a different scheme of liability, it could have said that the discharge of raw human — sewage of human origin, pardon me, is prima facie evidence of a violation by the municipality that directly discharges it, or it could have said by the person who discharges it. They said: "By the municipality in which it originates." Their language adds to the clear intent. When you look at the possibility of what they could have said, it lends further credence to [sic] the clear intent here is to impose liability on the municipality where the discharge originated. And, in fact, the statute goes on to address those circumstances where the municipality cannot be held responsible. So that is additional evidence of the very clear intent here of the legislature. In my view, the statute is unambiguous. It's unambiguous in making a municipality where the discharge originated subject to the remedies in [MCL 324.3115].

Now, the Defendant argues, as it did in September 2007, that strict liability cannot be imposed on the Township per Lake Isabella Development versus Lake Isabella. The holdings in Lake Isabella Development is [sic] that a rule promulgated by the Department of Environmental Quality did not comport with legislative intent because it imposed liability on the municipality to take over operation and

maintenance of a privately owned and built sewage system if the owner fails to perform.

Now, DEQ did argue that the rule was an enforcement mechanism for the strict liability imposed by [MCL 324.3109]. I don't think this falls precisely under the strict ruling and holding in the Lake Isabella Development case. They did address the argument that was made by DEQ. And the Court of Appeals said that liability under [MCL 324.3109] requires actual knowledge, constructive knowledge, or disregard under [MCL 324.3115]. I agreed with the Plaintiff, I read those requirements to be necessary for criminal liability. [MCL 324.3115] contains no knowledge, constructive knowledge or disregard requirement for civil fine or for injunctive relief. But, nevertheless, this case is not dependent on strict liability.

The Township of Worth was aware, and has been aware, for many years, of the discharge of raw human sewage into the waters of this state. The affidavit of Janice Putz, P-U-T-Z, who was the Township supervisor of November 2000 to November 2004, supports that. She indicates that she received many complaints from residents of sewage either running in the ditches, gullies, or onto neighboring properties. She personally investigated and personally observed failing septic systems with raw sewage, gray in color, a distinct foul sewage odor, flowing into residents' lots into drainage ditches.

Furthermore, the affidavit of Lynn Laughlin, L-A-U-G-H-L-I-N, who was the zoning administrator, slash, ordinance enforcement office, from October 2002 until February 2005, further supports this. She also received complaints of sewer odor, as well as residents complaining of unwanted discharges flowing onto their property. She indicates that she would visit the site, personally, to verify these complaints. And she formatted a sanitary complaint form every time she received a complaint and recorded it. She observed many instances of human sewage being discharged into the Mill Creek and ultimately into Lake Huron. She describes that there is an area of saturation of human waste into the soil. And that when she walked on it, the ground was saturated in sewage and was spongy. She

actually documented failing septic systems on a map and documented 30-plus leaching septic systems, and 30 to 40 homes that were pumping gray water onto the soil. She noted one particularly bad area where four or five homes had installed pumps and were pumping their bath, dish water and laundry wastewater onto the property. She noted on several occasions she witnessed trenches had been dug along property lines to drain saturated septic fields to the creek.

Furthermore, the affidavit of Grant Carman, C-A-R-M-A-N, who is the environmental health director from 1970 — well, he was with the Sanilac County Health Department from 1970 to 2007, for much of that time, the environmental health director, he said that for many years he observed numerous instances in Worth Township where the discharge of sewage of human origin is being made to the ground surface into ditches, over the lake bluff and through perimeter drains and storm drains. This was due to failing septic systems. That the failing septic systems existed right up to the date of his retirement, which was in August of 2007. He said he evaluated hundreds of septic systems in Worth Township in the area of concern, and 80 percent were in a state of failure. They were either openly discharging to a ditch, or discharging through a camouflage drain, or intermittently flooded due to the high seasonal water table. In some instances he said there was a direct discharge over the bluff to Lake Huron. He noted these conditions on permits and inspection reports.

Furthermore, the affidavit of Susan VanDyke, who says that she was with the Sanilac County Health Department from April 2002 to the present, as an environmental health staff sanitarian, she observed numerous instances in Worth Township where the discharge of sewage of human origin was being made to the ground surface into ditches, again, over the lake bluff, through perimeter drains and storm drains. That has occurred and continues to occur due to failing septic systems. She also says the failing septic systems are prevalent in a densely populated region of Worth Township, which is the area of concern. That these failures have been documented in a complaint log, and in

the Township files. She evaluated dozens of septic systems in Worth Township that were failing. Eighty to 85 percent were in the state of failure. They were openly discharging into a ditch. She noted, again, those failed conditions on permits and inspection reports.

Furthermore, there is a district compliance agreement that was signed by the Department of Environmental Quality and Worth Township on August 9, 2004. And that district compliance agreement very clearly sets forth the Township's knowledge and awareness of the fact that failing septic systems have caused raw sewage of human origin to enter the waters of this state. And that action needs to be taken to abate that situation.

Furthermore, Worth Township, itself, passed resolution [sic] indicating — Resolution 2004-9: There are numerous documented instances of failed sewage systems within the densely populated area of Worth Township.

Further, the Ordinance notes that they are depositing sewage directly to the surface and ground water and creating a public health hazard. The resolution goes on to acknowledge that [a] wastewater collection and treatment system is going to be functional, and that action has to be taken until it is functional.

Likewise, Resolution 2005-10 makes the very same observations that there are failed sewage systems in Worth Township. That sewage is being deposited directly to the surface and groundwater, creating a public health hazard. And that action has to be taken until a wastewater collection and treatment system is functional.

So even if strict liability is, in the view of the Court of Appeals, not the case with the statute, Worth Township had years of notice, years of knowledge that this was an ongoing pervasive problem throughout the Township, that there was a discharge into the waters of this state, and that it created a hazard for human health.

Going on to the Defendant's other legal argument[s], and they're made in response to the Plaintiff's motion, the Defendant, again, raises some issues that were previously raised. And, essentially, the Defendant argues that given

separation of powers, and the right to local self-government, it cannot be compelled to build a public sewer system, and that there is no authority to say that it can be compelled. Well, I'm not going to compel Worth Township to build a public sewer system. But there is, in fact, authority. And it's [*People ex rel Stream Control Comm v Port Huron*, 305 Mich 153; 9 NW2d 41 (1943)]. The Steam [sic] Control Commission ordered the City of Port Huron to construct a sewage treatment plant. The trial court refused to enforce that order because it used a balance test in determining whether injunctive relief was appropriate, and weighed out whether there would be greater harm to the city to enforce the order than there would be to Plaintiff in denying enforcement of the order. The Supreme Court reversed that saying there's no balancing done in the issue of Public Health, even though the City claimed it didn't have the money. The Supreme Court ordered enforcement of the Steam [sic] Control Commission's order.

Now, I have been asked to take judicial notice with regard to some underlying facts of that case. And I'm going to decline that request, because the case is what it is. It is the law. And I don't think it's appropriate to take judicial notice or relevant to take judicial notice of underlying facts in that case that may or may not be facts in that case. Because the only pertinent aspect of that case is the holding of the Supreme Court.

Furthermore, there is authority in NREPA for the relief requested, which is to require that the discharge be stopped, and that the problem be fixed. And that is that [MCL 324.3115] provides that the Attorney General may commence a civil action for appropriate relief, including a permanent or temporary injunction. Further, it provides that the Court has jurisdiction to restrain the violation and require compliance. And I would note one other thing that I really don't think is dispositive by itself. But I think it is something that bears mentioning. And that is that no one has unilaterally told Worth Township that they had to build a sewer system. Actually, the district compliance agreement that was signed by the DEQ and Worth Township agreed to do just that. Worth Township agreed to a

time table for construction of a sewage treatment system. And, according to the affidavit of Janice Putz, that agreement was signed after much discussion with the full township board at open meetings. So Worth Township reached the conclusion, after the entire process of open meetings, and township legislative action, that that is what was required to be done. Even the resolution that I previously mentioned acknowledged that decision to build a wastewater collection and treatment system. So they've acknowledged the depth of the problem, and the need to address it as a pervasive problem.

Finally, there is the argument that was raised in 2007, and, again, now compelling Worth Township to comply with NREPA that would violate the *Headlee Amendment* [Const 1963, art 9, §§ 25 to 34]. This is not like [*Delta Co v Dep't of Natural Resources*, 118 Mich App 458; 325 NW2d 455 (1982), overruled in part by *Livingston Co v Dep't of Management & Budget*, 430 Mich 635; 425 NW2d 65 (1988),] where a general duty to avoid unlawful pollution was changed to a more specific duty to construct a PVC liner or a 2-foot clay backup on a bustling solid waste landfill. There are no new or increased duties in this case.

The statute before *Headlee* in this case would have required Worth Township to comply with the requirements not to discharge raw sewage of human origin into any waters of this state. The statute, after *Headlee*, remains the same. The only thing that is changed is the mechanism of enforcement. The mechanism of the statute before *Headlee* was a hearing before a commission that could then order compliance. The mechanism after *Headlee* is an action in Circuit Court with a judge having the ability to order compliance. *Headlee* is simply not implicated in this case.

Now, there are a couple factual arguments that the Defendant makes. One is that there is no proof that the contamination is of human origin. And the support they have for that is an affidavit in which the affiant says that there was no testing that appears to be done to determine if it was of human origin. I would say that the evidence here that it is of human origin isn't just compelling, it's overwhelming, and it's unrebutted. The evidence, as I

already described, comes from numerous eye witness accounts of people who have observed the failing septic systems, and observed the raw sewage from those systems running into the waters of this state. There is no other method of disposal of human waste other than these septic systems. And the Township itself has acknowledged their failure. To say that there is no proof that the contamination is of human origin is almost preposterous.

The argument is also made that the contamination is virtually non-existent as of 2008. The September 16, 2008 report of a sanitary wastewater survey conducted in Worth Township shows that there is contamination to surface water with fecal coliform and E. coli bacterial counts succeeding [sic, exceeding] water quality standard[s].

The report goes on to indicate that 14 sites were sampled for fecal coliform. And 36 percent were above the water quality standard. Thirty-one sites were sampled for E. coli, and 81 percent were above the water quality standard for total body contact, which means that people can't swim in that water. Fifty-two percent were above the water quality standard for partial body contact, which means people can't fish in that water. Of the 14 sewers sampled that directly discharge into the Lake Huron, 36 percent had fecal coliform counts greater than Michigan's water quality standard.

I would say, again, with respect to that issue, the evidence isn't just compelling, it's overwhelming, and it is unrebutted, and it very clearly entitles the Plaintiff to summary disposition under MCR 2.116(C)(10), and I am granting the Plaintiff's motion, and I'm denying the Defendant's motion.

Pursuant to MCL 324.3115, the trial court then directed the township to take necessary corrective measures in accordance with a given time schedule and to pay fines and attorney fees. The township now appeals.[6]

[6] It is important to note that this is a civil case between a local unit of government and the state for injunctive relief to resolve an environmen-

II. ISSUE

On appeal, the township claims that it is not responsible for the inadvertent discharge of raw sewage from private septic systems within its boundaries.[7] In particular, the township makes the surprising assertion that Michigan courts have no authority to grant injunctive relief to resolve this dispute. Yet remarkably, the majority opinion reverses the trial court and concludes that MCL 324.3109(2) does not apply to the township.

Historically, townships have been responsible for addressing issues concerning the infrastructure needed to provide proper utilities and access to properties within their boundaries. This includes the responsibility for overseeing proper disposal of sewage generated by businesses and residences within the township. Under the Michigan Constitution, a township has the authority to grant public utilities franchises within its constituted boundaries. Const 1963, art 7, § 19. Under the Township and Village Public Improvement and Public Service Act, townships have the authority to acquire property through purchase, acceptance, or condemnation and to finance, construct, and maintain sanitary sewers and

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tal and public-health crisis. It is not a criminal action; it is an action in equity to remediate a serious problem in the township.

[7] In its brief on appeal, defendant raises a separation-of-powers argument and alleges a Headlee Amendment violation, see Const 1963, art 9, §§ 25 to 34. In my opinion, both arguments are meritless. MCL 324.3115 provides that the Attorney General may seek an injunction for appropriate relief in this circumstance, and the trial court's injunction simply ordered the township to develop a comprehensive plan to remediate an environmental and public-health crisis. Most importantly, it is the responsibility of the township to remediate the problem. There exists no Headlee Amendment violation because even before the Headlee Amendment was implemented, the township had been responsible for remediating sewage problems within its boundaries.

sewage disposal plants and equipment. MCL 41.411(1) and (3). Further, townships have the statutory authority to adopt ordinances regulating public health, safety, and welfare, including ordinances that require individual property owners to hook up to a public sanitary-sewerage system. MCL 41.181; MCL 333.12753(1); see also MCL 324.4301 *et seq*.

These historical obligations entrusted to a township to oversee the proper disposal of sewage within its boundaries are further reflected by MCL 323.1 *et seq*., a former act establishing a state water resources commission and repealed by 1994 PA 451, which in turn enacted the more comprehensive NREPA. Former MCL 323.6(a) stated, "It shall be unlawful for any person directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare . . . ." Former MCL 323.6(b) stated:

> The discharge of any raw sewage of human origin, directly or indirectly into any of the waters of the state shall be considered prima facie evidence of the violation of [MCL 323.6(a)] unless said discharge shall have been permitted by an order, rule, or regulation of the commission. Any city, village or township which permits, allows or suffers the discharge of such raw sewage of human origin into any of the waters of the state by any of its inhabitants or persons occupying lands from which said raw sewage originates, shall be subject only to the remedies provided for in [MCL 323.7].

The Legislature clearly intended that a local unit of government, such as a township, be responsible for both the direct and indirect discharge of human sewage within its boundaries into state waters. The Legislature further intended that a township be subject only to the remedies provided by the act, and it gave the Attorney

General's office authority under former MCL 323.6(d) to pursue an action to resolve the violations.[8]

After MCL 323.1 *et seq* was enacted, it went through several amendments and eventually was incorporated into part 31 of NREPA, MCL 324.3101 *et seq*. When it incorporated the statute into NREPA, the Legislature did not alter a township's responsibility for the discharge of raw sewage into state waters. MCL 324.3109 states:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.
>
> (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
>
> (c) To the value or utility of riparian lands.
>
> (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to their growth or propagation.
>
> (e) To the value of fish and game.
>
> (2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in [MCL 324.3115].[9]

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[8] MCL 323.6(d) stated:

> Any violation of any provision of [MCL 323.6] shall be prima facie evidence of the existence of a public nuisance and in addition to the remedies provided for in this act may be abated according to law in an action brought by the attorney general in a court of competent jurisdiction.

[9] MCL 324.3109(3) solely concerns a municipality's responsibility for an unauthorized discharge by a sewerage system that services, but is not

MCL 324.3101(m) defines "municipality" as "this state, a county, city, village, or township, or an agency or instrumentality of any of these entities." By defining a "municipality" to include a township, the Legislature chose not to alter the liability of the local unit of government for the discharge of human sewage into state waters within its boundaries.[10]

MCL 324.3109 provides a methodology to resolve and remediate any environmental problems that may occur within a municipality. MCL 324.3109(1) imposes liability for a direct discharge of raw sewage into the waters of this state. MCL 324.3109(2) imposes liability on a

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owned by, the municipality. Because no sewerage system even exists within in the township, this subsection is wholly inapplicable to the present case.

[10] I disagree with the majority's rationale that because it can identify another entity that it believes should also hold some responsibility for the discharges, the township should automatically be let off the hook. The fact that another governmental entity, such as the state, a county, a city, or a village, has overlapping jurisdiction over the area where the discharge originated and could potentially be held liable for the discharge is irrelevant to the fact that the township can *also* be held responsible for a discharge of raw sewage within its borders and be subject to the remedies set forth in MCL 324.3115. MCL 324.3115 permits the Attorney General to file a civil suit against any appropriate party to compel compliance with the statute and allows for injunctive relief. MCL 324.3115(1) states, in pertinent part:

> The department may request the attorney general to commence a civil action for appropriate relief, including a permanent or temporary injunction, for a violation of this part or a provision of a permit or order issued or rule promulgated under this part. . . . The court has jurisdiction to restrain the violation and to require compliance. In addition to any other relief granted under this subsection, the court, except as otherwise provided in this subsection, shall impose a civil fine of not less than $2,500.00 and the court may award reasonable attorney fees and costs to the prevailing party.

If the township believes that it is not the only municipality that should be held responsible for these discharges, the appropriate solution is to seek to add these additional entities as codefendants in this action.

municipality, including a township, for any "discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state" if the discharge occurred within that municipality's borders.

Through a process of questionable linguistics, unnecessary definitions, and rebuttable presumptions, the majority concludes that MCL 324.3109(2) only applies to a municipality if it is the discharging party. Yet if the majority's interpretation were correct, MCL 324.3109(2) would be unnecessary in light of MCL 324.3109(1). MCL 324.3109(1), which the majority opinion fails to take into consideration, prohibits a person from directly or indirectly discharging human sewage into the waters of this state. A "person," for purposes of NREPA, includes a governmental entity. MCL 324.301(h). It is MCL 324.3109(1), not MCL 324.3109(2), that applies to circumstances in which the actions of a municipality lead to a discharge. MCL 324.3109(6) identifies remedies available to address such a violation.

The purpose of MCL 324.3109(2) is to make the local municipality responsible for any discharges within its boundaries, even if the municipality did not actively discharge the sewage in question. Although the majority believes that the phrase "by the municipality" in this subsection indicates that the municipality only faces responsibility if its actions lead to the discharge, I find this interpretation of the relevant phrase to be incorrect. The majority correctly notes that *Random House Webster's College Dictionary* (1997) includes "through the agency of" and "as a result or on the basis of" among its definitions of the term "by." However, the proper application of these definitions to the phrase "by the municipality" does not automatically lead to the conclusion that the phrase indicates that some direct action by the municipality causing the discharge must

occur for the municipality to be held responsible. Instead, the evidence makes it quite clear that in this case, the massive discharges of human waste into Lake Huron have occurred "as a result" of the township; if the township had a sewerage system, such discharges would not occur. Regardless, I believe that a proper reading does not require implementing such semantics; the phrase "by the municipality" is simply used to modify "violation," in order to indicate the entity subject to liability for the discharge.[11]

I also note that the phrase "prima facie evidence" in MCL 324.3109(2) is modified by the phrase "of a violation of this part . . . ." This means that the discharge of raw human sewage into state waters is prima facie evidence of a violation of part 31. Part 31 includes MCL 324.3109(1), which prohibits the discharge of a substance that is or may become injurious to public health, safety, or welfare. Accordingly, this prima facie evidence of a violation of part 31 is rebutted by a showing by the municipality that the discharges are *not* injurious to public health, safety, or welfare, e.g., that the discharges are nominal or will not cause injury. Yet in this case, the discharges are pervasive, extensive, and of such high concentrations that they are clearly injurious to the public health, safety, or welfare.

In addition, the majority orders that on remand, the trial court must enter an order of summary disposition in favor of defendant. The majority appears to determine that summary disposition is appropriate because any prima facie evidence indicating that the township is responsible for discharges of human waste within its bor-

[11] The majority mistakenly concludes that the DEQ is a municipality under the definition set forth in MCL 324.3101(m). However, MCL 324.3101(d) indicates that part 31 of NREPA uses the term "department" to refer to the DEQ. If the Legislature had wished to include the DEQ in its definition of "municipality," it is conceivable that it would have included "the department" in its list of entities, but it did not.

ders into state waters is thoroughly and completely rebutted by the fact that the township does not operate any sanitary system that could be the source of the discharge. However, rebuttal of prima facie evidence of a violation does not automatically mean that summary disposition in favor of the opposing party is appropriate, especially in a case like this, in which the evidence suggests that the township is responsible for the ongoing discharge of human waste into state waters by actively delaying the construction of a sewerage system.[12] At the very least, the majority should remand for additional fact-finding instead of summarily granting summary disposition in favor of the township.

In *Lake Isabella*, 259 Mich App at 414 (O'CONNELL, J., dissenting), I noted that "local governments, through forty years of legislation designed to require them to manage their sewage, possess the resources, information, and local accountability needed to take responsibility" for an abandoned sewerage system. The same rationale applies here. It has always been, currently is, and, until the Legislature devises a new methodology to remediate sewage problems, always will be the local unit of government's responsibility to provide a proper and effective plan for sewage disposal within its boundaries. The township has no viable claim that another governmental entity should bear the responsibility of taking the necessary corrective action.[13]

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[12] In addition, it is likely that the township also has some direct responsibility for the leaching of human waste into state waterways. The Worth Township office, located at 6903 Lakeshore Road, is located within the affected area. The office presumably has a septic system, and it is conceivable that waste from this township-owned septic system is leaching into state waters.

[13] In my opinion, *Lake Isabella* was wrongly decided. The Supreme Court should grant leave and both reverse the present case and overrule *Lake Isabella*.

I would affirm and adopt as my own the well-reasoned decision of the learned trial judge.[14]

[14] The majority effectively concludes that the state has no authority to order local units of government to remediate sewage problems. The unintended consequence of this decision is that no one is responsible for the abominable and unsanitary conditions in Worth Township.

PEOPLE v DENDEL (ON SECOND REMAND)

Docket No. 247391. Submitted October 29, 2009, at Lansing. Decided August 24, 2010, at 9:00 a.m.

Katherine S. Dendel was convicted of second-degree murder in the Jackson Circuit Court, Chad C. Schmucker, J. Experts for the prosecution had testified that the deceased, Paul M. Burley, defendant's domestic partner, had died as the result of an insulin injection, and the court determined that defendant had killed Burley by injecting him with the insulin. The Court of Appeals, BORRELLO, P.J., and SAAD, J. (WILDER, J., dissenting), in an unpublished opinion per curiam, issued July 18, 2006 (Docket No. 247391), reversed the conviction and remanded the case to the trial court for a new trial on the basis of defendant's claim of ineffective assistance of counsel. The Supreme Court reversed the judgment of the Court of Appeals and remanded the case to the Court of Appeals for consideration of defendant's remaining issues raised on appeal. 481 Mich 114 (2008). On remand, the Court of Appeals, BORRELLO, P.J., SAAD, C.J., and WILDER, J., affirmed defendant's conviction in an unpublished opinion per curiam, issued September 11, 2008 (Docket No. 247391). The Supreme Court, in lieu of granting leave to appeal, vacated in part the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration of defendant's Confrontation Clause and hearsay issues in light of the United States Supreme Court's decision in *Melendez-Diaz v Massachusetts*, 557 US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009). 485 Mich 903 (2009).

On second remand, the Court of Appeals *held*:

1. The statements that Burley died with a glucose level of zero that were contained in the toxicology report prepared by employees of AIT Laboratories after the medical examiner's original findings had been challenged were testimonial statements. The toxicology testing was performed in anticipation of a criminal trial. The authors of the statements were subject to confrontation under the Sixth Amendment.

2. *People v Lewis* (*On Remand*), 287 Mich App 356 (2010), is not factually analogous to this case and is not binding under the principle of stare decisis. While the Court in *Lewis* ruled that the

autopsy report involved in that case was not testimonial because it was prepared pursuant to a legal duty, the statements in the toxicology report in this case were not prepared pursuant to a legal duty but were instead prepared in anticipation of a criminal trial. In addition, the autopsy report in *Lewis* did not address the pivotal issue in that case, while the cause of Burley's death was a primary factual question in this case.

3. The nontestifying lab technicians' findings that Burley's glucose level was zero at the time of death was the fact on which the testifying AIT employee based his opinion that an insulin injection was a possible cause of Burley's death. Although the statement concerning a glucose level of zero had no independent incriminating effect, it was an accusatory statement under *Melendez-Diaz* because it supported the prosecution's theory that defendant killed Burley by injecting him with insulin. While the glucose-level finding was purportedly the result of neutral scientific testing, the Court in *Melendez-Diaz* ruled that such testing is not exempt from the Confrontation Clause because of the possibility of error or bias.

4. The technicians' statement of a zero-glucose finding comported with the factors indicating a testimonial statement subject to the Confrontation Clause delineated in *Davis v Washington*, 547 US 813 (2006), and analyzed in *People v Bryant*, 483 Mich 132 (2009). The classifying of a statement as a fact in support of an expert's conclusion rather than the conclusion itself does not negate evidentiary or Confrontation Clause concerns.

5. The glucose report was not admissible under the hearsay exception for public records because the report was obtained in response to the medical examiner's request in the course of investigating a suspicious death. In addition, *Crawford v Washington*, 541 US 36 (2004), provided that out-of-court statements are not exempt from confrontation merely because they come within a hearsay exception, including hearsay exceptions traditionally considered to be imbued with indicia of reliability.

6. Defendant's Sixth Amendment right to confront witnesses was violated when the testifying AIT employee was permitted to give hearsay testimony that other persons in the AIT laboratory had determined that Burley's glucose level was zero at the time of his death.

7. Defendant's failure to object to the hearsay evidence was reasonable in light of the state of law at the time of defendant's trial. Fundamental fairness requires that this issue be reviewed as though it had been fully preserved. Therefore, the standard of review is whether it is clear beyond a reasonable doubt that a

rational jury would have found defendant guilty absent the error. If it is beyond a reasonable doubt that the jury would have convicted defendant on the basis of the untainted evidence, she is not entitled to a new trial. In light of the medical examiner's testimony, defendant's position at trial that Burley could have taken insulin himself, and the circumstantial evidence surrounding Burley's death, it is clear beyond a reasonable doubt that a reasonable jury would have convicted defendant absent the inadmissible evidence regarding the toxicological results. The Confrontation Clause error was harmless beyond a reasonable doubt, and defendant is not entitled to a new trial.

Affirmed.

WILDER, J., concurring, agreed that under *Melendez-Diaz*, the statements concerning the toxicology testing preformed at AIT Laboratories, and, in particular, the glucose levels obtained as the result of the testing, were testimonial in nature and, therefore, that the testimony concerning the testing violated defendant's Sixth Amendment right to confront witnesses. He disagreed, however, that fundamental fairness requires imposition of the legal fiction proposed by the majority and the conclusion that the appropriate remedy for the violation should be a retroactive application of the right of confrontation, treating defendant's posttrial objection on Confrontation Clause grounds as having been made at trial and preserved, even though it actually was not.

1. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — RIGHT TO CONFRONT WITNESSES — TESTIMONIAL STATEMENTS.

The Sixth Amendment bars the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness; a pretrial statement is testimonial if the declarant should reasonably have expected the statement to be used in a prosecutorial manner and the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial.

2. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — RIGHT TO CONFRONT WITNESSES — NEUTRAL SCIENTIFIC TESTING RESULTS.

Findings that are alleged to be the result of neutral scientific testing are not exempt from challenge under the Confrontation Clause because of the possibility of error or bias with regard to such findings (US Const, Am VI).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Hank C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

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

ON SECOND REMAND

Before: BORRELLO, P.J., and SAAD and WILDER, JJ.

SAAD, J. In light of a recent United States Supreme Court case that further defines the scope of the rights granted under the Confrontation Clause, *Melendez-Diaz v Massachusetts*, 557 US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009), our Supreme Court remanded this case for us to address whether the trial court violated defendant's confrontation rights when it admitted expert testimony that was based on a report prepared by nontestifying forensic analysts. For the reasons set forth in this opinion, we affirm defendant's conviction because, though we hold that a Confrontation Clause violation occurred, the error was harmless beyond a reasonable doubt.

I. FACTS AND PROCEEDINGS

The trial court convicted defendant of second-degree murder, MCL 750.317, for causing the death of her domestic partner, Paul Michael Burley. At trial, the prosecution maintained that defendant injected Burley with insulin because she was frustrated and overwhelmed by the demands of attending to Burley's considerable medical needs. Defendant used insulin to treat her own diabetes, and she knew that insulin breaks down almost immediately upon death and can-

not be detected in a dead body. Defendant took the position at trial that Burley died from a morphine overdose or, if he died from an insulin injection, he committed suicide in order to relieve defendant of the burden of caring for him.

In *People v Dendel*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 2006 (Docket No. 247391) (*Dendel I*), we reversed defendant's conviction and remanded for a new trial on the basis of defendant's claim of ineffective assistance of counsel. Our Supreme Court reversed and remanded this case for us to consider defendant's remaining issues raised on appeal. *People v Dendel*, 481 Mich 114; 748 NW2d 859 (2008). In *People v Dendel (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2008 (Docket No. 247391) (*Dendel II*), we affirmed defendant's conviction. Defendant sought leave to appeal, and, in leau of granting leave to appeal, the Supreme Court vacated in part this Court's judgment and remanded the case for reconsideration of defendant's Confrontation Clause and hearsay issues in light of *Melendez-Diaz*. *People v Dendel*, 485 Mich 903 (2009).

II. OUR DECISION IN *DENDEL II*

Defendant's hearsay and Confrontation Clause arguments concern the testimony of Dr. Michael Evans. In *Dendel II*, we summarized the relevant facts as follows:

> Dr. Evans is a toxicologist at AIT Laboratories, and president and [chief executive officer] of the company. He manages the corporation and directs laboratory operations. AIT Laboratories provides services to the clinical community and hospitals throughout the county, as well as the pharmaceutical industry by performing research to aid in new drug development. The laboratory also performs fo-

rensic toxicology testing in autopsy cases. Dr. Evans described the logistics and procedures for autopsy testing at the request of medical examiners' offices.

Here, the laboratory performed a pane 1 autopsy test on a sample of Burley's blood, urine, and vitreous fluids at the request of Dr. John Mayno from the Jackson County Medical Examiner's office. Dr. Evans explained that in such cases, the technicians "proceed as if we have no information" and "proceed without any preconceived notion about what we're going to look for in starting our testing process." He testified at length about the procedures utilized in the lab, and the many substances that the autopsy tests identify.

Dr. Evans testified generally about the relationship between insulin and glucose levels, and the body's response to insulin. He explained the difficulty of testing for the presence of insulin during an autopsy. Dr. Evans then testified that the toxicology results showed that the level of glucose in Burley's system was zero. He opined that the zero glucose level was consistent with Burley having been injected with insulin. Defense counsel objected to the admission of Dr. Evans' testimony about the toxicology results as lacking proper foundation because Dr. Evans did not perform the autopsy test himself. Dr. Evans stated that about fifteen people from his lab were involved in the testing. The trial court ruled that an adequate foundation had been laid for the admission of Dr. Evans' testimony, and that the toxicology results came within the exception to the hearsay rule for business records. [*Dendel II*, unpub op at 2.]

Defendant argued in *Dendel II* that the trial court abused its discretion by admitting Dr. Evans's testimony about the results of toxicology tests of Burley's bodily fluids because Dr. Evans did not perform the tests. *Id*. Citing *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), defendant contended that the admission of this hearsay testimony violated her rights under the Confrontation Clause. Because

defendant failed to preserve this issue with a timely challenge to Dr. Evans's testimony based on the Confrontation Clause, we reviewed the matter for plain error affecting her substantial rights. *Dendel II*, unpub op at 3. We concluded that the statements contained in the toxicology report were not testimonial, and they could be admitted without affording defendant an opportunity to cross-examine the analysts from the lab. We distinguished the toxicology report from the laboratory report that was deemed inadmissible in *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005):

> "Defendant relies on *Lonsby*, *supra*, a sexual assault case in which this Court ruled that the notes and laboratory report of a nontestifying serologist were testimonial in nature, and were admitted in violation of the defendant's Sixth Amendment right to confront witnesses against him. However, in *Lonsby*, this Court clarified:
>
> "The critical point . . . is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others. In short, one expert cannot act as a mere conduit for the opinion of another." [*Lonsby, supra* at 393 n 12, quoting *State v Williams*, 253 Wis 2d 99, 113; 644 NW2d 919 (2002).]
>
> This "critical point" makes *Lonsby* distinguishable from the present case. Here, unlike in *Lonsby*, the witness did not testify to subjective observations from the toxicologists who performed the autopsy test. Dr. Evans did not speculate about any reasoning or judgment exercised by the nontestifying toxicologists. *Id*. at 392. The zero-level of glucose in Burley's system was an objective result, and Dr. Evans formed his own expert opinion on the basis of that finding. And unlike the police crime lab serologist in *Lonsby*, Dr. Evans was not employed by law enforcement. He testified that the lab testing is performed without any preconceived notions about what might be found, and without any case background.

> Additionally, autopsy reports are not testimonial because they are public records prepared pursuant to a duty imposed by law as part of the statutorily defined duties of a medical examiner. See MCL 52.202(1)(a) (mandating a medical examiner to conduct an autopsy when the deceased's death was unexpected), MCL 52.207 (mandating a medical examiner to conduct an autopsy upon the order of a prosecuting attorney). Therefore, the autopsy and toxicology reports qualify as public records under MRE 803(8). Thus, the toxicology results were not testimonial in nature, and Dr. Evans' testimony based on the results did not violate defendant's rights under the Confrontation Clause. [*Dendel II*, unpub op at 3-4.]

After we issued our opinion in *Dendel II*, the United States Supreme Court issued its decision in *Melendez-Diaz*. Because this decision directly addressed the question of a defendant's confrontation rights in the context of laboratory reports prepared by nontestifying witnesses, our Supreme Court remanded *Dendel* to this Court in order to reexamine Confrontation Clause issues arising from Dr. Evans's reliance on glucose-level findings made by nontestifying personnel at AIT Laboratories.

III. CONFRONTATION CLAUSE JURISPRUDENCE

To decide whether the admission of hearsay evidence violated defendant's due-process right to confront witnesses, we must examine recent Supreme Court decisions interpreting the Confrontation Clause. 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." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Generally, hearsay is inadmissible unless it comes within an exception to the hearsay rule. *McLaughlin*, 258 Mich App at 651. Con-

troversies over the admission of hearsay statements may also implicate the Confrontation Clause, US Const, Am VI, which guarantees a criminal defendant the right to confront the witnesses against him or her. See also Const 1963, art 1, § 20.

In *Crawford*, 541 US at 53-54, the United States Supreme Court held that the Sixth Amendment bars the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. A pretrial statement is testimonial if the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 51-52; *Lonsby*, 268 Mich App at 377. In *Davis v Washington*, 547 US 813, 817-822; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the Supreme Court considered whether statements that a crime victim made to a 911 emergency operator describing an ongoing assault were testimonial statements subject to confrontation under the Confrontation Clause. The Court ruled that the statements were not testimonial. *Id.* at 829. However, in the companion case, *Hammon v Indiana*, police officers responding to a report of a domestic disturbance questioned the alleged victim regarding the assault that had just taken place. When the police first arrived, the victim denied that any assault had occurred, but when the officers questioned her outside the defendant's presence, she signed an affidavit stating that the defendant had assaulted her. *Id.* at 820-821. The Court concluded that these statements were testimonial because they were made in response to an investigation of possible criminal con-

duct that had occurred in the past, rather than an ongoing situation. *Id.* at 829-830.

The Supreme Court held that statements are not testimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 547 US at 822. On the other hand, "[t]hey are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* The Court in *Davis* further explained that "in the final analysis [it is] the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 822 n 1; see also *People v Bryant*, 483 Mich 132, 139-140; 768 NW2d 65 (2009), cert gtd 559 US ___; 130 S Ct 1685; 176 L Ed 2d 179 (2010).

In *Bryant*, 483 Mich at 140, our Supreme Court observed that *Davis* differed from *Crawford* because, in *Davis* (1) the victim was speaking about events as they were happening, rather than describing past events, (2) the victim was experiencing an ongoing emergency, (3) the victim's statements were made to help address the ongoing emergency, rather than to disclose past events, and (4) the victim made the statements frantically, rather than in a tranquil or safe environment. The Court in *Bryant* also set forth the factors that tended to establish that the statements in *Hammon* were testimonial: (1) the statements were made in response to an interrogation that was part of an investigation into " 'possibly criminal past conduct,' " (2) the statements were not made contemporaneously with an ongoing emergency, and (3) the officer's questions were not

intended to learn what was happening, but what had already happened. *Id.* at 141, citing *Davis*, 547 US at 829-830.

After we issued our opinion in *Dendel II*, the United States Supreme Court issued its decision in *Melendez-Diaz*. The prosecution had charged the defendant in *Melendez-Diaz* with narcotics-trafficking offenses. In order to prove that the substance in question was cocaine of a certain quantity, the prosecution introduced into evidence sworn certificates of state laboratory analysts documenting the results of tests performed on the material seized by the police. *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2531; 174 L Ed 2d at 320-321. Building on the principles established in *Crawford* and *Davis*, a majority[1] of the Supreme Court determined that the certificates constituted testimonial statements because they were made under circumstances in which an expert witness would anticipate their future use at trial and also because they served as the " 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance" under the relevant Massachusetts statutes. *Id*. at ___; 129 S Ct at 2532; 174 L Ed 2d at 321 (citation omitted). The Court concluded that, "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ' "be confronted with" ' the analysts at trial." *Id.* at ___; 129 S Ct at 2532; 174 L Ed 2d at 322, quoting *Crawford*, 541 US at 54. In response to the dissenting justices, the majority explained in a footnote that its ruling did not require "that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device" was required

[1] Justice Scalia, joined by Justices Stevens, Souter, Thomas, and Ginsburg.

to testify in person; rather, it was "up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live." *Melendez-Diaz*, 557 US at ___ n 1; 129 S Ct at 2532 n 1; 174 L Ed 2d at 322 n 1.

Responding to various other arguments raised by the dissent and the prosecution, the Court rejected the assertion that the analysts were not "accusatory" witnesses, and therefore not subject to confrontation. The Court commented that the Confrontation Clause "contemplates two classes of witnesses"—those against the defendant and those in his favor—omitting a third category of witnesses who were "helpful to the prosecution, but somehow immune from confrontation." The Court was not persuaded that the analysts' statements were exempt from the Confrontation Clause on the ground that the statements were not independently sufficient to establish the defendants' guilt. *Id.* at ___; 129 S Ct at 2533-2534; 174 L Ed 2d at 323. The Court also was not persuaded by the attempt of the prosecution and the dissent to distinguish the analysts' statements from " 'conventional' " or " 'typical' " ex parte testimony when the witness observed the crime or human action related to it or when the witness's statements were given in response to interrogation. *Id.* at ___; 129 S Ct at 2534-2536; 174 L Ed 2d at 324-325.

The Court in *Melendez-Diaz* also rejected the dissent's and the prosecution's arguments that the reliability of objective, neutral scientific testing obviated the need for confrontation and that cross-examination was an inferior method of challenging scientific testing. The Court stated:

> Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge

> or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available. Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. . . . *A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution*. [*Id.* at ___; 129 S Ct at 2536; 174 L Ed 2d at 326 (emphasis added).]

The Court further commented that confrontation could help "weed out" both fraudulent analysts and incompetent analysts. *Id.* at ___; 129 S Ct at 2537; 174 L Ed 2d at 326.

Finally, the Court in *Melendez-Diaz* addressed the argument that the analysts' affidavits were admissible without subjecting the analysts to confrontation under the business-records exception to the hearsay rules. The Court concluded that the certificates were not admissible as business records because they were more akin to reports generated by law-enforcement officials. *Id.* at ___; 129 S Ct at 2538; 174 L Ed 2d at 328. The Court further commented that the prosecution misunderstood the relationship between the hearsay exception for business and official records and the Confrontation Clause. The Court stated:

> *Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial*. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were

> subject to confrontation under the Sixth Amendment. [*Id.* at ___; 129 S Ct at 2539-2540; 174 L Ed 2d at 329-330 (emphasis added).]

The Court demurred to the dissent's remaining assertions that its holding drastically departed from prior jurisprudence or that it would "commence the parade of horribles" unfairly hampering prosecution of drug charges. *Id.* at ___; 129 S Ct at 2542; 174 L Ed 2d at 332.

Several post-*Melendez-Diaz* cases have addressed Confrontation Clause issues in the context of autopsy reports or similar reports containing scientific data. In *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2008 (Docket No. 274508), this Court had ruled that no Confrontation Clause violation occurred when the medical examiner testified with regard to an opinion based on an autopsy report prepared by two nontestifying medical examiners. The Supreme Court, in lieu of granting leave to appeal, vacated in part the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration of this issue in light of *Melendez-Diaz*. *People v Lewis*, 485 Mich 878 (2009). On remand, this Court ruled that the autopsy report was not testimonial. The Court distinguished the autopsy report from the certificates in *Melendez-Diaz* because the certificates were prepared for the sole purpose of providing prima facie evidence against the defendant at trial, whereas the autopsy report was prepared pursuant to a duty imposed by statute. *People v Lewis (On Remand)*, 287 Mich App 356, 362-363; 788 NW2d 461 (2010). The Court further commented that "unlike the way the certificates in *Melendez-Diaz* were used, Dr. [Carl] Schmidt [the testifying medical examiner] formed independent opinions based on objective information in the autopsy report and his opinions were

subject to cross-examination." *Id.* at 363. The Court also noted that the autopsy report "was not outcome determinative" because " '[t]here is no dispute that a crime was committed, and the autopsy did not aid in establishing the identity of the perpetrator, which was the central issue in this case.' " *Id.*, quoting *Lewis*, unpub op at 5. (The autopsy report was not necessary to establish that the victim died of multiple stab wounds.)

In *Commonwealth v Avila*, 454 Mass 744, 760; 912 NE2d 1014 (2009), the Massachusetts Supreme Judicial Court held that a substitute medical examiner could testify about his own opinions and conclusions concerning the cause of the decedent's death, though his opinions were based on findings set forth in an autopsy report prepared by his predecessor, who did not testify at trial. However, the court held that the substitute medical examiner could not testify about the facts and findings themselves on direct examination. *Id.* at 760-761. The court explained that an expert without first-hand knowledge of the facts at issue is permitted to state an expert opinion based on facts assumed in hypothetical questions or on data properly admitted into evidence. *Id.* at 761. The court stated:

> Expert opinion testimony of this nature does not offend the confrontation clause as interpreted by the Supreme Court of the United States in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (*Crawford*) (confrontation clause prohibits admission of testimonial out-of-court statements unless declarant unavailable and defendant had prior opportunity to cross-examine declarant about statements), and most recently in *Melendez-Diaz v. Massachusetts*, [557 US ___] 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (deeming certificates of forensic laboratory analysis offered in evidence in lieu of testimony as testimonial, and thus subject to *Crawford*, because certificates were affidavits prepared for sole purpose of serving as evidence at trial). [*Id.* at 762.]

The Massachusetts Supreme Judicial Court held that the trial court erred when it allowed the substitute medical examiner to testify on direct examination regarding the findings in the autopsy report, but it concluded that the unpreserved error "did not result in a substantial likelihood of a miscarriage of justice" because the erroneously admitted testimony was cumulative of other properly admitted evidence. *Id.* at 763.

In *State v Locklear*, 363 NC 438; 681 SE2d 293 (2009), the state's chief medical examiner, Dr. John Butts, testified about the victim's cause of death on the basis of an autopsy report that he did not prepare. He also testified about the identification of the victim on the basis of forensic dentistry. The pathologist who performed the autopsy, Dr. Karen Chancellor, and the dentist who made the identification, Dr. Jeffrey Burkes, did not testify. *Id.* at 451. The North Carolina Supreme Court held that "[t]he admission of such evidence violated defendant's constitutional right to confront the witnesses against him . . . ." *Id.* at 452. However, the court held that the error was harmless beyond a reasonable doubt because the defendant's guilt was established by substantial admissible evidence, including his own confession. *Id.* at 452-453.

Following *Melendez-Diaz*, at least two courts have held that factual statements from nontestifying forensic analysts may be used to support the conclusions and opinions of testifying expert witnesses. In *People v Johnson*, 394 Ill App 3d 1027; 915 NE2d 845 (2009), the prosecution introduced evidence that the defendant's DNA matched a semen stain found at the crime scene. The prosecution introduced the evidence through the testimony of a DNA analyst, Charlotte Word, who reviewed DNA testing conducted by others. *Id.* at 1029. Ms. Word testified that she was able to determine from

the notes and documentation in the laboratory folder that the proper procedures were followed with the appropriate control tests. *Id.* Brian Schoon, who performed the tests, also testified, but the analysts who prepared the defendant's sample profile did not. *Id.* at 1030. The defendant argued that this violated his Confrontation Clause rights because he did not have the opportunity to cross-examine any of the analysts who prepared the profile. *Id.* The court found no error, stating:

> Word, a Cellmark analyst, testified about the laboratory's procedures and practices regarding DNA testing, though she did not participate in the testing. She used the report that was prepared as the basis of her expert opinion that the proper procedures were followed in the analysis. Defendant's attorney was able to cross-examine Word about the basis of her opinion and called attention to the fact that she did not participate in the testing and that she assumed that the analysts properly documented each part of the testing, as required by Cellmark. The same reasoning holds true for Schoon. He used the Cellmark report as the basis for part of his opinion that the male DNA profiled [sic] obtained from the crime scene matched defendant's DNA. The Cellmark report was not offered to prove the truth of its contents, but was used as part of the bases for two experts' opinions. Accordingly, we find no *Crawford* violation in this case, and thus, no error. [*Id.* at 1034.]

The court also noted that DNA analysis results are not "accusatory" because they might lead to either incriminatory or exculpatory results. *Id.* at 1035.

In *Johnson*, the Illinois court ruled that its analysis under *Crawford* was not altered by the Supreme Court's decision in *Melendez-Diaz*. The court quoted the footnote in *Melendez-Diaz* disclaiming the inference that all persons involved in the chain of custody, authenticity of the sample, or accuracy of the testing

device were required to give live testimony. *Id.* at 1036-1037. The court also stated:

> Significantly, the decision in *Melendez-Diaz* did not reach the question of whether the analyst who conducted the scientific tests must testify at a defendant's trial, which is the issue raised by defendant in the instant case. In contrast with certificates presented at trial in *Melendez-Diaz*, Word and Schoon each testified in person as to their opinions based on the DNA testing and were subject to cross-examination. [*Id.* at 1037.]

The court held that "the holding in *Melendez-Diaz* is distinguishable from instances in which a witness testifies at trial about scientific analyses in which he or she did not participate in the analysis . . . ." *Id.* at 1038.

The court in *Johnson* relied substantially on a decision from the California Court of Appeal, *People v Rutterschmidt*, 176 Cal App 4th 1047; 98 Cal Rptr 3d 390 (2009). In *Rutterschmidt*, two codefendants, Olga Rutterschmidt and Helen Golay, were accused of fatally drugging one of their victims, Kenneth McDavid, to collect money from fraudulently obtained life insurance policies. Golay, but not Rutterschmidt, objected on Confrontation Clause grounds to the testimony of Joseph Muto, the chief laboratory director of the Los Angeles County Department of Coronor, who testified about the presence and quantity of prescription drugs and alcohol found in McDavid's blood samples. The court summarized Muto's testimony regarding his involvement in the testing as follows:

> Muto offered expert testimony as to the results of the toxicology analyses performed on samples of McDavid's blood. The testing was done under his supervision, and he signed the two reports containing the testing results. As the chief laboratory director, Muto had degrees and a license in toxicology and was a certified blood-alcohol analyst. He explained that in conducting toxicology analy-

> ses, criminalists in the laboratory performed tests on samples of biological material taken during autopsies. Four laboratory criminalists under his supervision performed the testing on McDavid's samples. Muto was familiar with all the criminalists in the laboratory. With regard to every toxicology report issued from his laboratory, he conducted either an administrative review or a peer review. In the former, before certifying the testing results, he would review the entire case to verify compliance with proper procedures and scientific standards, including quality control. As a peer reviewer, he acted as a second chemical analyst to ensure a sufficient informational foundation for the original analyst's conclusions. All final reports go out under his signature, reflecting that he examined the documentation and analytical work comprising the final report. [*Id.* at 1071.]

Muto verified that the analyses were performed according to laboratory procedures and that he reviewed the reports. *Id.* at 1072.

The court in *Rutterschmidt* commented that there was "no federal Supreme Court or California authority for the proposition that *Crawford* precludes a prosecution scientific expert from testifying as to an opinion in reliance upon another scientist's report." *Id.* at 1073. The court rejected Golay's argument that the Supreme Court's decision in *Melendez-Diaz* warranted a different result. It distinguished the toxicological findings from the sworn certificates in *Melendez-Diaz* on the ground that the former were not sworn affidavits entered into evidence. The court stated:

> Here, in contrast, the toxicological findings were not proved by means of an affidavit. As we have shown, Muto testified as a qualified expert, subject to cross-examination, that his review of data obtained under his supervision supported his conclusion as to the presence of alcohol and drugs in biological samples taken from McDavid's body. The *Melendez-Diaz* decision did not reach the question of

> whether such expert testimony runs afoul of *Crawford*. Indeed, the lead opinion speaks for a court majority only on the narrow basis set forth in Justice Thomas's concurring opinion—"that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' [Citations.]" (*Melendez-Diaz, supra*, [557] U.S. at p. ___, 129 S. Ct. at p. 2543, [174 L Ed 2d at 333] (conc. opn. of Thomas, J.).) Accordingly, the testimony challenged by defendant Golay does not fall within the *Melendez-Diaz* majority's holding. [*Id.* at 1075.]

The court affirmed Golay's conviction. *Id.* at 1087. On December 2, 2009, the California Supreme Court granted Golay's petition for review, limited to the issue whether Muto's testimony violated Golay's right to confront witnesses and whether the decision in *Melendez-Diaz* affected the decision. *People v Rutterschmidt*, 102 Cal Rptr 3d 281; 220 P3d 239 (2009).

We also take into consideration two cases decided before *Melendez-Diaz* that addressed the issue of hearsay evidence to establish objective data underlying an expert's opinion. In *United States v Richardson*, 537 F3d 951 (CA 8, 2008), a case involving DNA evidence that linked the defendant to a firearm, the prosecution called Alyssa Bance, a forensic scientist with the Minnesota Bureau of Criminal Apprehension. The court summarized Bance's testimony as follows:

> Bance testified about DNA testing performed by another scientist in the office, Jacquelyn Kuriger. Bance testified that she personally "didn't actually receive the evidence in this case," but instead "received the case file with [Kuriger's] notes and results." Bance did, however, perform a peer review, in which she "look[ed] for basically everything down to that the i's are dotted and the t's are crossed. And if there's anything crossed out, are they initialed." Bance looked to make sure "everything is . . .

> complete from the start of the case in the analysis to the end of the DNA results and the report." Bance testified, generally, the role of the peer reviewer is to "go through all of the case notes and documentation" the initial scientist did "to be sure that everything has been done properly and documented properly." Bance testified that "[t]he peer reviewer in a DNA case also does a second independent analysis of the DNA data and compares" it to the first scientist's review "to be sure that the two scientists agree in all aspects of the DNA testing." [*Id.* at 955-956.]

Bance "did not perform or witness any DNA testing of the samples," but "testified as to the tests Kuriger performed and the procedures and controls Kuriger used, as well as the results of Bance's own independent analysis of Kuriger's data." Bance "admitted her only knowledge of the tests was from reviewing the paperwork Kuriger generated, conducting a second independent analysis of Kuriger's data, and comparing her analysis of the data with Kuriger's analysis of the same data." *Id.* at 956. Reviewing the Confrontation Clause issue under the plain-error standard for unpreserved issues, the court concluded that the error, if any, was not plain error. The court noted that neither the United States Supreme Court nor the United States Court of Appeals for the Eighth Circuit had addressed the question whether DNA samples and related testimony were testimonial. It commented that other federal courts had ruled that DNA samples themselves are not testimonial. *Id.* at 960. The Court further held:

> Additionally, the admission of Bance's testimony that Richardson's DNA evidence matched the DNA evidence found on the gun was not in error. Richardson argues that the tests and conclusions performed by Kuriger are testimonial; therefore Bance could not testify as to these without violating the Confrontation Clause. Bance, however, testified as to her own conclusions and was subject to cross-examination. Although she did not actually perform

> the tests, she had an independent responsibility to do the peer review. Her testimony concerned her independent conclusions derived from another scientist's test results and did not violate the Confrontation Clause. [*Id.* at 960.]

The Supreme Court denied certiorari in *Richardson* a month before issuing its decision in *Melendez-Diaz*. *Richardson v United States*, 556 US ___; 129 S Ct 2378; 173 L Ed 2d 1299 (2009).

In *United States v De La Cruz*, 514 F3d 121 (CA 1, 2008), the United States Court of Appeals for the First Circuit rejected a defendant's argument that his Confrontation Clause rights were violated when the chief medical examiner for the state of New Hampshire, Dr. Thomas Andrew, testified as an expert regarding the victim's cause of death. Dr. Andrew had not performed the autopsy or conducted the toxicological tests, but he relied on autopsy and toxicology reports prepared by others. *Id.* at 132-133. The court ruled that autopsy reports are not subject to Confrontation Clause rights, stating as follows:

> An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*. [*Id.* at 133.]

The court was "unpersuaded that a medical examiner is precluded under *Crawford* from either (1) testifying about the facts contained in an autopsy report prepared by another, or (2) expressing an opinion about the cause of death based on factual reports—particularly an autopsy report—prepared by another." *Id.* at 134. The Supreme Court denied certiorari in *De La Cruz* only

four days after it issued its opinion in *Melendez-Diaz*. *De La Cruz v United States*, 557 US ___; 129 S Ct 2858; 174 L Ed 2d 600 (2009).

Thus, at least one post-*Melendez-Diaz* case, *Avila*, 454 Mass 744, holds that statements asserting objective scientific data are testimonial statements subject to confrontation under the Sixth Amendment and, therefore, are not admissible absent an opportunity to cross-examine the witness who produced the statement. At least three post-*Melendez-Diaz* cases, including one from this Court, *Lewis (On Remand)*, 287 Mich App 356, *Johnson*, 394 Ill App 3d 1027, and *Rutterschmidt*, 176 Cal App 4th 1047, permit the introduction of such statements if they form the factual basis of a testifying expert witness's opinion. We also have two pre-*Melendez-Diaz* cases, *Richardson*, 537 F3d 951, and *De La Cruz*, 514 F3d 121, that hold that hearsay statements asserting objective scientific data are not testimonial under *Crawford*.

IV. APPLICATION OF *MELENDEZ-DIAZ* AND ITS PROGENY

We hold that the statements here are testimonial. We would be bound by *Lewis (On Remand)*, 287 Mich App 356, under the principle of stare decisis, MCR 7.215, if *Lewis* were factually analogous. However, the Court in *Lewis* ruled that the autopsy report was nontestimonial because it was prepared pursuant to a legal duty. Here, the AIT laboratory performed the glucose tests at the request of the medical examiner, who asked for the testing to investigate the possibility that Burley died of an insulin injection. Dr. Bernardino Pacris, the medical examiner, had originally concluded that Burley died of natural causes, but he reopened the case when the police informed him of suspicious circumstances that raised the question whether defendant may have used

her insulin to end Burley's life. Dr. Pacris testified, "After talking again with the police officer, I believe there was an issue that insulin might have been given to Mr. Burley. . . . We contacted AIT laboratory. We requested tests to see if . . . it can provide us some light." He further acknowledged that he requested testing for glucose, C-peptides, and insulin because he learned about the possibility of insulin involvement in Burley's death. The medical examiner did not merely delegate to the AIT laboratory an ordinary duty imposed by law: he sought from the lab specific information to investigate the possibility of criminal activity. Under these circumstances, any statements made in relation to this investigation took on a testimonial character. Although Dr. Evans testified that toxicological testing is normally performed without any case background and without preconceived notions about what might be found, the testing here was performed in anticipation of a criminal trial, after the medical examiner's original findings had been challenged. The holdings in *Crawford* and *Melendez-Diaz* caution that, under the Confrontation Clause, defendant did not have to take Dr. Evans at his word about the test results, but instead had the right to show that "[f]orensic evidence is not uniquely immune from the risk of manipulation" or that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2536; 174 L Ed 2d at 326. For these reasons, the statement that Burley died with a glucose level of zero was a testimonial statement.

We further observe that in *Lewis* the cause of death was not a central issue because there was no question that the victim died from multiple stab wounds. Rather, the pivotal issue in *Lewis* was whether the defendant

was the person who inflicted the stab wounds. The autopsy findings had no relevance to the issue of the perpetrator's identity. In contrast, Burley's cause of death is the primary factual question in this case. Evidence regarding the glucose finding does not conclusively prove defendant's guilt, because questions remain about the significance of the result and there remains the possibility that the death was suicide. However, it supports the prosecution's theory that Burley died of an insulin injection.

Of the aforementioned cases, we find *Avila*, 454 Mass 744, to be the most persuasive, the most consistent with the Supreme Court's holding in *Melendez-Diaz*, and the most factually analogous to this case. The court in *Avila* held that statements in an autopsy report prepared by a nontestifying medical examiner were subject to confrontation, notwithstanding that the statements served as the facts underlying the testifying expert's opinion. Similarly, the court in *Locklear*, 363 NC 438, concluded that statements in an autopsy report and forensic dentistry report were subject to confrontation. These holdings are fully consistent with *Melendez-Diaz*. Quoting *Crawford*, 541 US at 51, the Supreme Court in *Melendez-Diaz* explained that " '*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or *similar pretrial statements* that declarants would reasonably expect to be used prosecutorially' " came within the " 'core class of testimonial statements' " subject to the Confrontation Clause. *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2531; 174 L Ed 2d at 321 (emphasis added). The Court concluded that statements certifying the results of qualitative and quantitative analysis of the substance in question came within this class because they were functionally equivalent to live,

in-court testimony. *Id.* at ___; 129 S Ct at 2532; 174 L Ed 2d at 321. The Court rejected the argument that the analysts who prepared the statements were not "accusatory" witnesses in that they did not directly accuse the defendant of wrongdoing. *Id.* at ___; 129 S Ct at 2533; 174 L Ed 2d at 323.

As noted, the *Melendez-Diaz* Court also rejected the argument that "neutral scientific testing" obviated the need for confrontation. The Court disagreed that purportedly "neutral" testing was necessarily as neutral or as reliable as the prosecution suggested, commenting that forensic scientists are not immune from error or to pressures to speed up their work or obtain a particular result. *Id.* at ___; 129 S Ct at 2536-2537; 174 L Ed 2d at 325-326. The Court stated:

> This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that "[t]he substance was found to contain: Cocaine." At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use "methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs." At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination. [*Id.* at ___; 129 S Ct at 2537; 174 L Ed 2d at 327 (citations omitted).]

And, as discussed, the Court in *Melendez-Diaz* rejected the proposition that the certificates were business records not subject to confrontation. The Court noted that the certificates were more akin to police reports because they were intended mainly for use in the courts. *Id.* at ___; 129 S Ct at 2538; 174 L Ed 2d at 328.

Here, the laboratory technicians' finding that Burley's glucose level was zero at the time of death was the fact on which Dr. Evans based his opinion that an insulin injection was a possible cause of his death. Although the statement concerning a glucose level of zero has no independently incriminating effect, it was nonetheless an accusatory statement under *Melendez-Diaz* because it supported the prosecution's theory that defendant had killed Burley by injecting him with insulin. Although the glucose-level finding was purportedly the result of neutral scientific testing, the Court in *Melendez-Diaz* ruled that such testing is not exempt from the Confrontation Clause because of the possibility of error or bias. *Id.* at ___; 129 S Ct at 2536; 174 L Ed 2d at 326. There was no testimony concerning how such tests are conducted or whether the tests of Burley's fluid samples were conducted in accordance with testing protocols. Moreover, Dr. Evans gave no testimony to establish that he directly supervised the tests or independently verified that all testing protocols were observed.

We also hold that the technicians' statement of a zero-glucose finding comports with the factors indicating a testimonial statement as delineated in *Davis*, 547 US 813, and analyzed in *Bryant*, 483 Mich 132. Their involvement occurred only after the police advised the medical examiner that defendant was suspected of injecting Burley with insulin, prompting the medical examiner to request toxicological analysis. Burley's autopsy and the subsequent toxicological testing were not a neutral or objective investigation of an unexplained death, but a criminal investigation into whether a homicide had occurred in the past. The technicians' statements were not made contemporaneously with an ongoing emergency, but in response to an inquiry about past events. *Bryant*, 483 Mich at 141.

We are unpersuaded that the federal circuit court decisions in *Richardson*, 537 F3d 951, and *De La Cruz*, 514 F3d 121, counsel a different outcome. The courts in those cases emphasized that the autopsy reports in question only formed the factual bases for the experts' conclusions and that the experts were not acting merely as a conduit for another's opinion. Theoretically, this approach could provide a basis for distinguishing the instant case from *Melendez-Diaz*, on the ground that the certificates in *Melendez-Diaz* were a final statement sufficient in themselves to establish an element of the crime, whereas the glucose-level finding was only a factual finding that Dr. Evans determined was consistent with the prosecution's theory of the cause of death. While we recognize the distinction, we are unconvinced that classifying a statement as a fact in support of an expert's conclusion rather than the conclusion itself negates evidentiary or Confrontation Clause concerns.

Previously, we ruled that the glucose report was admissible under the hearsay exception for public records. However, the Supreme Court in *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2538; 174 L Ed 2d at 328, held that the cocaine-analysis certificates were not public records or business records exempt from confrontation because they were more akin to police reports. This holding applies by analogy to the glucose report, which was obtained in response to a medical examiner's request in the course of investigating a suspicious death. Moreover, under *Crawford*, out-of-court statements are not exempt from confrontation merely because they come within a hearsay exception, including hearsay exceptions traditionally considered to be imbued with indicia of reliability.

Furthermore, this case is distinguishable from *Richardson*, 537 F3d 951, because the testifying expert in

Richardson had greater personal involvement in the testing process than Dr. Evans had in the glucose testing. In *Richardson*, a forensic scientist, Bance, performed a peer review, verifying that Kuriger, another scientist, conducted a thorough and proper analysis. *Id*. at 955-956. Although Dr. Evans supervised the AIT laboratory, he did not give any testimony regarding his supervision of the glucose testing.

Finally, we are unpersuaded by the holding in *Rutterschmidt*, 176 Cal App 4th 1047, that the toxicological findings were distinguishable from the certificates in *Melendez-Diaz* because the certificates were sworn affidavits made expressly for trial. The salient concern in *Melendez-Diaz* was that the prosecutor used hearsay statements in lieu of live testimony to establish a scientific fact that was key to the prosecution's case, denying the defendant the opportunity to cross-examine the persons who performed the tests and issued the certificates. The concern that this use of hearsay implicates the Confrontation Clause is not diminished when the statement is unsworn rather than sworn.

We therefore conclude that defendant's Sixth Amendment right to confront witnesses was violated when Dr. Evans was permitted to give hearsay testimony that other persons in the AIT laboratory determined that Burley's glucose level was zero at the time of his death.

V. RELIEF

As noted, defendant failed to raise a timely objection to Dr. Evans's testimony on Confrontation Clause grounds. However, the trial in this case took place before *Melendez-Diaz* and *Crawford* were decided. The applicable test when defendant was tried, enunciated by

the Court in *Ohio v Roberts*, 448 US 56, 65; 100 S Ct 2531; 65 L Ed 2d 597 (1980), provided that out-of-court statements made by unavailable witnesses could be admitted without violating a defendant's confrontation right if there were sufficient indicia of reliability under evidentiary hearsay rules. Under these circumstances, an objection based on the Confrontation Clause would have been futile. Furthermore, at the time of trial, MRE 703 did not require, as it now does, that the facts or data "upon which an expert bases an opinion or inference shall be in evidence." Also, pre-*Crawford*/*Melendez-Diaz* caselaw in Michigan tended to regard autopsy reports and similar evidence as admissible hearsay exempt from the Confrontation Clause.[2] Defense counsel's failure to object can be attributed to the absence of any positive legal authority that Dr. Evans's testimony violated the Confrontation Clause. Accordingly, defendant's objection on hearsay grounds, but not under the

[2] Because autopsy reports could be considered public records prepared pursuant to the medical examiner's duties, MCL 52.202(1) and 52.207, they could be admitted into evidence pursuant to the hearsay exception for public records, MRE 803(8). In *People v Rode*, 196 Mich App 58, 68; 492 NW2d 483 (1992), rev'd on other grounds sub nom *People v Hana*, 447 Mich 325 (1994), this Court held that the chief medical examiner permissibly testified with regard to the observations recorded in a report prepared by a subordinate medical examiner. Conversely, in *People v Shipp*, 175 Mich App 332, 338-339; 437 NW2d 385 (1989), this Court held that "conclusions and opinions contained in an autopsy report are not admissible under MRE 803(6)." The Court in *Rode*, 196 Mich App at 68, distinguished *Shipp* on the ground that the hearsay statements from the report were limited to the medical examiner's observations. A toxicologist's determination of a decedent's glucose level is more in the nature of a factual observation than a conclusion or opinion: it is objective numerical data obtained from standardized testing rather than a subjective judgment derived from personal observations or professional evaluation. In this pre-*Crawford*, pre-*Melendez-Diaz* view of autopsy reports and similar evidence, defense counsel had insufficient cause to believe that an objection on Confrontation Clause grounds would have been anything but futile.

Confrontation Clause, was reasonable in light of the state of the law at the time of her trial.

Fundamental fairness requires that this issue be reviewed as though it were fully preserved. See *People v Shirk*, 383 Mich 180, 196; 174 NW2d 772 (1970); *People v Townsend*, 25 Mich App 357, 361-362; 181 NW2d 630 (1970); see also *Lonsby*, 268 Mich App at 394-395.[3] We review preserved issues of constitutional error to determine whether they are harmless beyond a reasonable doubt. "A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' " *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540

[3] We recognize that, in our prior opinion, we reviewed defendant's Confrontation Clause claim as an unpreserved constitutional error. However, because our Supreme Court vacated that part of the opinion, we are not bound by that standard of review. See Black's Law Dictionary (7th ed), p 1546 (stating that the meaning of "vacate" is "[t]o nullify or cancel; make void; invalidate"). We further observe that, in *Bryant*, 483 Mich at 151-152, our Supreme Court treated a similar claim as an unpreserved constitutional error. However, the Court did not specifically rule that the plain-error rule applies to all cases in which controlling authority postdates the trial and a timely objection would have been pointless because of the state of the law at the time of trial. Indeed, the Court in *Bryant* prefaced its discussion with the phrase "[e]ven assuming that the error here is unpreserved" and later noted that caselaw at the time of the defendant's trial made it "completely reasonable" that the defendant did not offer an objection pursuant to the Confrontation Clause. *Id*. at 151 & n 17. The *Bryant* Court further opined that, because *Crawford* was not decided until after the trial, the "defendant cannot be faulted for failing to raise the Confrontation Clause issue at the trial." *Id*. at 151 n 17. Our reading of *Bryant* indicates that the Court reviewed the issue under the plain-error rule merely to show that the defendant was entitled to relief even if he had to meet the higher standard of showing prejudicial error. However, we hold that under the circumstances of this case, and because there was a clear violation of *Melendez-Diaz*, defendant is not required to show her actual innocence or that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. Rather, as noted, this issue merits review as though the issue had been preserved under the standard of harmless beyond a reasonable doubt.

(2001), quoting *Neder v United States*, 527 US 1, 18; 119 S Ct 1827; 144 L Ed 2d 35 (1999). In other words, if it is beyond a reasonable doubt that the jury would have convicted defendant on the basis of untainted evidence, defendant is not entitled to a new trial.

The trial court specifically ruled, "I find that [Burley] really died from having a zero glucose level." This wording suggests that the trial court considered the zero-glucose finding in its holding. However, as our Supreme Court observed in *Dendel*, 481 Mich 114, ample other evidence supported defendant's conviction. Defendant argues that Dr. Evans should not have been allowed to testify about the finding of no glucose in Burley's system after he died. But Dr. Pacris testified before Dr. Evans, and he also noted that there was a lack of glucose in Burley's bodily fluids. As our Supreme Court stated, "Dr. Pacris explained that, although the glucose levels in a person's bodily fluids drop immediately after the person dies, the complete lack of glucose in Burley's vitreous fluids was consistent with a finding that Burley had been injected with insulin." *Id*. at 126. We further note that Dr. Pacris repeatedly attached little importance to a failure to find glucose in Burley's blood after he died because "glucose drops instantly once we die." Moreover, Dr. Pacris testified that Burley died of hypoglycemic shock, and he did not base his conclusion on the toxicological data. As our Supreme Court noted:

> [Dr. Pacris] found acute tubular necrosis in the kidneys and dead cells in the proximal tubules of the brain, which are usually seen in people who have suffered hypoglycemic shock. Dr. Pacris ultimately concluded that the cause of death was complications from hypoglycemia, which can be caused by an insulin injection. *In reaching this conclusion, he relied more on his anatomical findings and the circumstances surrounding the death rather than on the toxico-*

> *logical findings*. Specifically, he relied on microscopic hypoxic changes in Burley's brain in concluding that Burley must have been comatose for at least 12 hours before he died at 4:00 p.m. on April 2, 2002. He testified that hypoxic changes to the brain, including red neurons on the hippocampus, are only manifested if the person has been comatose for about 12 hours. [*Id*. at 126-127 (emphasis added).]

In her dissent, Justice KELLY agreed that "[t]he process by which Dr. Pacris determined the cause of death was founded on an anatomical basis and the circumstances surrounding the death rather than on toxicological findings." *Id*. at 142 (KELLY, J., dissenting).

As our Supreme Court also observed, defense counsel took the position at trial that "Burley had died either by injecting himself with insulin or from the side effects of numerous medications prescribed for him." *Id*. at 121 (majority opinion). The importance of the zero-glucose finding is severely undermined by this defense, which accepts the fact that Burley may have taken insulin and merely avers that Burley injected it into himself. The Supreme Court further stated in the opinion:

> After defendant's arrest, she told police detectives that Burley had injected himself with insulin. During a later interview with a police detective, defendant said, "That poor dear, he killed himself for me." She told the detective that despite Burley's severely impaired vision and problems with holding things, he could inject himself with insulin. Defendant also told defense counsel that Burley had killed himself by an insulin injection and that she wanted him to pursue this theory of defense at trial. Defendant also testified that Burley had mental problems and that he had "talked suicide for 10, 15 years." She had informed two of Burley's doctors of his suicidal intentions. [*Id*. at 120-121.]

It makes little difference that the fact-finder heard inadmissible testimony that Burley's fluids showed a

lack of glucose, which would suggest that insulin was introduced into his system, in light of evidence that defendant believed Burley could have taken insulin.

Moreover, evidence other than the scientific findings played a significant role in defendant's conviction:

> [S]trong circumstantial evidence supported the theory that defendant had given Burley an insulin injection.
>
> Burley was difficult to care for because of his multiple health problems, which included dementia. Defendant was under a great deal of stress as Burley's sole caregiver. Frustrated by Burley's demands, defendant had considered giving him a shot of insulin, which she knew could be lethal and would be difficult to detect in a deceased person. When her caregiving situation became worse, defendant unsuccessfully attempted to obtain assistance in caring for Burley from several sources. Less than 24 hours before Burley's death, defendant became "quite tearful and upset" when the nurse assisting defendant terminated her services because Burley had been uncooperative. Defendant admitted that she was at her "wit's end" in the middle of that night when the police declined to take Burley away after he caused a disturbance. In light of the facts leading up to Burley's death, the trier of fact could reasonably conclude that this nighttime incident caused defendant to finally snap and follow through with her idea to inject Burley with insulin. This finding would be consistent with Dr. Pacris's testimony that hypoxic changes in Burley's brain indicated that he had fallen into a coma from insulin-induced hypoglycemic shock at about 4:00 a.m., shortly after the police left.
>
> The trier of fact could also infer that defendant's actions after Burley's death demonstrated her guilty state of mind and her attempt to cover up the crime. Defendant testified that when she suspected that Burley might be dead, she did not contact 911, but instead called a friend to come over. Defendant lied to Burley's family about his condition and hid his death from the only persons who might have questioned the cause of death and recalled her threat to

> inject him with insulin. Moreover, defendant managed to have Burley's body cremated before Burley's family could question the cause of death. She had also wanted Burley's body cremated without an autopsy being performed, but was unable to prevent the autopsy. This circumstantial evidence regarding defendant's state of mind further supports the prosecution's theory that defendant murdered Burley. [*Id*. at 132-134.]

In light of Dr. Pacris's testimony, defendant's position at trial, and the circumstantial evidence surrounding Burley's death, we hold that it is clear beyond a reasonable doubt that a reasonable jury would have convicted defendant absent the inadmissible evidence regarding the toxicological results. Accordingly, the Confrontation Clause error was harmless beyond a reasonable doubt, and defendant is not entitled to a new trial.

Affirmed.

BORRELLO, P.J., concurred.

WILDER, J. (*concurring*). I concur in the result reached by the majority. I write separately to address the majority's conclusion that defendant's failure to object, on Confrontation Clause grounds, to the testimony of Dr. Michael Evans, founder, president, chief executive officer, and director of operations at AIT Laboratories,[1] was reasonable given the then existing state of the law and that, therefore, fundamental fairness requires that we treat this issue as though it had been properly preserved.

"Due process requires fundamental fairness, which is determined in a particular situation first by 'considering any relevant precedents and then by assessing the several interests that are at stake.' " *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Lassiter*

[1] In this regard, Dr. Evans was more than a mere toxicologist at AIT.

v Dep't of Social Servs, 452 US 18, 25; 101 S Ct 2153; 68 L Ed 2d 640 (1981); see the observation in 16B Am Jur 2d, Constitutional Law, § 948, pp 448-449 ("That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, and thus violative of due process may, in other circumstances and in the light of other considerations, fall short of such denial."). "This Court has said that due process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests." *United States v Ruiz*, 536 US 622, 631; 122 S Ct 2450; 153 L Ed 2d 586 (2002).

The majority first concludes that under *Melendez-Diaz v Massachusetts*, 557 US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009), the statements concerning the toxicological testing performed at AIT Laboratories and, in particular, the glucose levels obtained as a result of the testing, were testimonial in nature and that, therefore, Dr. Evan's testimony concerning the testing violated defendant's Sixth Amendment right to confront witnesses. I agree. The majority then concludes that "fundamental fairness" requires retroactive application of the rights of confrontation provided by the Confrontation Clause as a remedy for the violation, so that defendant's posttrial objection to the offending statements on Confrontation Clause grounds must be treated as having been made at trial and preserved, even though it actually was not.

I respectfully disagree that fundamental fairness requires imposition of the legal fiction proposed by the majority.

First, although defendant certainly has an interest in confronting the incriminating statements against her,

there is little probative value to defendant in treating the Confrontation Clause objection as preserved, even though it actually was not, because there was more than sufficient other evidence, to which no credible challenge has been made, in support of the trial court's finding that defendant was guilty of second-degree murder, MCL 750.317, beyond a reasonable doubt. In other words, treating the admission of the statements as something other than plain error, as we did in our previous opinion,[2] makes no demonstrable difference insofar as the outcome of the case is concerned.

Second, the interests of the people of the state of Michigan[3] are impaired by limiting, through a legal fiction, the consideration of evidence that the prosecution might have been able to "properly" introduce by other means had it been placed on notice to consider doing so with a contemporaneously raised objection.[4] In this regard, like the prosecutor (as well as the defense counsel and the circuit judge) so eloquently defended by Justice BLACK in his concurring opinion in *People v Shirk*, 383 Mich 180, 198-200; 174 NW2d 772 (1970), the prosecutor in the instant case was a vigorous advocate, within the rules as they then existed, in seeking and obtaining defendant's conviction of second-

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[2] *People v Dendel* (*On Remand*), unpublished opinion per curiam of the Court of Appeals, issued September 11, 2008 (Docket No. 247391).

[3] These interests are not expressly acknowledged by the majority in its fundamental-fairness analysis.

[4] The Supreme Court has observed:

> "It is the duty of the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and it is likewise his duty to use his best endeavor to convict persons guilty of crime; and in the discharge of this duty an active zeal is commendable, yet his methods to procure conviction must be such as accord with the fair and impartial administration of justice . . . ." [*People v Bahoda*, 448 Mich 261, 266 n 6; 531 NW2d 659 (1995), quoting *People v Dane*, 59 Mich 550, 552; 26 NW 781 (1886).]

degree murder. In my judgment, it would not accord with due process, on the facts of this particular case, to retroactively apply a Confrontation Clause analysis to the laboratory evidence as though proper, contemporaneous objections had been made.

I join the majority in affirming, but I would leave to another day the question regarding under what circumstances fundamental fairness requires the retroactive application of *Melendez-Diaz v Massachusetts*. I respectfully submit that this is not that case.

FINDLEY v DAIMLERCHRYSLER CORPORATION

Docket No. 291402. Submitted June 1, 2010, at Detroit. Decided August 24, 2010, at 9:05 a.m.

Torme C. Findley sought workers' compensation benefits for injuries allegedly sustained when she fell from a motorized cart driven by her supervisor and, on a later date, when she tripped over a cord and fell. The magistrate found that Findley's testimony was not credible and denied benefits. Findley appealed to the Workers' Compensation Appellate Commission (WCAC). The lead opinion, signed by one commissioner, quoted the magistrate's findings of fact, stated that there was no reason to alter those findings, and affirmed the magistrate's denial of benefits. A second commissioner stated that he concurred only with the result reached in the lead opinion without further explanation. The third commissioner dissented, contending that a remand was necessary to resolve a factual issue raised by Findley. Findley sought leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

Under MCL 418.247(8), in order for a decision of the WCAC to be reviewable by the Court of Appeals, it must be a true majority decision. A true majority decision is one in which a majority of the commissioners agree regarding the material facts and the ultimate outcome. There was no true majority decision in this case because a majority of the commissioners did not agree regarding the material facts. A concurrence in the result only does not shed light on the factual findings and legal reasoning used by the WCAC. The matter must be remanded for the WCAC to make adequate findings of fact.

Vacated and remanded.

WORKERS' COMPENSATION — APPELLATE COMMISSION — DECISIONS — REVIEW — MAJORITY OF WORKERS' COMPENSATION COMMISSIONERS — NECESSITY.

For a decision of the Workers' Compensation Appellate Commission to be reviewable by the Court of Appeals, it must be a true majority decision; a true majority decision is one in which a majority of the commissioners are in agreement regarding the material facts and the ultimate outcome (MCL 418.274[8]).

Slusky & Walt, P.C. (by *Howard J. Slusky*), and *Daryl C. Royal* for Torme C. Findley.

Lacey & Jones LLP (by *Gerald M. Marcinkoski*) for DaimlerChrysler Corporation.

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

PER CURIAM. Plaintiff appeals by leave granted an order of the Workers' Compensation Appellate Commission (WCAC), which affirmed the magistrate's denial of benefits.[1] We vacate and remand.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff began her employment as an assembly-line worker for defendant in 1999. On February 18, 2004, plaintiff fell from a motorized cart driven by her supervisor. She stated that she "flew up," hit her head, and lost consciousness. Plaintiff claims that her injuries include shoulder and back pain, a closed-head injury, memory problems, depression, and anxiety.

Plaintiff was off of work for two months. She returned to work in April 2004 and worked through October 2004, but testified that she was unable to do her assigned jobs. Thereafter, plaintiff did not work until August 2005 because no work was available. When plaintiff returned to work, she tripped over a cord and fell. She did not return to work. Defendant sent her a letter regarding her absence from work, but plaintiff did not respond. Plaintiff maintained that she did not receive the letter. Defendant terminated plaintiff's employment in September 2005 because of plaintiff's failure to respond to the letter or return to work.

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[1] *Findley v DaimlerChrysler Corp*, unpublished order of the Court of Appeals, entered July 1, 2009 (Docket No. 291402).

Plaintiff sought workers' compensation benefits. She alleged work injuries that occurred on February 18, 2004, October 15, 2004, and August 30, 2005. Magistrate Beatrice Logan presided over the November 2007 trial, at which plaintiff and her daughter testified. The magistrate also considered plaintiff's medical records, as well as the deposition testimony of both parties' medical witnesses, in a detailed and thorough written opinion. The magistrate ruled, in pertinent part:

> Plaintiff testified that on February 18, 2004, while she was riding on the back of a cart being driven recklessly inside the plant by her supervisor, she was thrown from the cart when he made a turn. The fall caused and/or aggravated injuries to her entire spine, bilateral shoulders, bilateral upper extremities, and bilateral lower extremities. She also sustained a closed head injury and developed problems with anxiety, panic attacks and depression. Plaintiff said she "flew up, hit the concrete, passed out. The next thing I remember I was in the hospital." It is undisputed that plaintiff was riding on an electric cart being driven by a supervisor. Plaintiff weighs 180 pounds, 200 pounds or 240 pounds depending on the various records.
>
> I do not find it credible that a plaintiff at 180 pounds was thrown from a cart and flew through the air. According to the records from St. John Macomb Hospital, the hospital plaintiff was taken after the incident, plaintiff fell out of the cart after the driver made a sharp turn. The records also state the cart tipped over and plaintiff fell off. I reject plaintiff's claim that she was thrown into the air in favor of the conclusion that she merely fell off the back of the cart to the ground.
>
> There were different statements regarding the loss of consciousness by plaintiff. She testified that after hitting her head, the next thing she remembers is being in St. John Hospital. The St. John records state she said she may have briefly loss [sic] consciousness when she hit the ground. She said when she came to she recalls being surrounded by a number of people at the plant. Plaintiff told Dr. Robert

Bauer at Henry Ford Health System that she lost consciousness for an unknown period of time, but awoke on the plant floor in a supine position. Plaintiff told Dr. Sarala Vunnam that she had a loss of consciousness for a few minutes when she fell on carpet. Plaintiff told Dr. Rhonda Levy-Larson that she was thrown from a fast moving cart onto concrete. She said she did not actually remember landing and hitting her head. She woke up in the hospital. She later said she remembered hitting her head and "rolling". She said she lost consciousness for an unknown amount of time and woke up in the hospital. Plaintiff told Dr. Van Horn that she does not remember if she lost consciousness. I do not find plaintiff's testimony credible regarding a loss of consciousness as a result of her fall from the electric cart. Based upon the contradictions as to whether plaintiff actually lost consciousness, I find that she did not lose consciousness.

Plaintiff began treating at Henry Ford Behavior Health System (HFBHS) on March 3, 2004. Plaintiff's initial diagnosis, based upon the history she provided, was adjustment disorder with depressed mood. The records state there were no attention problems noted; no concentration problems noted and plaintiff denied any memory problems. However, it appears that the longer plaintiff treated the more symptoms she developed. Plaintiff returned to work in April, 2004 and worked until October, 2004, with the exceptions of some short lay-offs. She went off work again and returned in August, 2005. By August 6, 2004, her diagnosis was major depressive disorder. Interestingly enough, the records state, on July 20, 2004, plaintiff had returned to work with restrictions and the records state "Plaintiff refused repeated attempts to try to get her to look at ways to channel anger. She keeps self in a 'victim' role."

The HFBHS records for plaintiff on September 6, 2004, state there were no attention problems noted or concentration problems and plaintiff's thought process was logical/coherent.

The HFBHS records entry for October 15, 2004, states plaintiff complained her co-workers are out to get her because she accidentally almost hit one of her co-workers with her car. She said the co-worker became upset and tried

to cut her off in her car. She said the co-worker was told by a supervisor to run her off the road. Plaintiff also mentioned that prior to the incident of February 18, 2004, there was some jealousy of her skills as a laborer. Plaintiff felt people were making threats and talking about her.

On November 23, 2004, the HFBHS records state plaintiff was driving and paying bills.

Plaintiff testified she had hallucinations, that she hears voices, and see[s] shadows, but Dr. Nanette Colling noted on January 14, 2005 that plaintiff had no auditory or visual perceptual disturbances.

Dr. John Head, Jr. treated plaintiff from July 6, 2006 to September 27, 2007, at the Northeast Guidance Center (NGC). Dr. Head's diagnosis was major depression with psychotic features. Dr. Samet's diagnosis was signs and symptoms suggestive of possible brain injury with Major Depression. Dr. Van Horn's diagnosis was Adjustment Disorder mixed with Anxiety and Depression. Dr. Head, Dr. Samet and Dr. Van Horn found plaintiff disabled as a result of the injuries she sustained on February 18, 2004. All three doctors relied on the history of events as described by plaintiff.

Dr. Rhonda Levy-Larson evaluated plaintiff on September 25, 2006. Dr. Levy-Larson testified plaintiff could not sign her name without looking at her driver's license[]. Yet plaintiff was seen at the NGC on September 12, 2006. The records state plaintiff was pleasant and cooperative. She told Dr. Head she had been down without her meds and was not sleeping well without her meds. On October 10, 2006, plaintiff was at NGC and told Dr. Head that she felt a little better and her appetite was still poor at times. Dr. Head noted she appeared depressed. There is nothing to indicate plaintiff was so mentally disabled that she did not know who she was and would have to refer to her driver's license to write her name.

Dr. Michael Freedman evaluated plaintiff on January 5, 2007. Dr. Freedman testified plaintiff appeared for the evaluation and could not recall where she lived, her age, her date of birth, but she could recall the incident which caused her lack of memory.

Dr. Yasmeen Ahmad evaluated plaintiff on September 21, 2006. When plaintiff arrived for the evaluation with Dr. Ahmad, she had the history of the incident written on a piece of paper along with her birth date, address, telephone number, her sister's name, and other information. However, Dr. Ahmad said plaintiff was oriented to month, day, season, place and person.

Dr. Jeffrey E. Middeldorf evaluated plaintiff on October 11, 2005. At Dr. Middeldorf's evaluation, plaintiff was able to provide the doctor a verbal history of the incident and treatment she had received. However, she was unable to move her back, right shoulder and neck. Dr. Middeldorf's findings included gross symptom magnification.

Dr. Samet evaluated plaintiff on November 6, 2006. On the date of Dr. Samet's evaluation, plaintiff did not know the current President Bush or President Clinton, did not know the holiday coming up was Thanksgiving and did not know the function of an ink pen. Plaintiff could not add four plus four, or five plus five. Dr. Samet said plaintiff's ability to cooperate with the evaluation was very limited and her presentation suggested an organic psychosis. On November 7, 2006, the very next day, plaintiff treated at the [NGC]. The NGC's records for November 7, 2006, state plaintiff was pleasant and cooperative. Plaintiff was given medication samples with instructions. The NGC Consumer Progress Note states:

"Ms. Findley's Plan of Service Review was done today by writer/therapist with input from Ms. Findley. She wished to retain current goals/objectives but stated that she hasn't gone to a county clinic due to waiting period and comfortability as Medicare insurance will not be effective until 2007. Therapist has encouraged her many times to see her previous primary care doctor who is familiar with her physical condition as she states that she has chronic pain particularity [sic] in legs, back, neck, and hand area due to a car accident and injury on her job. Discussed level of care and transitioning to groups next year in addition to consultation again with a case manager due to inability to get some prescriptions filled and not having medical insurance. Ms. Findley was satisfied with the services received

during this review period ands [sic] states that she wants to feel normal again physically as well as emotionally. She needs to continue to work toward progression of treatment goals/objectives."

On November 7, 2006, there was no indication plaintiff was in such an emotional state that she did not know of President Bush or the day, month or year and would not know the function of an ink pen. At the NGC plaintiff was noted as being pleasant and cooperative and had input in her service review.

Dr. Van Horn testified she was unable to do the complete neuropsychological testing on January 24, 2007 and February 14, 2007, as plaintiff was unable to cooperate with them. However, plaintiff was at NGC on January 9, 2007 and February 6, 2007, and on both visits, she was listed as "pleasant and cooperative". Plaintiff's behavior at NGC was inconsistent with that she exhibited at Dr. Van Horn's attempted evaluations in January and February.

Plaintiff alleges she has problems with her memory despite being able to provide a very detailed history of her incident at work and her subsequent treatment. Dr. Head testified plaintiff had problems with short term memory and not her long term memory. Yet, plaintiff appeared at the evaluation of Dr. Ahmad with her history, birth date, address, telephone number, sister's name, mother's name and the accident date and history written on a piece of paper. It would appear that all of that information would be in her long term memory. None of that information would change to be short term. The history of the incident would be in her long term memory and it was for the other evaluators. Plaintiff's birth date most certainly did not change and would be long term memory as would her address which could be considered short term memory information only if she moved frequently and her address was the same as when she was working. Her sister's name, her mother's name and the accident date would all have been the same and would be in her long term memory if I accept Dr. Head's explanation as to why she could remember some things and not remember others.

Plaintiff was seen by Dr. Shlomo Mandel at Henry Ford Hospital on October 26, 2005. Plaintiff, despite her claim of difficulty with her memory, was able to tell Dr. Mandel that on February 18, 2004, she "was thrown on to a concrete from a fast moving cart" and she tripped over a cord in 2005 and fell to the ground. Plaintiff appears to have no problem with her memory regarding the incident but she has problems with her date of birth and other general information. At trial, she had no problem with providing information but at the [independent medical examinations (IMEs)] she could not remember the same information she easily provided at trial. Dr. Colling at NGC noted on January 14, 2005, that plaintiff complained of memory problems but she was able to remember her appointment. Appointments would be in plaintiff's short term memory and not her long term memory bank. I do not accept Dr. Head's explanation rather I accept the testimony of Dr. Ahmad that plaintiff may have had a mild concussion which did not cause cognitive deficits.

Despite testifying she has problems with her memory, plaintiff said she did not receive the letter from the defendant requiring her to report to work. She said she remembers being told that she would receive a certified letter but she did not receive the letter. She was emphatic that she did not receive the letter.

Because I find plaintiff's testimony not credible, I find she did receive the letter but at her own peril chose to ignore the letter. [MCL] 418.301(5) states:

"(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal."

Plaintiff testified that had she received the letter she would not have been able to work. Plaintiff's explanation is

not sufficient. Case law requires she first report to the defendant and a determination has to be made if the offer is for reasonable employment. I find plaintiff voluntarily removed herself from the workforce when she failed to respond to the defendant['s] offer of employment. However, assuming arguendo I found she did not receive the letter, I would nevertheless find plaintiff not disabled because of the many inconsistencies in her testimony and her exaggerated behavior at the IME's.

Plaintiff complained of pain in her back which radiated into her legs. She had pain in her shoulders which radiated into her hands. She said standing, sitting and walking were all painful. She said her arms would throb and ache with pain all the time. Despite her complaints of constant pain, she did not attend pain management although Dr. Colling recommended several times that she consider pain management. I do not doubt plaintiff experiences pain however, it is not as limiting as she described at trial.

Dr. Head, Dr. Van Horn and Dr. Samet found plaintiff's disability was caused by the incident of February 18, 2004, based upon the history provided by plaintiff. Dr. Ahmad disagreed plaintiff was disabled. Dr. Ahmad said a person cannot have a closed head injury without a loss of consciousness and it was clinically significant that the [electroencephalogram (EEG)] and the CAT scan of plaintiff's brain were normal and plaintiff had not been started on seizure medications by a neurologist. Dr. Head would only testify that he had heard of cases where a person can have a traumatic brain injury with a normal EEG, a normal MRI, and a normal CAT scan. When Dr. Head was asked if it was the exception rather than the rule, he answered he was unsure of the ratio. There was no objective evidence that plaintiff sustained a closed head injury. The doctors that found plaintiff disabled relied on the history as provided by plaintiff and plaintiff's responses at the IME's was grossly exaggerated, even at the IME's requested by her attorney.

Plaintiff testified she has limited use of her right upper extremity, yet she appeared at trial pushing a walker with both hands and appeared to have no difficulty using her

> right upper extremity. She also sat and testified with no apparent difficulty. It is not expected that the plaintiff has to sit and squirm to establish she is disabled, but she was apparently able to sit during the time she was on the witness stand without any difficulty until the defense attorney questioned her behavior on the stand as being inconsistent with her testimony that she was unable to sit for long period of time. Her response was she did not know that she could stand while testifying.
>
> I did not find plaintiff credible and her exaggerated responses and behavior at the IME's further lessened her credibility. I therefore, accept the testimony of Dr. Ahmad, Dr. Levy-Larson, Dr. Middeldorf and Dr. Freedman that plaintiff was not disabled based upon the incident of February 18, 2004. If I had found plaintiff sustained a work related injury, I would have had a hard time finding her physically or mentally disabled based upon the lack of objective medical evidence.
>
> Plaintiff apparently has some type of disability but she has failed to sustain her burden of proof that the disability was either caused or significantly aggravated by her employment with the defendant.
>
> Benefits are denied. [Citations omitted.]

Plaintiff appealed to the WCAC. Plaintiff also filed a "MOTION FOR ADDITIONAL TESTIMONY," contending that the magistrate incorrectly stated that she had used a walker at trial. Plaintiff sought to have the WCAC either accept her affidavits to that effect or remand the matter to the magistrate for further findings. Two WCAC commissioners denied plaintiff's motion without explanation. The third commissioner dissented, opining that a remand was warranted because the magistrate's reference to the walker was not harmless given that the case hinged on plaintiff's credibility.

On March 12, 2009, the WCAC affirmed the magistrate's denial of benefits. In the lead opinion, one commissioner stated:

> We find no reason to alter the magistrate's findings. The magistrate performed the necessary fact finding functions with detail and clarity. The magistrate provided numerous reasons to support her conclusion that she could not trust plaintiff's testimony. She then explained that she also could not accept plaintiff's experts' opinions because the experts relied on plaintiff's exaggerated statements to form their opinions. Plaintiff argues that we should substitute our findings. We cannot, because to do so would clearly violate the *Isaac* [*v Masco Corp*, 2004 Mich ACO 81,] standard. Plaintiff provides nothing more than an alternative view of the facts.

A second commissioner concurred "in result only," without explanation. The third commissioner again dissented. He was concerned that the magistrate's assessment of plaintiff's credibility might have been influenced by an inaccurate recall of plaintiff's use of a walker at trial. He opined that a remand was necessary to resolve any such inaccuracy before the WCAC could properly render an ultimate decision.

II. STANDARD OF REVIEW

Review under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., is limited. *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003). When substantial evidence on the whole record does not exist to support the magistrate's factual findings, the WCAC may substitute its own findings of fact for those of the magistrate. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698-700; 614 NW2d 607 (2000). In contrast, in the absence of fraud, this Court must treat findings of fact made by the WCAC when acting within its powers as conclusive if there is any competent supporting evidence in the record. MCL 418.861a(14).

This Court does not independently review whether the magistrate's findings of fact are supported by sub-

stantial evidence. *Mudel*, 462 Mich at 700-701. Rather, this Court's review is complete once it is satisfied that the WCAC has understood and properly applied its own standard of review. *Id*. at 703-704. As long as the WCAC did not " 'misapprehend or grossly misapply' " the standard of substantial evidence and the record reflects evidence supporting the WCAC's decision, then this Court must treat the WCAC's factual decisions as conclusive. *Id*. (citation omitted).

III. TRUE MAJORITY

Plaintiff argues that the WCAC's decision should be vacated because it did not reflect a true majority of the WCAC panel. We agree.

In order for a decision of the WCAC to be final and reviewable by this Court, it must be a true majority decision. MCL 418.274(8) provides in pertinent part that "[t]he decision reached by a majority of the assigned 3 members of a panel shall be the final decision of the commission." In *Aquilina v Gen Motors Corp*, 403 Mich 206; 267 NW2d 923 (1978), our Supreme Court vacated an order of the Workers' Compensation Appeal Board (WCAB)[2] because it did not reflect a true majority. Two of the board members concurred in the "controlling opinion," but did not issue separate opinions. *Id*. at 209. A fourth board member dissented, and the fifth member concurred in that dissent. *Id*. The Court noted that because two of the board members merely concurred in the result, the controlling opinion was not a "majority *decision*" setting forth the board's findings of fact as required by the WDCA. *Id.* at 212. The Court further emphasized that the board had to properly

[2] When *Aquilina* was decided by the WCAB, the predecessor of the WCAC, panels of the WCAB had five members.

articulate its factual findings to facilitate appellate review. *Id.* at 213. The Court ruled:

> [W]e cannot discharge our reviewing responsibilities unless a *true* majority reaches a decision based on stated facts. A decision is not properly reviewable when some of the majority concur only in the result and do not state the facts upon which that result is based. We must ask the board members to make a finding regarding all critical or crucial facts as well as the result when they choose not to sign the controlling opinion.
>
> We would also encourage concurring board members to articulate whether or not they agree with the legal standard and the rationale employed in reaching the decision. While we are mindful that this process of articulation may prove burdensome at times, it will most certainly assist the appellate courts of this state in effectively discharging their responsibilities in these matters. [*Id.* at 214.]

Stated more succinctly, a true majority decision is one in which at least a majority of the commissioners agree regarding the material facts and the ultimate outcome.

Defendant, however, posits that this requirement for a true majority as set forth in *Aquilina* is no longer valid because the standard of review for the WCAC differs from that in effect for the WCAB when *Aquilina* was decided. This argument is unavailing. As our Supreme Court noted in *Mudel*, 462 Mich at 698-699, the WCAB previously employed de novo review of a magistrate's decision. Now, the substantial evidence standard governs the WCAC's review of a magistrate's findings. *Id.* Under this standard, the WCAC engages in a qualitative and quantitative analysis of the whole record and "need not necessarily defer to all the magistrate's findings of fact." *Id.* at 702-703. Importantly, however, our review of the WCAC's findings remains the same as our previous review of the WCAB's findings—we must determine if any competent evidence exists to support

the WCAC's findings. *Id.* at 700-703. Thus, the mere fact that the WCAC's standard for reviewing a magistrate's decision has changed since *Aquilina* was decided is simply not relevant to whether competent evidence supports the WCAC's findings. And, in determining whether any competent evidence exists to support the WCAC's findings, "we cannot discharge our reviewing responsibilities unless a *true* majority reaches a decision based on stated facts." *Aquilina*, 403 Mich at 214. To allow otherwise would be to corrupt the integrity of the administrative process. See *Mudel*, 462 Mich at 701. Accordingly, the true-majority requirement articulated in *Aquilina* continues to be valid.

In this case, one commissioner issued the lead opinion. The second commissioner did not adopt the factual findings of the lead opinion, did not make findings of his own, and instead concurred in the result only. The third commissioner dissented. Therefore, no true majority decision existed because a majority of commissioners did not agree regarding the critical facts of the matter. A concurrence in result only is inadequate for appellate review, as it does not shed light on the factual findings and legal reasoning used by the majority in reaching its ultimate conclusion. Thus, the decision was not a final decision and is not properly reviewable under *Aquilina*. Consequently, the matter requires remand.[3]

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[3] Defendant's reliance on *Smith v Exemplar Mfg Co*, unpublished opinion per curiam of the Court of Appeals, issued January 31, 2008 (Docket No. 272749), is also unavailing. First, unpublished opinions are not binding on this Court. *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 515; 739 NW2d 402 (2007). Further, *Smith* is obviously distinguishable from the present situation. In *Smith*, this Court ruled that it was apparent from the concurrence that, in all other respects, the concurring WCAC commissioner agreed with the lead opinion and, as such, "there clearly was a two-member majority." *Smith*, unpub op at 2. Because the concurrence in this case was in the *result* only, this Court cannot conclude, as the *Smith* Court did, that the concurring WCAC

On remand, we direct the WCAC to make adequate findings of fact to facilitate the appellate review process. This Court has previously ruled that the WCAC must state the facts it adopted, not merely summarize the magistrate's findings, and must also explain its legal reasoning:

> In order for this Court to discharge its appellate function, the WCAB must sufficiently detail its findings of fact so that the Court can separate the facts it found from the law it applied. . . . In *Kostamo* [*v Marquette Iron Mining Co*, 405 Mich 105, 136; 274 NW2d 411 (1979)], our Supreme Court noted:
>
> "[C]onclusory findings [by the WCAB] are inadequate because we need to know the path it has taken through the conflicting evidence, the testimony it has adopted, the standards followed and the reasoning used to reach its conclusion."
>
> Having reviewed the WCAB's opinion in this case, we find that we cannot perform our appellate function. The WCAB merely affirmed the referee's decision and summarized the expert testimony presented. It did not state which testimony it *adopted*, the standards it followed, or the reasoning it used to reach its conclusion. *Id.* Hence, we vacate the WCAB's opinion and remand this case to the WCAB for further proceedings. [*Williams v Chrysler Corp*, 159 Mich App 8, 11-12; 406 NW2d 222 (1987).]

See also *Lubic v Joba Constr Co*, 429 Mich 865; 413 NW2d 424 (1987) (relying on *Aquilina* to remand to the WCAB for specific findings of fact); *Jamison v Frito-Lay Inc*, 424 Mich 874; 380 NW2d 42 (1986) (remanding to the WCAB for adequate findings of fact sufficient to permit appellate review).

Finally, plaintiff argues that the WCAC abused its discretion by denying her request to remand the case

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commissioner agreed with the factual findings and reasoning in the lead opinion.

for additional testimony to correct the magistrate's misstatement regarding her use of a walker. Although we find no abuse of discretion at this juncture, if the WCAC deems it necessary, it may remand the matter to the magistrate. MCL 418.861a(12).

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

PEOPLE v ROSE

Docket No. 290936. Submitted June 15, 2010, at Lansing. Decided July 1, 2010. Approved for publication August 26, 2010, at 9:00 a.m.

A jury in the Allegan Circuit Court, George R. Corsiglia, J., convicted Ronald C. Rose of four counts of first-degree criminal sexual conduct and two counts of disseminating sexually explicit matter to a minor. Defendant appealed, arguing, in part, that he was deprived of his constitutional right to confront the witnesses against him when the court permitted one of the victims, JB, who was eight years old, to testify from behind a screen that prevented JB from being able to see the defendant, although the defendant could see her.

The Court of Appeals *held*:

1. The trial court erroneously relied on MCL 600.2163a, which allows the use of special arrangements necessary to protect the welfare of a witness, when it allowed the use of the witness screen because the statute makes no reference to witness screens. The error, however, did not warrant relief. The existence of the statute does not preclude trial courts from using alternative procedures permitted by law or court rule to protect witnesses. The relevant inquiries were whether the use of the screen violated defendant's right to confront the witnesses against him and whether the use of the screen violated defendant's right to due process and a fair trial.

2. The trial court's decision to permit use of the screen did not violate defendant's right to confront witnesses. Before a witness screen is used, a trial court must determine that the screen is necessary to protect a witness who would otherwise be traumatized by the presence of the defendant and that the emotional distress to the witness in the absence of the screen would be more than *de minimis*. The trial court in this case found that there was a high likelihood that testifying face to face with defendant would cause JB significant psychological harm and that she might not be able to testify at all in defendant's presence. Those findings were sufficient to warrant limiting defendant's right to confront JB face to face, especially in light of the fact that use of the screen preserved the other

elements of defendant's right of confrontation and thus adequately ensured the reliability of the truth-seeking process.

3. With regard to due process, the use of a screen that prevents a witness from being able to see the defendant is not inherently prejudicial in terms of undermining the presumption of the defendant's innocence and the inferences a jury might draw from the use of the screen. The record in this case did not support the conclusion that use of the screen actually prejudiced defendant.

4. Although the prosecution failed to comply with a discovery order, the trial court did not abuse its discretion by denying defendant's motion to preclude the prosecution's expert witness on child sexual abuse from testifying. The exclusion of a witness is an extreme sanction that should not be employed if the trial court can fashion a different remedy that will limit the prejudice to the party injured by the violation while still permitting the witness to testify. Defendant failed to establish that the trial court's decision to deny that sanction was outside the range of principled outcomes under the circumstances presented.

5. The trial court did not abuse its discretion by denying defendant's alternative motions for a new trial or an evidentiary hearing in light of a juror's associations with members of JB's family. Defendant had the burden to establish that the juror was not impartial or at least that the juror's impartiality was in reasonable doubt. Defendant presented no evidence that the juror was partial or evidence of juror misconduct that prejudiced him.

Affirmed.

CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — PRESUMPTION OF INNOCENCE — WITNESSES — FACE-TO-FACE CONFRONTATION — SCREENS TO SHIELD WITNESSES.

The use of a screen that prevents a witness from being able to see the defendant is not inherently prejudicial; before it may allow the taking of a witness's testimony from behind a screen, the trial court must make case-specific findings that the screen is necessary to protect a witness who would otherwise be traumatized by the presence of the defendant and that the emotional distress to the witness in the absence of the screen would be more than *de minimis*.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

A. Scott Grabel & Associates (by *Scott Grabel*) for defendant.

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

PER CURIAM. Defendant appeals as of right his convictions by a jury of four counts of first-degree criminal sexual conduct, MCL 750.520b, and two counts of disseminating sexually explicit matter to a minor, MCL 722.675. The trial court sentenced defendant to serve 25 years to 50 years in prison for each of his convictions of first-degree criminal sexual conduct and to serve 16 months to 24 months in prison for each of his convictions of disseminating sexually explicit matter to a minor. The court ordered that the sentences be served concurrently and with 50 days of sentence credit for time served on each. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The present case has its origins in allegations of sexual abuse by JB against defendant, Ronald Carl Rose. JB is the youngest of five children. At the time of the trial, JB was eight years old. JB has a brother, RB, who is approximately two years older than her and has three older sisters who were each in their early twenties at the time of the trial. Rose's wife is JB's oldest sister.

Rose and his wife had a home within five to six miles of JB's parent's home in Allegan County. Although RB and JB lived with their parents, they spent a significant amount of time at Rose's home and often stayed overnight. In June 2007, JB revealed to her mother that Rose had been sexually assaulting her for some time. After JB's revelations, RB also indicated that Rose had exposed him to pornography and touched him inappropriately.

The prosecutor charged Rose with eight separate crimes on the basis of these revelations. The first four counts were for first-degree criminal sexual conduct committed against JB: one count for digital-vaginal penetration, one count for penile-vaginal penetration, one count for penile-oral penetration, and one count for penile-anal penetration. The prosecutor also charged Rose with accosting a minor for immoral purposes and with second-degree criminal sexual conduct. At trial, the prosecutor argued that the accosting charge was founded on Rose's provision of alcohol to JB and that the second-degree criminal sexual conduct charge was founded on Rose's touching of JB's chest. However, the prosecutor agreed to dismiss those charges after the close of her proofs because JB had not testified that Rose provided her with alcohol or touched her chest. The last two charges were for disseminating sexually explicit matter to JB and RB.

JB testified at trial about the timing and location of the abuse that she suffered. She said that the abuse occurred at Rose's house in the bedroom and living room. Sometimes her older sister was home, and sometimes she was even in the same room, but the sister did not see the abuse because she was asleep when "we did it in the back room." Sometimes the abuse occurred at night and sometimes during the morning.

She also described the nature of the abuse. She said Rose put his private part by her private part—by both the "back and the front." She said he had tried to put his private into her front private, but it just did not work and she told him it hurt. She said she was sideways on the bed and that white stuff came out of his private part and got on her leg and the bed. JB said that Rose "put his private in the back while I was on my stomach." She said he put it in her "bottom, but it

didn't go all the way in." It hurt and she told him. She said she knew that the white stuff came out again because she could feel it on her leg. She said that, a lot of times, he put his private into where her poop comes from.

She also testified that sometimes Rose would touch her front private with his fingers. She said he tried to make his finger go in, but it hurt. In addition, he made her put her "mouth on him" more than once. Sometimes he would touch his private part while she put her mouth on it and would move it in her mouth. He was lying on his back on the bed, and she was on her knees.

Finally, JB testified that Rose would sometimes show her and her brother movies: "They had girls on it and that had the exact same thing that he did to me." He also showed them magazines that had pictures of people with no clothes on. Rose told her that the movies were about having sex, and he would watch the movies with her and RB. He also sometimes had the movies on while he was doing stuff to her.

RB also testified at trial. He said he did not like going over to his older sister's house when Rose was there because he would show them bad stuff—videos and magazines with naked people. He would put the videos on, and the people in them would have sex. RB said that Rose told them that the videos showed how babies were made. Sometimes Rose would play with his penis in front of them. Rose would have his pants halfway down and would move his penis up and down. RB said that his older sister was never home when this happened.

Rose's defense was that he had been wrongfully accused. Specifically, he presented testimony—including the testimony of two of JB's older sisters—that suggested that JB's mother caused JB and RB to fabricate the allegations

in an effort to break up the marriage between Rose and JB's older sister.

The jury rejected Rose's defense and returned a verdict of guilty on each of the six remaining counts.

In October 2008, Rose moved for an evidentiary hearing or a new trial. In his motion, Rose argued that he was deprived of a fair trial when his trial counsel failed to timely object to the prosecution's failure to produce a written summary of the proposed testimony by its expert on child-sexual-abuse dynamics. He also argued that his counsel unreasonably failed to call an expert to rebut the medical testimony at trial. He further claimed that his trial counsel unreasonably failed to call a rebuttal witness, GA, who would have testified that JB's father told GA that he knew that Rose had done nothing wrong. Rose also argued that there was evidence that one of the jurors knew JB's aunts, GA and LB, as well as her uncle, BB. Rose alleged that this juror had worked with BB and may have heard things about the case at work. For these reasons, Rose asked the trial court to order hearings on the issues or grant a new trial.

In February 2009, the trial court issued an opinion and order denying Rose's motion for a new trial. The trial court determined that the evidence did not demonstrate grounds for relief on the basis of a juror's limited knowledge of a single witness, GA, who did not actually testify at trial. Further, the court noted that the affidavits proffered by Rose in support of his motion did not show that the juror had engaged in misconduct. Rather, the affidavits established the mere possibility that the juror might have been exposed to prejudicial remarks. This evidence, the trial court concluded, was insufficient to warrant relief.

This appeal followed.

II. USE OF A WITNESS SCREEN

A. STANDARDS OF REVIEW

Rose first argues that the trial court violated his rights under the state and federal constitutions, as well as MCL 600.2163a, when it permitted JB to testify from behind a screen that prevented her from being able to see Rose even though he could see her. Rose contends that the use of a witness screen is inherently prejudicial and that the United States Supreme Court has specifically disavowed the use of one-way screens to prevent a witness from being able to see a defendant. He also argues that the trial court failed to make the necessary findings in order to use the alternative procedures permitted under MCL 600.2163a and that, in any event, the use of a screen is not permitted under that statute.

This Court reviews de novo questions of constitutional law such as the right to confront witnesses. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). However, this Court reviews for clear error the trial court's findings of fact underlying the application of constitutional law. See *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). This Court also reviews de novo the proper interpretation of a statute. *People v Martin*, 271 Mich App 280, 286-287; 721 NW2d 815 (2006).

B. THE TRIAL COURT'S FINDINGS

On the first day of trial, the prosecutor moved for permission to use a screen during JB's testimony. The prosecutor stated that she made the motion because JB had indicated that she was afraid to testify in Rose's presence. The trial court agreed to take testimony from JB's therapist.

Jill VanderBent testified that she supervised nine therapists for Bethany Christian Services and that she

also counseled JB. VanderBent stated that she was treating JB for symptoms related to trauma, including nightmares, bedwetting, difficulty concentrating, zoning out, and anger outbursts. JB had also expressed fear about having to come and testify in court—that she did not want to see Rose and "was very fearful." JB had even stated that she feared that she could not testify in his presence. VanderBent stated that it was her opinion that testifying face to face might trigger some traumatic experiences and cause "numbing, shutting down, not being able to speak even." She opined that if JB were to see Rose, it could be traumatic for her, but the use of a screen that would permit others to see her without JB being able to see Rose would sufficiently safeguard her emotional and psychological well-being. Further, when asked whether JB "would be psychologically and emotionally unable to testify if we didn't have some sort of protection that goes beyond re-configuring the courtroom," VanderBent opined that it was "a likely possibility, yes."

On cross-examination, VanderBent continued to assert the high potential for harm if JB were forced to testify face to face with Rose:

> *Q.* Okay. Now, what do you predict for her mental health if she testifies? Or that she won't be able to testify or that she'll be harmed? Can you clarify that?
>
> *A.* Sure. The concern is with [JB] specifically because she had indicated to me that she's very fearful of seeing the defendant. If she has to testify in his presence there's concern that that would be a trigger for her which could cause her to exhibit some of these symptoms I had expressed; the numbing out, spacing out and possibly not even being able to speak.
>
> *Q.* Is she able to articulate this fear clearly?
>
> *A.* Yes.
>
> *Q.* Does she exhibit any symptoms of fear?

A. Yes. She's very fearful, very shaky, talks about being very nervous, stomach aches.

Q. This is related to testifying?

A. In front of the defendant.

Q. Specifically in front of the defendant.

A. Correct.

Q. Would she suffer any permanent emotional damage do you think?

A. That's hard to say.

* * *

Q. Is there any particularly heightened effect on [JB] of testifying versus say any other witness in a traumatic case?

A. Well I think the difference in this particular case is that [JB] has expressed this fear of being in front of face to face to the defendant. Some, you know, it varies based on the child. However, because she has verbally expressed that this is very scary for her, shows me that this is something we need to try to prevent her from being so fearful. Because if she's too fearful and she becomes—her stress arousal happens, she's going to have a very difficult time expressing, verbalizing and accessing her memories.

Rose's trial counsel objected to the prosecutor's motion for permission to use a screen on the grounds that the prosecution had not met the requirements of MCL 600.2163a and because the use of the screen violated Rose's right to confront JB and was otherwise prejudicial. Nevertheless, Rose's trial counsel also argued that the trial court had to use the standard set forth in MCL 600.2163a(17) when deciding whether to use a screen: "The defendant asserts that that is the correct standard for the use of a witness screen. It would be the same for video recorded deposition testimony." Rose's trial counsel did not suggest any alternatives to the use of the screen, such as the methods stated under MCL 600.2163a(3), (4), (14), (16), and (17).

After hearing the parties' arguments, the trial court found that there was "a high likelihood" that testifying face to face with Rose would cause JB to "regress in her therapy, have psychological damage" and could cause her "to possibly not testify . . . ." For that reason, the trial court concluded that the criteria under MCL 600.2163a had been met and that it was necessary to use a screen to protect the welfare of the child. The trial court also determined that Rose's rights would be adequately protected because he would be able to see JB, as would the jury, and he would be able to cross-examine her.

C. MCL 600.2163a

In this case, the trial court relied on MCL 600.2163a for the authority to use a witness screen. Under MCL 600.2163a(15), if the trial court finds, on the motion of a party, that "the special arrangements specified in subsection (16) are necessary to protect the welfare of the witness, the court shall order those special arrangements." The special arrangements listed under MCL 600.2163a(16) include excluding unnecessary persons from the courtroom during the witness's testimony, rearranging the courtroom to move the defendant as far from the witness stand as is reasonable, and using a questioner's stand or podium. If the court finds that the witness will be psychologically or emotionally unable to testify even with the benefits of the protections afforded under MCL 600.2163a(3), (4), (14), and (16), the court must order the taking of a videorecorded deposition of the witness in lieu of live testimony. MCL 600.2163a(17).

On appeal, Rose argues that the trial court erred to the extent that it relied on MCL 600.2163a because it failed to make the necessary findings under that statute and because the statute does not specifically permit the use of witness screens.

As noted, MCL 600.2163a requires the trial court to employ very specific protections, and none of these protections includes the use of a witness screen. Thus, the trial court could not have properly relied on MCL 600.2163a. Nevertheless, the trial court's erroneous reliance on MCL 600.2163a does not necessarily warrant relief. See *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996) ("Additionally, even if it were error to apply the statute, it does not necessarily follow that defendant's right to confrontation was violated."). The Legislature provided that the protections afforded under MCL 600.2163a were "in addition to other protections or procedures afforded to a witness by law or court rule." MCL 600.2163a(19). Accordingly, while trial courts may rely on MCL 600.2163a to afford witnesses certain protections, the existence of this statute does not preclude trial courts from using alternative procedures permitted by law or court rule to protect witnesses. And trial courts have long had the inherent authority to control their courtrooms, which includes the authority to control the mode and order by which witnesses are interrogated. MRE 611(a); *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002) ("It is well settled in Michigan that a trial court has broad discretion in controlling the course of a trial."). This inherent authority also includes the ability to employ procedures that limit a defendant's right to confront his accusers face to face even when the provisions of MCL 600.2163a do not apply. See *Burton*, 219 Mich App at 287-291. Thus, the trial court's erroneous reliance on MCL 600.2163a does not itself warrant relief. Rather, the relevant inquiry is whether the trial court's decision to use a witness screen violated Rose's Sixth Amendment right to confront JB or violated Rose's basic right to due process and a fair trial. See *Burton*, 219 Mich App at 287.

D. THE RIGHT TO CONFRONT WITNESSES FACE TO FACE

The United States Supreme Court first addressed whether the use of a screen to shield a witness from viewing the defendant while testifying violated a defendant's constitutional right to confront the witnesses against him or her in *Coy v Iowa*, 487 US 1012; 108 S Ct 2798; 101 L Ed 2d 857 (1988). In *Coy*, the defendant was arrested and charged with sexually assaulting two 13-year-old girls while they were camping in their backyard. *Id.* at 1014. On the prosecutor's motion, the trial court permitted the complaining witnesses to testify from behind a screen. With adjustments to the lighting in the courtroom, the defendant could dimly see the witnesses, but the witnesses could not see the defendant. *Id.* at 1014-1015. On appeal in the United States Supreme Court, the defendant argued that the trial court violated his constitutional rights by permitting the screen because the Confrontation Clause gave him the right to face-to-face confrontation and because the screen eroded the presumption of innocence. *Id.* at 1015.

Justice Scalia, writing the majority opinion, noted that the Supreme Court has "never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 1016. He explained that the perception that confrontation is essential to fairness "has persisted over the centuries" because it "is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' " *Id.* at 1019. Moreover, Justice Scalia opined that the benefits of face-to-face confrontation outweighed the potential harms to the witness:

> Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the ac-

> cuser; both "ensur[e] the integrity of the factfinding process." The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs. [*Id.* at 1019-1020 (citation omitted).]

Turning to the facts in the case before the Court, Justice Scalia stated that it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.* at 1020. Although he acknowledged that the Court had in the past stated that the right to confront witnesses was not absolute, Justice Scalia differentiated those prior holdings on the ground that they did not involve the literal meaning of the Confrontation Clause:

> To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the Clause: "a right to *meet face to face* all those who appear and give evidence *at trial*." *Id.* at 1020-1021 (citation omitted).

Justice Scalia did leave open the possibility that there might be exceptions to the right to face-to-face confrontation. *Id.* at 1021. Such an exception, he opined, would "surely be allowed only when necessary to further an important public policy." *Id.* However, such an exception was not established through a "legislatively imposed presumption of trauma." *Id.* Rather, because there had been no "individualized findings that these particular witnesses needed special protection, the judgment here could

not be sustained by any conceivable exception." *Id.* For these reasons, the Court reversed the judgment of the Iowa Supreme Court and remanded the case for a harmless-error review. *Id.* at 1022.

Although Justice O'Connor was one of the six justices who signed Justice Scalia's opinion, she wrote a concurrence to clarify that the use of procedures "designed to shield a child witness from the trauma of courtroom testimony" might be permissible under facts different from those present in the case before the Court. *Id.* at 1022. Justice O'Connor acknowledged that the Confrontation Clause generally required that a witness face the defendant. However, she explained that this requirement was not absolute:

> But it is also not novel to recognize that a defendant's "right physically to face those who testify against him," even if located at the "core" of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion. Rather, the Court has time and again stated that the Clause "reflects a *preference* for face-to-face confrontation at trial," and expressly recognized that this preference may be overcome in a particular case if close examination of "competing interests" so warrants. [*Id.* at 1024 (citations omitted).]

Justice O'Connor went on to state that she would permit the use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure were necessary to further "an important public policy." *Id.* at 1025. Moreover, although a mere generalized legislative finding of necessity is insufficient to establish such a necessity, when a court "makes a case-specific finding of necessity, as is required by a number of state statutes, our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.* at 1025 (citations omitted).

Almost two years to the day after the decision in *Coy*, the United States Supreme Court clarified whether and to what extent there were exceptions to a defendant's right to confront witnesses face to face. See *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990). In *Craig*, the defendant was charged with physically and sexually abusing a six-year-old girl who attended a kindergarten and prekindergarten center owned and operated by the defendant. *Id.* at 840. Before trial, the prosecution moved to permit the child to testify by means of one-way closed-circuit television. *Id.* The trial court permitted the use of this procedure after first taking evidence and finding, as required under the relevant state statute, that the child witness and other child witnesses would suffer serious emotional distress to the extent that the children would not be able to reasonably communicate. *Id.* at 842-843. The Maryland Court of Appeals reversed the defendant's convictions because the prosecution's showing of necessity was insufficient under the decision in *Coy*. *Id.* at 843.

Writing for the majority, Justice O'Connor noted that the right guaranteed by the Confrontation Clause ensures not only a personal examination of the witness, but also that the witness will testify under oath, that the witness will be subject to cross-examination, and that the jury will have the opportunity to observe the witness's demeanor. *Id.* at 845-846. She explained that the benefits conferred by this right could not be reduced to any one element of confrontation:

> The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. [*Id.* at 846.]

This was even true of the core value of the Confrontation Clause—the right to face-to-face confrontation. *Id.* at 847 ("[W]e have nevertheless recognized that [face-to-face confrontation] is not the *sine qua non* of the confrontation right."). "For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant." *Id.* Rather, as

> suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. [*Id.* at 850.]

Turning to Maryland's statutory procedure, Justice O'Connor noted that it did prevent a child witness from seeing the defendant as he or she testified. However, she found it significant that the remaining elements of the confrontation right were preserved: "The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." *Id.* at 851. The presence of these elements "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* Because the procedure leaves sufficient safeguards in place, when the use of the procedure is necessary to further an important state interest, its use will "not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." *Id.* at 852. Therefore, Justice O'Connor stated, the critical inquiry is whether use of the procedure is necessary to further an important state interest. *Id.*

Justice O'Connor reiterated that the Court had already recognized that the states have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment. *Id.* And, on a similar basis, she concluded that a "State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853. But the state may not limit face-to-face confrontation unless the state makes an adequate showing of necessity. *Id.* at 855. The requisite finding is case-specific; the trial court must hear evidence and determine whether the procedure "is necessary to protect the welfare of the particular child witness who seeks to testify." *Id.* In order to warrant dispensing with face-to-face confrontation, the trial court must find that the emotional distress suffered by the child would be both caused by the presence of the defendant and more than *de minimis* distress caused by nervousness, excitement, or reluctance to testify. *Id.* at 856. Applying these standards to the Maryland procedure, Justice O'Connor determined that the statute's requirement that the trial court find that the child would suffer serious emotional distress to the extent that the child would not reasonably be able to communicate met the necessity requirements and, for that reason, was consonant with the Confrontation Clause. *Id.* at 856-857.

Following the decision in *Craig*, this Court adopted the test stated in *Craig* and determined that trial courts may limit a defendant's right to face his or her accuser in person and in the same courtroom. See *Burton*, 219 Mich App at 289 (holding that the trial court did not err when it permitted a mentally and physically challenged adult who was brutally physically and sexually assaulted to testify by way of closed-circuit television even

though the witness's situation did not meet the requirements of MCL 600.2163a); *People v Pesquera*, 244 Mich App 305, 309-314; 625 NW2d 407 (2001) (holding that the trial court properly allowed the child victims of sexual assault—ranging in age from four to six—to give videotaped depositions in lieu of live testimony under MCL 600.2163a); *People v Buie*, 285 Mich App 401, 408-410, 415; 775 NW2d 817 (2009) (adopting the test stated in *Craig* for determining whether a trial court may permit an expert witness to testify by way of videoconferencing). In order to warrant the use of a procedure that limits a defendant's right to confront his accusers face to face, the trial court must first determine that the procedure is necessary to further an important state interest. *Burton*, 219 Mich App at 288. The trial court must then hear evidence and determine whether the use of the procedure is necessary to protect the witness. *Id.* at 290. In order to find that the procedure is necessary, the court must find that the witness would be traumatized by the presence of the defendant and that the emotional distress would be more than *de minimis*. *Id.*

In this case, the trial court clearly found that the use of the witness screen was necessary to protect JB when it invoked MCL 600.2163a and stated that it was "necessary to permit this to protect the welfare of this child." In making its findings, the trial court also clearly referred to the fact that JB had expressed fear of Rose and that, given her age, the nature of the offenses, and her therapist's testimony, there was "a high likelihood" that testifying face to face with Rose would cause her to "regress in her therapy, have psychological damage" and could cause her "to possibly not testify . . . ." These findings were sufficient to warrant limiting Rose's ability to confront JB face to face. See *Craig*, 497 US at 856-857. In addition, aside from JB's inability to see

Rose, the use of the witness screen preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process. *Id.* at 851-852. Consequently, the trial court's decision to permit JB to testify with the witness screen did not violate Rose's right to confront the witnesses against him.

E. DUE PROCESS AND THE PRESUMPTION OF INNOCENCE

We shall next address Rose's argument that the use of the witness screen was inherently prejudicial and violated his right to due process. Every defendant has a due process right to a fair trial, which includes the right to be presumed innocent. *Estelle v Williams*, 425 US 501, 503; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Under the presumption of innocence, guilt must be determined solely on the basis of the evidence introduced at trial rather than on " 'official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.' " *Holbrook v Flynn*, 475 US 560, 567; 106 S Ct 1340; 89 L Ed 2d 525 (1986) (citation omitted). For that reason, courts must be alert to courtroom procedures or arrangements that might undermine the presumption of innocence. *Estelle*, 425 US at 503-504. However, not every practice tending to single out the accused must be struck down. This is because the jurors are understood to be "quite aware that the defendant appearing before them did not arrive there by choice or happenstance . . . ." *Holbrook*, 475 US at 567. Notwithstanding this, certain procedures are deemed to be so inherently prejudicial that they are generally not permitted at trial. See *Illinois v Allen*, 397 US 337, 344; 90 S Ct 1057; 25 L Ed 2d 353 (1970) (stating that "no person should be tried while shackled and gagged except as a last resort"); *Estelle*, 425 US at 504-505

(stating that it violates a defendant's due process right to a fair trial to compel a defendant to wear identifiable prison garb during trial). When determining whether a particular procedure is inherently prejudicial, courts examine whether there is an unacceptable risk that impermissible factors will come into play. *Holbrook*, 475 US at 570; see also *Estes v Texas*, 381 US 532, 542-543; 85 S Ct 1628; 14 L Ed 2d 543 (1965) (stating that questions of inherent prejudice arise when "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process"). One important factor in determining whether a particular practice is inherently prejudicial is whether the practice gives rise primarily to prejudicial inferences or whether it is possible for the jury to make a wider range of inferences from the use of the procedure. *Holbrook*, 475 US at 569 ("While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable."). If a particular procedure is not inherently prejudicial, the defendant bears the burden of showing that the procedure actually prejudiced the trial. *Id.* at 572. However, when the procedure is inherently prejudicial, it will not be upheld if the procedure was not necessary to further an essential state interest. *Id.* at 568-569.

Surprisingly few courts have had the opportunity to address whether the use of a screen is inherently prejudicial under due process. As discussed earlier, the Court in *Coy* determined that the use of a screen without particularized findings establishing the necessity of its use violated the defendant's right to confront the witnesses against him. The Court did not address whether the use of a screen is inherently prejudicial

under due process. However, in his dissent, Justice Blackmun did address this issue and determined that the use of a screen was not inherently prejudicial:

> Unlike clothing the defendant in prison garb, *Estelle v Williams*, [425 US at 504-505] or having the defendant shackled and gagged, *Illinois v. Allen*, 397 U.S. 337, 344 [905 S Ct 1057; 25 L Ed 2d 353] (1970), using the screening device did not "brand [appellant] . . . 'with an unmistakable mark of guilt.' " See *Holbrook v Flynn*, 475 U.S., at 571, quoting *Estelle v Williams*, 425 U.S., at 518 (BRENNAN, J., dissenting). A screen is not the sort of trapping that generally is associated with those who have been convicted. It is therefore unlikely that the use of the screen had a subconscious effect on the jury's attitude toward appellant. See [*Holbrook*,] 475 U.S. at 570. [*Coy*, 487 US at 1034-1035 (Blackmun, J., dissenting).]

In contrast to this view, at least one state court has held that the use of a screen is inherently prejudicial. See *State v Parker*, 276 Neb 661; 757 NW2d 7 (2008), mod 276 Neb 965 (2009). The court in *Parker* explained that the use of a large screen to shield the victim from the defendant's view might have caused the jury to conclude that the trial court placed the screen "because the court believed her accusations were true." *Id.* at 672. Even if this connection were discounted, the court determined that there were no innocuous inferences that the jury could have made concerning the screen and numerous impermissible inferences:

> Instead, more akin to prison garb or shackles, the screen acted as a dramatic reminder of Parker's position as the accused at trial. The scene presented of the jurors watching Parker as he was forced to look onto a large panel instead of his accuser makes palpable the marks of shame and guilt caused by this looming presence in the courtroom. Nor can we ignore . . . the dramatic emphasis placed by the screen upon the State's key witness. In a case such as this, where the jury's assessment of the credibility of the accuser is so

> crucial, the risk of these impermissible factors simply cannot be overlooked. [*Id.* at 673.]

We do not agree that the use of a screen is inherently prejudicial; rather, we agree with Justice Blackmun's conclusion that a screen is generally not the type of device that brands a defendant with the mark of guilt, such as wearing prison garb or being shackled and gagged. *Coy*, 487 US at 1034-1035 (Blackmun, J., dissenting). We also do not agree with the assertion in *Parker*, 276 Neb at 673, that the use of the screen can never be associated with innocuous events or give rise to a wider range of inferences beyond prejudicial ones. See *Holbrook*, 475 US at 569 (noting that the presence of guards does not necessarily give rise to impermissible inferences). Although a juror might conclude that the witness fears the defendant because the defendant actually harmed the witness, a reasonable juror might also conclude that the witness fears to look upon the defendant because the witness is not testifying truthfully. A reasonable juror could also conclude that the screen is being used to calm the witness's general anxiety about testifying rather than out of fear of the defendant in particular. Likewise, anytime a child victim testifies against a defendant who is accused of harming the child victim, the jury is going to reasonably infer that the child has some fear of the defendant. Finally, there are a variety of different screens and screening techniques that may be employed to shield a victim from having to see the defendant and, for that reason, the potential for prejudice will vary depending on the particular screen or screening technique employed. Accordingly, we cannot conclude that the use of a screen—no matter what its size or composition may be and no matter how it was employed at trial—must in every case be presumed to prejudice the defendant. See i*d.* at 569 ("However, 'reason, principle, and common human

experience,' counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.") (citation omitted); see also *Carey v Musladin*, 549 US 70, 72; 127 S Ct 649; 166 L Ed 2d 482 (2006) (holding that the state court did not misapply federal law when it determined that it was not inherently prejudicial for members of the public to wear buttons with the victim's image during the trial).

Moreover, the record in this case does not support the conclusion that the screen actually prejudiced Rose's trial. There is no evidence in the record that discloses the screen's appearance—we do not know its size, shape, or color or the nature of the materials used. In contrast to the court in *Parker*, this Court also has no record evidence concerning how the screen was stored in the courtroom or placed before JB testified. See *Parker*, 276 Neb at 672-673 (placing emphasis on the fact that the screen at issue was large and opaque and jutted curiously into the room and noting the manner in which it was put in place before the witness testified and concluding that, on the basis of the nature of the screen actually used, all screens are inherently prejudicial).

For this reason, we conclude that Rose has failed to meet his burden to show that the use of the screen prejudiced his trial. *Holbrook*, 475 US at 572.

Even if the use of a screen were inherently prejudicial, a trial court could nevertheless require a screen if its use were necessary to further an essential state interest. *Id.* at 568-569; see also *Parker*, 276 Neb 673 ("Having determined that the screen was inherently prejudicial, we subject the procedure to close judicial scrutiny and consider whether it was justified by an essential state interest specific to this trial."). The

United States Supreme Court has already held that the state has a compelling interest in protecting child witnesses from the trauma of testifying when the trauma would be the result of the defendant's presence and would impair the child's ability to testify. See *Craig*, 497 US at 855-857. And the trial court in this case found that the use of the screen was necessary in order to ensure that JB would be able to testify. Thus, the question is whether the trial court correctly determined that the use of the screen itself—as opposed to some other technique for shielding JB—was necessary under the facts of this case.

In *Parker*, the court recognized that the trial court had determined that the use of the screen was necessary to protect the child witness and ensure that she would be able to testify accurately and completely. *Parker*, 276 Neb at 673. However, the court still determined that the trial court erred because it "had available another equally effective method of protecting S.M. while procuring her testimony that would not have been inherently prejudicial to Parker's due process rights." *Id.* at 674. The court explained that videorecording or closed-circuit television would have been more effective because "the jury would not usually be specifically aware that the child was being shielded from the defendant. Instead, the jury could easily infer that the accommodation was standard procedure for children who, as common sense dictates, may be intimidated by the courtroom environment." *Id.* at 675.

We do not agree that a witness screen—even if assumed to be inherently prejudicial—could not be used under any circumstance because of the availability of videorecording or closed-circuit television. It is true that, in the analogous context of shackling, courts have held that, even if the trial court makes the necessary findings in support of using restraints, the defendant generally has the right to have the minimum level of restraints necessary to main-

tain safety and decorum and have held that the trial court must take steps to minimize any prejudice from the use of restraints. See *DeLeon v Strack*, 234 F3d 84, 87-88 (CA 2, 2000); *United States v Brooks*, 125 F3d 484, 502 (CA 7, 1997). Hence, the trial court had a duty to take steps that adequately protected JB from the trauma of testifying while minimizing the prejudice to Rose. Nevertheless, the analysis in *Parker* assumes that video is *always* preferable to the use of a screen because the use of video will *always* be less prejudicial. Yet a reasonable juror could just as easily infer that the child witness was recorded or interrogated in a separate room to shield the child from the defendant. This is especially true if the witness testifies through closed-circuit television with the parties' trial counsel present with the witness; in such a case, it will be patently obvious to the jury that the parties' trial counsel left the courtroom to interrogate the witness rather than bring the witness into the courtroom. Thus, the concern that the jury will infer that the court employed alternative procedures to protect the witness from the defendant is present for both the use of a screen and the use of video. Likewise, use of video equipment deprives the jury of the ability to see the witness in person and judge his or her reactions without the distorting effects created by the use of videorecording devices. For these reasons, even if the use of a screen were inherently prejudicial, under some circumstances a trial court might properly conclude that the use of a physical screening method would safeguard a defendant's rights better than the use of closed-circuit television or a recorded deposition. See *Holbrook*, 475 US at 572. Because Rose has not presented any evidence that the use of the screen occasioned more prejudice than an alternative method—indeed Rose's trial counsel did not even suggest use of another method—we conclude that Rose's claim under due process would fail even if we were to conclude that screens are inherently prejudicial.

III. DISCOVERY SANCTION

A. STANDARDS OF REVIEW

Rose next argues that the trial court erred when it denied his motion to preclude testimony by Thomas Cottrell, who was the prosecution's expert on child-sexual-abuse dynamics. Specifically, Rose argues that the trial court abused its discretion by failing to preclude the testimony, even after it found that there had been a discovery violation, on the sole basis that the motion was untimely. Rose also argues that, to the extent that the trial court properly denied his motion as untimely, his trial counsel's failure to make the motion earlier constituted the ineffective assistance of counsel.

This Court reviews a trial court's decision regarding the appropriate remedy for a discovery violation for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). When there has been no evidentiary hearing and no findings of fact by the trial court, this Court reviews de novo the entire record to determine whether the defendant's trial counsel's representation constituted the ineffective assistance of counsel. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

B. DISCOVERY VIOLATION

On the day before trial was to begin, Rose's trial counsel moved to preclude Cottrell from testifying at trial. Rose's counsel argued that exclusion was appropriate because the prosecution had failed to comply with the trial court's earlier discovery order that required the prosecution to supply a written curriculum

vitae for all expert witnesses as well as a written summary of the expert's proposed testimony and the basis for that testimony. Rose's counsel indicated that the prosecution's failure to comply with the discovery order prevented him from evaluating the expert's credentials or preparing for cross-examination.

On the second day of trial, the trial court addressed Rose's motion. The trial court found that the prosecution had not complied with the discovery order, but nevertheless refused to preclude Cottrell from testifying. The court found it noteworthy that the defense had known about the proposed expert for months:

> However, notice of Mr. Cottrell was given months ago and I don't—and there is no objection regarding Mr. Cottrell, as an expert, in respect to that matter until the day before this trial is commenced. This is a matter that could have been addressed weeks ago, months ago, it wasn't. So in this Court's opinion you waived that requirement. So that is denied. The Court will allow Mr. Cottrell to testify consistent with the decisions of the Supreme Court . . . .

Rose has not argued that Cottrell's testimony was inadmissible or that Cottrell was not competent to testify as an expert. Rather, Rose only argues that the trial court should have sanctioned the prosecution for failing to comply with the trial court's discovery order by precluding Cottrell from testifying—that is, Rose argues that the trial court should have precluded otherwise relevant and admissible testimony solely on the basis that the prosecution failed to give Rose a written copy of Cottrell's curriculum vitae and proposed testimony. Trial courts have the discretion to fashion an appropriate remedy for a discovery violation. *Davie*, 225 Mich App at 597-598. " 'The exercise of that discretion involves a balancing of the interests of the courts, the public, and the parties.' It requires inquiry into all the relevant circumstances, including 'the causes and bona

fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.' " *Id.* at 598 (citations omitted). However, the exclusion of a witness is an extreme sanction that should not be employed if the trial court can fashion a different remedy that will limit the prejudice to the party injured by the violation while still permitting the witness to testify. *Yost*, 278 Mich App at 386.

Cottrell did not testify about the substantive facts of this case; as he noted on cross-examination, he had not interviewed any person related to the case and had not reviewed any reports. Rather, his testimony was limited to explaining certain behaviors commonly engaged in by the perpetrators and victims of child sexual abuse. Given the nature of this testimony, Rose's trial counsel did not require significant advance notice in order to prepare for Cottrell's cross-examination. Further, although the prosecution failed to comply with the discovery order, Rose's trial counsel had notice months before trial that the prosecution intended to have Cottrell testify and could have requested the documentation at any point before trial and remedied any prejudice occasioned by the failure to submit the summary. Moreover, Rose's counsel did not ask the trial court to postpone Cottrell's testimony in order to give him more time to prepare; instead, he asked for the extreme sanction of preclusion. There was also no evidence that Rose's trial counsel was actually unable to effectively cross-examine Cottrell at trial. Given the nature of the testimony, the fact that any minimal prejudice could readily have been cured had Rose's trial counsel raised the issue earlier, and the absence of any evidence of prejudice, we conclude that the trial court's decision to deny Rose's motion to preclude Cottrell from testifying was within the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 379.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Rose also argues on appeal that his trial counsel was ineffective for failing to move to preclude Cottrell from testifying earlier. "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* at 387.

On this record, Rose's trial counsel's decision not to move to exclude Cottrell's testimony earlier cannot be said to fall below an objective standard of reasonableness. The decision whether and when to make a motion are matters of trial strategy and professional judgment that are entrusted to a defendant's trial counsel. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). And Rose's trial counsel may reasonably have concluded that the trial court would not grant a motion to exclude Cottrell's testimony at a point sufficiently in advance of trial to correct the discovery violation. Instead, counsel may have thought that the best point to make the motion was immediately before trial when he could reasonably argue that the deficient discovery would prevent him from adequately preparing. Therefore, on this record, we cannot conclude that the decision of Rose's trial counsel fell below an objective standard of reasonableness under prevailing professional norms.

Likewise, given the limited nature of Cottrell's testimony and the trial court's ability to fashion a less extreme sanction, it is highly unlikely that the trial court would have precluded Cottrell from testifying had his counsel filed the motion earlier. See *Yost*, 278 Mich App at 386 (noting that trial courts should, when able, fashion a remedy short of exclusion). Indeed, in its opinion and

order denying Rose's motion for a hearing or new trial, the court essentially asserted the same thing. Rose has also not presented any evidence that, had his counsel had more time to prepare, he might have more effectively challenged Cottrell's testimony on cross-examination. Accordingly, Rose has failed to show that his trial counsel's failure to seek preclusion earlier prejudiced his trial.

The trial court did not abuse its discretion when it denied Rose's motion to preclude Cottrell from testifying, and Cottrell's trial counsel was not ineffective for failing to make the motion earlier.

IV. JUROR ISSUES

A. STANDARDS OF REVIEW

Finally, Rose argues that the trial court abused its discretion when it denied his motion for a new trial on the basis of a juror's failure to disclose his familiarity with JB's family. In the alternative, he argues that the trial court abused its discretion when it denied his motion for an evidentiary hearing to explore this juror's knowledge and to evaluate whether his trial counsel would have sought to dismiss the juror had he known of the connection.

This Court reviews for an abuse of discretion a trial court's decision concerning whether to grant a motion for a new trial. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). This Court also reviews for an abuse of discretion a trial court's decision concerning whether to hold an evidentiary hearing. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008).

B. NEW TRIAL OR EVIDENTIARY HEARING

On appeal, Rose argues that the trial court should have granted him a new trial because there was evi-

dence that one of the jurors knew people who were related to the victim and failed to disclose that information to the court during voir dire. At the very least, Rose contends, the trial court should have held an evidentiary hearing to determine the full extent of the juror's knowledge and to learn whether his trial counsel would have exercised a peremptory challenge had he known that the juror knew members of the victim's extended family.

A criminal defendant has the right to be tried by an impartial jury. *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). A juror's failure to disclose information that the juror should have disclosed may warrant a new trial if the failure to disclose denied the defendant an impartial jury. *Id.* at 548. "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id.* at 550.

During voir dire in the present case, the potential jurors were asked if they knew any of the witnesses in the case, who included several members of JB's family. Each of the witnesses from JB's family was from her immediate family. Juror No. 168 did not indicate that he knew any of these witnesses. However, on the third day of trial, Juror No. 168 brought to the trial court's attention that he might have known a potential witness.

Juror No. 168 told the court that he thought the witness was GA, whom he had known in junior high school approximately 40 years ago. Rose's trial counsel indicated that he did have a potential rebuttal witness named GA. When asked, the juror told the court that he had not had any contact with GA since junior high school. The trial court then asked the juror whether he would treat the witness any differently or whether he would evaluate her testimony by the same standards as

every other witness. The juror responded that he would treat her the same as any other witness. After this, the trial court indicated that it was "satisfied there's no problem."

After the verdict, Rose's new counsel filed a motion for a new trial and eventually submitted three affidavits in support of that motion. The affidavits were by the victims' aunts, GA and LB, and their uncle, BB.[1] In their affidavits, GA and LB averred that on the first day of trial they went to lunch in a restaurant and discussed the case in the presence of a person they later realized was Juror No. 168. They both indicated that Juror No. 168 did not give any sign that he recognized them. In his affidavit, BB averred that he had become acquainted with Juror No. 168 at work before trial and that the juror told him that he remembered BB's family, but was more familiar with BB's sisters, GA and LB. From this evidence and the fact that Juror No. 168 told the court that he knew GA, Rose argues that it is clear that Juror No.168 knew JB's family and failed to spontaneously disclose that information to the court. This, he further argues, amounted to juror misconduct that warrants a new trial.

Although these affidavits are evidence that Juror No. 168 might have known members of JB's extended family at one time, there was no evidence that Juror No. 168 actually knew any of the members of JB's family who were identified as potential witnesses before trial. It is also undisputed that the potential jurors were not asked whether they knew GA. Accordingly, there was no evidence that the juror misled the court when he denied knowing any of the potential witnesses. Further, the juror's own statements on the third day of trial and the

[1] In the affidavits, the affiants used their formal names. However, for ease of reference, we have referred to them by their initials as used at trial.

affidavits demonstrated that the juror's knowledge of the family was limited to decades-old interactions and limited recent interactions at work. BB himself averred that Juror No. 168 did not at first know him from work, but only learned that BB was a member of the family after BB approached him and disclosed this fact. Further, there was no evidence that Juror No. 168 actually knew JB's father or his immediate family members. Finally, the mere fact that Juror No. 168 might have known the victims's aunts and uncles to some limited degree did not establish that the juror harbored any bias against or in favor of the family. Absent evidence that Juror No. 168 was partial, Rose has failed to establish the prejudice required in order to warrant a new trial on the basis of Juror No. 168's failure to spontaneously bring up the fact that he knew some members of JB's family before the trial began. See *Miller*, 482 Mich at 553-554. Accordingly, the trial court did not err when it refused to grant Rose a new trial on the grounds of juror misconduct.

For similar reasons, the trial court did not err when it denied Rose's motion to hold an evidentiary hearing concerning whether and to what extent Juror No. 168 might have known members of JB's family. In this case, although there was evidence that Juror No. 168 might have had some limited knowledge of the family, there was no evidence that Juror No. 168 was partial. Instead, Rose essentially invited the trial court to speculate that Juror No. 168 might have had some bias on the basis of his purported failure to disclose his knowledge of the family. However, the mere possibility of prejudice is insufficient to warrant relief. *People v Nick*, 360 Mich 219, 227; 103 NW2d 435 (1960). And absent more concrete evidence tending to suggest bias, the trial court was well within the range of principled outcomes when it declined Rose's motion for an evidentiary hearing.

Finally, we note that, in his motion for a new trial and supporting affidavits, Rose argued that Juror No. 168 was potentially exposed to outside information about the case. However, on appeal, Rose has not addressed this argument by reference to law or facts. Therefore, we conclude that Rose has abandoned these alternative claims of juror impropriety. *Martin*, 271 Mich App at 315.

There were no errors warranting relief.

Affirmed.

PEOPLE v CAMPBELL

Docket No. 291345. Submitted July 7, 2010, at Detroit. Decided July 13, 2010. Approved for publication August 26, 2010, at 9:05 a.m.

Keith J. Campbell was charged in the Tuscola Circuit Court with manufacturing marijuana and possession of marijuana with intent to deliver, as well as misdemeanor possession of marijuana and possession of a firearm during the commission of a felony. Defendant claimed that the marijuana was for medicinal use. While the charges were pending, the Michigan Medical Marihuana Act (MMA), MCL 333.26421 *et seq*., became law. Defendant moved to dismiss the charges under MCL 333.26428(a), which provides an affirmative defense for marijuana-related charges. The court, Patrick R. Joslyn, J., granted defendant's motion, concluding that the MMA should be retroactively applied, and the prosecution appealed.

The Court of Appeals *held*:

Statutes are generally presumed to operate prospectively unless the Legislature expressly or impliedly indicated an intention to give the statute retroactive effect. An exception exists for remedial statutes, which operate in furtherance of an existing remedy and neither create nor destroy existing rights. MCL 333.26428(a) created a new right by providing an affirmative defense to a criminal defendant facing prosecution for crimes related to the use of marijuana. Because the MMA created a new right, it cannot be considered a remedial statute and must therefore be applied prospectively to crimes committed on or after its effective date of December 4, 2008. Because defendant's alleged crime occurred before the MMA's effective date, the defense it provides was not available to him and the trial court abused its discretion by dismissing the charges against him.

Reversed and remanded for reinstatement of charges.

CRIMINAL LAW — CONTROLLED SUBSTANCES — MARIJUANA — MICHIGAN MEDICAL MARIHUANA ACT — STATUTES — EFFECTIVE DATES OF STATUTES.

The affirmative defense provided under the Michigan Medical Marihuana Act for defendants facing marijuana-related criminal charges applies only to offenses committed on or after December 4, 2008 (MCL 333.26428).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Mark E. Reene*, Prosecuting Attorney, and *Joel D. McGormley*, Assistant Attorney General, for the people.

Matthew R. Abel for defendant.

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

PER CURIAM. Defendant was charged with manufacturing marijuana, MCL 333.7401(2)(d)(*iii*), possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*), possession of a firearm during the commission of a felony (two counts), MCL 750.227b, and misdemeanor possession of marijuana, MCL 333.7403(2)(d). The trial court granted defendant's motion to dismiss after concluding that the Michigan Medical Marihuana Act (MMA), MCL 333.26421 *et seq*., should be retroactively applied. Plaintiff appeals as of right. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The charges against defendant resulted from a search, pursuant to a warrant, of his home and vehicle on December 3, 2007. Nine marijuana plants, two bags of dried marijuana, and assorted drug paraphernalia were discovered in the search. A shotgun was also recovered from defendant's home. Defendant stated to the police officers who executed the warrant that the marijuana was for medicinal use. While defendant's criminal charges were pending, the MMA was enacted and became effective on December 4, 2008.

Defendant moved to dismiss the charges against him on the basis of the MMA, which provides an affirmative defense for a criminal defendant facing marijuana-related charges. MCL 333.26428(a). The trial court granted defendant's motion despite the prosecution's assertion that

defendant was not entitled to the defense because his arrest occurred before the MMA became effective.

The sole issue on appeal is whether the MMA should be retroactively applied. A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). Questions of statutory construction are reviewed de novo. *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007).

In reaching its decision, the trial court relied on *People v Wright*, 40 Cal 4th 81; 51 Cal Rptr 3d 80; 146 P3d 531 (2006), a California Supreme Court case that authorized retroactive application of a statute that provided a new affirmative defense under that state's medical marijuana laws. We recognize that cases from foreign jurisdictions, which are not binding, can be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). However, the outcome in *Wright* is inconsistent with Michigan law because the enactment of the MMA affected substantive rights, as will be discussed in more detail below. Accordingly, the trial court abused its discretion by relying on *Wright*.

Generally, statutes are presumed to operate prospectively unless the Legislature either expressly or impliedly indicated an intention to give the statute retroactive effect. *People v Conyer*, 281 Mich App 526, 529; 762 NW2d 198 (2008). There is a recognized exception to this general rule for remedial or procedural statutes. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). A statute is remedial if it operates in furtherance of an existing remedy and neither creates nor destroys existing rights. *People v Link*, 225 Mich App 211, 214-215; 570 NW2d 297 (1997).

We find our decision in *Conyer* instructive in the resolution of this issue. *Conyer*, like the instant case,

dealt with whether a newly enacted statute should be applied retroactively. The *Conyer* Court concluded that the statute in that case, MCL 780.972, which eliminated the duty to retreat in certain situations, should only be applied prospectively because it affected substantive rights and the Legislature had not manifested an intent that it be applied retroactively. *Conyer*, 281 Mich App at 531. The *Conyer* Court also recognized that the statute could be considered at least partially remedial, but maintained that retroactive application was not permissible because the statute created a new substantive right. *Id*. at 530.

Like the statute analyzed in *Conyer*, MCL 333.26428(a) created a new right that did not exist before the enactment of the MMA by providing an affirmative defense to a criminal defendant facing prosecution for crimes related to the use of marijuana. Because the MMA created a new right, it cannot be considered a remedial statute. *Link*, 225 Mich App at 214-215. Consequently, the general presumption for prospective application is controlling.

We reject defendant's argument that MCL 333.26428(a) is subject to retroactive application because there is an indication that the Legislature so intended. The sections of the MMA that defendant relies on to support this position, specifically MCL 333.26425 and MCL 333.26429, do not relate to whether the affirmative-defense provision should be retroactively or prospectively applied. Instead, those sections provide a timeline for actions to be taken by the Department of Community Health to implement the registered-user provisions of the MMA, as well as a self-executing alternative if the department fails to take the necessary actions within the specified timeline. In no way does this language affect the general presumption that statutes are to be prospectively applied. In fact, it is this general presumption that negates

defendant's additional argument that the Legislature, by failing to include language that the MMA is to be applied prospectively, indicated its intent for retroactive application.

We also reject defendant's argument that the trial court's decision was correct in light of the outcome in *People v Lowell*, 250 Mich 349; 230 NW 202 (1930). In *Lowell*, the defendant was charged with violating the Michigan prohibition act. After the defendant engaged in the illegal conduct, the act was amended to increase the penalty. The *Lowell* Court upheld the trial court's decision to dismiss the charges after concluding that the amendment constituted a repeal of the act that authorized the prosecution against the defendant and determining that prosecution under the amended act would unconstitutionally violate the Ex Post Facto Clause. Defendant's reliance on *Lowell* is misplaced because the instant case does not involve the repeal of an existing criminal statute. Indeed, the possession, manufacture, and distribution of marijuana remain criminal acts, but now there is an affirmative defense available in some cases.

In light of our conclusions, we need not address the remaining arguments raised on appeal.

Reversed and remanded for reinstatement of the charges against defendant. We do not retain jurisdiction.

PEOPLE v SHORT

Docket No. 292288. Submitted June 15, 2010, at Lansing. Decided August 26, 2010, at 9:10 a.m.

Reginal L. Short was charged in the Saginaw Circuit Court with various weapons offenses after firearms were found in his vehicle when it was searched incident to his arrest for driving without a license or insurance. Defendant was secured in the back seat of the patrol car when the police officer searched his vehicle. Defendant moved to suppress the evidence of the weapons, arguing that the search violated his Fourth Amendment rights. The court, Janet M. Boes, J., denied defendant's motion following an evidentiary hearing, concluding that the search was lawful under *New York v Belton*, 453 US 454 (1981), and *Thornton v United States*, 541 US 615 (2004), which allowed vehicle searches incident to the arrest of a recent occupant even if there was no possibility the person arrested could gain access to the vehicle. The United States Supreme Court decided *Arizona v Gant*, 556 US ___; 129 S Ct 1710 (2009), the same day as defendant's hearing, narrowing the *Belton* rule. On reconsideration, the trial court again denied defendant's motion, concluding that while the search might have been unlawful under *Gant*, the officer had acted reasonably and in good faith in reliance on *Belton*. Defendant appealed.

The Court of Appeals *held*:

Under *Gant*, police officers may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment of the vehicle or if it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. Although *Gant* applied retroactively to this case because the case was pending when the court issued *Gant*, the evidence obtained from the unlawful search need not be automatically excluded. Under the good-faith exception to the exclusionary rule, if the police officers acted in good-faith reliance on caselaw existing at the time of the search, exclusion may not be an appropriate remedy. In the present case, the vehicle search was lawful under the law existing at the time of the search. Because it was objectively reasonable for the officer to rely on the caselaw existing at the time of the search, even though that caselaw was subsequently

overturned, the good-faith exception to the exclusionary rule applied, and the trial court correctly denied defendant's motion to suppress the evidence.

Affirmed.

1. SEARCHES AND SEIZURES — ARREST — VEHICLE SEARCHES INCIDENT TO ARREST.

Arizona v Gant, 556 US 332 (2009), which held that police officers may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the vehicle's passenger compartment or if it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle, applies retroactively to cases pending at the time the Court issued the opinion (US Const, Am XIV).

2. SEARCHES AND SEIZURES — FOURTH AMENDMENT — EXCLUSIONARY RULE — GOOD-FAITH EXCEPTION.

The good-faith exception to the exclusionary rule applies to an otherwise unlawful search when a police officer undertakes the search in reasonable and good-faith reliance on caselaw in existence at the time of the search, even if the caselaw is subsequently overturned (US Const, Am XIV).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

James F. Piazza for defendant.

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

SAAD, J. The prosecutor charged defendant with carrying a dangerous weapon with unlawful intent, MCL 750.226; being a felon in possession of a firearm, MCL 750.224f; carrying a concealed weapon, MCL 750.227; and possession of a firearm during the commission of a felony (two counts), MCL 750.227b. Defendant appeals by leave granted the trial court's order that denied his motion to suppress evidence. We affirm.

I. NATURE OF THE CASE AND ISSUE OF FIRST IMPRESSION

A disputed search of defendant's vehicle after defendant was arrested and placed in the back of a police car raises a Fourth Amendment issue of first impression under Michigan law that was left unresolved by our Court's recent opinion in *People v Mungo (On Remand)*, 288 Mich App 167; 792 NW2d 763 (2010). In light of the United States Supreme Court's decision in *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009), which overruled the well-established rule in *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), and its progeny, we must consider whether an officer's good-faith reliance on caselaw that is later overturned may form a proper basis to avoid the operation of the exclusionary rule. For the reasons explained below, and pursuant to the reasoning of rulings of the courts of appeals for the tenth and eleventh federal circuits, we hold that the good-faith exception applies and the trial court correctly denied defendant's motion to suppress.

II. FACTS AND PROCEEDINGS

Michigan State Police Trooper Jasen Sack testified at the hearing on defendant's motion to suppress evidence of two weapons found in his vehicle. Trooper Sack testified that on January 13, 2009, at around midnight, he observed defendant's vehicle traveling west on Webber Street in Saginaw. As defendant turned north onto Maplewood Avenue, Trooper Sack noticed that defendant's vehicle did not have a license plate. Trooper Sack and his partner turned their patrol car around to pursue defendant's vehicle. As defendant pulled into the parking lot of a convenience store and parked his car, Trooper Sack followed and activated the patrol car's flashing lights. Trooper Sack stopped his patrol car

approximately 10 to 15 feet away from defendant's vehicle. According to Trooper Sack, defendant stepped out of his vehicle, Trooper Sack alighted from his patrol car, and defendant began to walk toward the troopers. Trooper Sack asked defendant about his license plate, and defendant said he did not have one. Trooper Sack testified that, because defendant also stated that he did not have a driver's license or insurance, Trooper Sack placed defendant under arrest for driving with no operator's license and no insurance. Trooper Sack handcuffed defendant and placed him in the back of the patrol car.

Defendant offered testimony similar to Trooper Sack's except, according to defendant, he had exited his vehicle and was walking toward the entrance of the convenience store when he noticed that the troopers had followed him into the parking lot. Defendant further testified that the troopers asked him to come toward them and, after answering some questions about his license and insurance, he was arrested and placed in the back of the patrol car. It is undisputed that Trooper Sack searched defendant's vehicle after defendant was handcuffed and placed inside the patrol car. When he searched the inside of defendant's car, Trooper Sack found a rifle with a cut stock, a .223 caliber assault rifle, and four or five ammunition magazines.

Defendant moved to suppress evidence of the weapons found in his vehicle on the ground that the search of his vehicle violated his Fourth Amendment rights. Defendant also sought to suppress evidence obtained during a subsequent search of his home. After taking testimony from Trooper Sack and defendant on April 21, 2009, the trial court denied defendant's motion to suppress. The court ruled that the search of defendant's vehicle was constitutional pursuant to *Belton* and *Thornton v United States*, 541 US 615; 124 S Ct 2127; 158 L Ed 2d 905 (2004). On

the day of the suppression hearing, the United States Supreme Court decided *Gant*, which, in essence, narrowed the application of *Belton*. The trial court reconsidered defendant's motion to suppress, but again denied the motion on the ground that, while the search may have been unconstitutional under *Gant*, when the trooper conducted the search he had acted reasonably and in good-faith reliance on *Belton*. Accordingly, the trial court applied the good-faith exception to the exclusionary rule and declined to suppress the evidence.

III. ANALYSIS

Defendant argues that *Gant* applies retroactively, the search of his vehicle was unconstitutional pursuant to *Gant*, and the trial court should not have applied the good-faith exception to the exclusionary rule because the exception does not or ought not apply to warrantless searches under Michigan law. The prosecution acknowledges that *Gant* applies retroactively to this case and that, pursuant to *Gant*, the search of defendant's vehicle violated his Fourth Amendment rights. However, the prosecution argues that, because Trooper Sack relied on the longstanding rule in *Belton* and its progeny that permitted him to conduct a search of the vehicle incident to defendant's arrest, the trial court correctly applied the good-faith exception.

As this Court explained in *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009), "[w]e review for clear error a trial court's findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress." This Court also reviews de novo whether an exclusionary rule applies. *Id*.

The parties are correct that, pursuant to the Supreme Court's holding in *Gant*, the search of defendant's vehicle was unconstitutional. Under *Belton* and

its progeny, it was lawful for an officer to search a vehicle "incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 556 US at 341. However, the Court in *Gant* rejected this widely accepted reading of *Belton* and ruled that, pursuant to *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), police officers may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 US at 343. A vehicle search is also permissible if it is " 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " *Id.*, quoting *Thornton*, 541 US at 632 (Scalia, J., concurring in the judgment). As noted earlier, defendant was handcuffed and secured in the back of the police car when Trooper Sack conducted the search. Also, defendant was arrested for operating a vehicle without a license and without insurance, so the officers could not reasonably have expected to find inside the vehicle any evidence related to the reason for defendant's arrest. Accordingly, the search of defendant's vehicle violated the Fourth Amendment as interpreted in *Gant*.

The parties are also correct that *Gant* applies retroactively to this case under *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."). Though *Gant* was decided well after defendant's arrest and the vehicle search, defendant's case was pending in the trial court when the

Supreme Court issued its opinion and, thus, defendants' holding in *Gant* applies. However, retroactive application of *Gant* does not necessarily require suppression of the disputed evidence. "[W]hether the exclusion of evidence is an appropriate sanction in a particular case is a separate issue from whether police misconduct violated a person's Fourth Amendment rights." *People v Goldston*, 470 Mich 523, 529; 682 NW2d 479 (2004). When there has been a violation of a defendant's Fourth Amendment rights, the exclusionary rule generally bars the use of the disputed evidence at trial, *Mungo*, 288 Mich App at 176, citing *United States v Leon*, 468 US 897, 906; 104 S Ct 3405; 82 L Ed 2d 677 (1984), but our courts have also recognized that exclusion is not an automatic remedy for an unlawful search. As the *Mungo* Court explained:

> The purpose of the exclusionary rule is to deter police misconduct. [*Leon*, 468 US at 906]. In *Leon*, the United States Supreme Court established a good-faith exception to the exclusionary rule, noting that application of the exclusionary rule requires weighing the benefits of the resulting deterrence of police misconduct against the costs incurred by preventing the introduction of otherwise valid evidence. *Id.* at 906-907. The *Leon* Court concluded that circumstances could exist in which these costs could outweigh any slight benefits gained by application of the exclusionary rule. For example, if a law enforcement officer acted in good faith and in an objectively reasonable manner on a search warrant later found to be defective because of a judicial error, excluding the evidence obtained in the search would not operate to deter police misconduct. *Id.* at 920-921. The *Leon* Court concluded that the exclusionary rule should be applied on a case-by-case basis, and only if application would deter police misconduct. *Id.* at 918. [*Mungo*, 288 Mich App at 176.]

Contrary to defendant's position on appeal, this Court has rejected the view "that the retroactivity doctrine

precludes application of the good-faith exception to the exclusionary rule." *Id.* at 182. Indeed, the fact that *Gant* applies retroactively does not preclude the court from considering the good-faith exception when it determines an appropriate remedy. *Id*.

The question of first impression presented here is whether an officer's good-faith reliance on caselaw may prevent exclusion of the disputed evidence at trial. The United States Court of Appeals for the Sixth Circuit has not ruled on this question, and the federal district courts in Michigan disagree on the matter. See *United States v Schuttpelz*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 15, 2010 (Case No. 07-20410); 2010 WL 200827, at *4 (stating that even if the search would have violated *Gant*, *Belton* "was the law of the land" at the time of the search and the good-faith exception applies); *United States v Peoples*, 668 F Supp 2d 1042, 1050-1051 (WD Mich, 2009) (declining to extend the good-faith exception to include an officer's good-faith reliance on existing caselaw). This Court discussed but did not decide this question in *Mungo*, 288 Mich App at 183:

> Whether reliance on caselaw can form a basis to invoke the good-faith exception to the exclusionary rule is a significant legal question. The United States Supreme Court has been silent on this issue. The Sixth Circuit and Tenth Circuit courts of appeals have expanded the good-faith exception to apply to a law enforcement officer's reliance on caselaw. In [*United States v McCane*, 573 F3d 1037 (CA 10, 2009)] and similarly in [*United States v*] *Lopez*,[1] however, it was the clear and established law of

[1] *United States v Lopez*, unpublished memorandum opinion of the United States District Court for the Eastern District of Kentucky, issued September 23, 2009 (Case No. 6:06-120-DCR); 2009 WL 3112127; 2009 US Dist LEXIS 87720 (*Lopez III*).

> the circuit that law enforcement officers were vested with the right to search a vehicle incident to a recent occupant's arrest. *McCane*, 573 F3d at 1041-1042 (citing several Tenth Circuit opinions upholding searches without regard to the nature of the offense and in which the defendant was already restrained); *Lopez III*, 2009 WL 3112127 at *2, 2009 US Dist LEXIS 87720 at *7 ("Like its sister circuits prior to *Gant*, the Sixth Circuit recognized as lawful under *Belton* searches of vehicles conducted incident to an arrest even in circumstances where the arrestee did not have access to the passenger compartment of his car."). See also [*United States v Grote*, 629 F Supp 2d 1201, 1205 (ED Wash, 2009)] (noting that at the time the defendant's vehicle was searched it was "well accepted in the Ninth Circuit and elsewhere" that police could search a motor vehicle incident to a lawful arrest "without regard to whether an arrestee was secured or unsecured, and without regard to whether evidence particular to the crime of arrest might be found in the vehicle").

Notwithstanding its acknowledgement of the *probability* that the good-faith exception can be premised on an officer's reliance on existing caselaw in Michigan, the Court in *Mungo* declined to rule on the question because *Mungo* involved an issue of first impression about whether the rule in *Belton* could be extended "to a vehicle search solely incident to a *passenger's* arrest." *Id.* at 184 (emphasis added). The *Mungo* Court explained:

> Given our conclusion that the law in this state on this point was not established and clear, the search and seizure of evidence from defendant's vehicle could not, as a matter of law, have been premised on law enforcement's good-faith reliance on caselaw. We therefore conclude that the good-faith exception to the exclusionary rule has no application in the present case. [*Id.*]

In contrast, when the troopers searched defendant's vehicle in this case, the law in this state and, indeed,

throughout the country was well established and abundantly clear: Under *Belton* and its progeny, the search of defendant's vehicle was lawful incident to defendant's arrest.

At the time Trooper Sack acted, the validity of the search was clearly supported by settled caselaw that was subsequently overruled by *Gant*. Again, the Court in *Belton* ruled that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 US at 460. In *United States v White*, 871 F2d 41, 44 (CA 6, 1989), the Sixth Circuit interpreted *Belton* as permitting the search of a vehicle incident to an arrest "even after the arrestee has been separated from his vehicle and is no longer within reach of the vehicle or its contents." Indeed, the court in *White* specifically held, "[I]n this Circuit, our consistent reading of *Belton* has been that, once a police officer has effected a valid arrest, that officer can search the area that is *or was* within the arrestee's control." *Id*.; see also *United States v Martin*, 289 F3d 392, 399-400 (CA 6, 2002). Trooper Sack testified that he turned on the flashing lights of his patrol vehicle as he followed defendant into the convenience store parking lot. As the Sixth Circuit opined in *United States v Hudgins*, 52 F3d 115, 119 (CA 6, 1995):

> Where the officer initiates contact with the defendant, either by actually confronting the defendant *or by signaling confrontation with the defendant*, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton* and will be upheld as reasonable. [Emphasis added.]

And, though defendant maintains that he was away from his vehicle and walking toward the convenience store when the troopers approached him, this does not help his case because in *Thornton*, the Supreme Court ruled that, as long as the arrestee was a *recent* occupant of the vehicle, an officer may conduct a search of the vehicle "even when an officer does not make contact until the person arrested has left the vehicle." *Thornton*, 541 US at 617. Thus, regardless of which version of events is true, the search was clearly valid under caselaw existing at the time of the search.

The majority in *Gant* recognized that *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 556 US at 341. Indeed, the Court observed that the Arizona Supreme Court's "reading of *Belton* has been widely taught in police academies and . . . law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years . . . ." *Id*. at 349. Justice Breyer noted the "considerable reliance" on the "bright-line rule that permits a warrantless search of the passenger compartment of an automobile incident to the lawful arrest of an occupant—regardless of the danger the arrested individual in fact poses." *Id*. at 354-355 (Breyer, J., dissenting). Justice Alito further opined:

> The *Belton* rule has been taught to police officers for more than a quarter century. Many searches—almost certainly including more than a few that figure in cases now on appeal—were conducted in scrupulous reliance on that precedent. It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the *Belton* rule. [*Id*. at 359 (Alito, J., dissenting).]

Thus, it is beyond dispute that, before *Gant*, it was broadly understood that the precise actions taken by Trooper Sack to search defendant's vehicle were constitutionally sound.

Again, "[t]he purpose of the exclusionary rule is to deter police misconduct." *Goldston*, 470 Mich at 526. Courts have long recognized that "where the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances.' " *Leon*, 468 US at 919-920, quoting *Stone v Powell*, 428 US 465, 539-540; 96 S Ct 3037; 49 L Ed 2d 1067 (1976) (White, J., dissenting).

Excluding the evidence in this case does nothing to "remov[e] incentives to engage in unreasonable searches and seizures." *Goldston*, 470 Mich at 529. In light of the overwhelming majority of cases that have explicitly approved conduct identical to that of the trooper in this case, we hold that the trial court properly applied the good-faith exception to the exclusionary rule. Indeed, "[t]he lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context." *McCane*, 573 F3d at 1044 n 5. Accordingly, we agree with and adopt the reasoning of the United States Court of Appeals for the Tenth Circuit in *McCane*, 573 F3d at 1044-1045:

> Two inseparable principles have emerged from the Supreme Court cases and each builds upon the underlying purpose of the exclusionary rule: deterrence. First, the exclusionary rule seeks to deter objectively unreasonable police conduct, i.e., conduct which an officer knows or should know violates the Fourth Amendment. *See, e.g.,*

> *Herring* [*v United States*, 555 US 135, 141-146; 129 S Ct 695; 172 L Ed 2d 496 (2009); *Illinois v Krull*, 480 US 340, 348-349; 107 S Ct 1160; 94 L Ed 2d 364 (1987)]. Second, the purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities, and even if it was appropriate to consider the deterrent effect of the exclusionary rule on other institutions, there would be no significant deterrent effect in excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement. *See*, *e.g.*, [*Arizona v Evans*, 514 US 1, 14-15; 115 S Ct 1185; 131 L Ed 2d 34 (1995)]; *Krull*, 480 U.S. at 351-52, 107 S.Ct. 1160; *Leon*, 468 U.S. at 916-17, 104 S.Ct. 3405. Based upon these principles, we agree with the government that it would be proper for this court to apply the good-faith exception to a search justified under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by a Supreme Court decision.
>
> Just as there is no misconduct on the part of a law enforcement officer who reasonably relies upon the mistake of a court employee in entering data, *Evans*, 514 U.S. at 15, 115 S.Ct. 1185, or the mistake of a legislature in passing a statute later determined to be unconstitutional, *Krull*, 480 U.S. at 349-50, 107 S.Ct. 1160, a police officer who undertakes a search in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision, has not engaged in misconduct. The refrain in *Leon* and the succession of Supreme Court good-faith cases is that the exclusionary rule should not be applied to "objectively reasonable law enforcement activity." [*Leon*, 468 US at 919]. Relying upon the settled case law of a United States Court of Appeals certainly qualifies as objectively reasonable law enforcement behavior.

The Eleventh Circuit also recently ruled "that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subse-

quently overturned." *United States v Davis*, 598 F3d 1259, 1264 (CA 11, 2010).[2] As the Court explained in *Davis*:

> The [Supreme] Court has gradually expanded this good-faith exception to accommodate objectively reasonable police reliance on: subsequently invalidated search warrants, *Leon*, 468 U.S. 897, 104 S.Ct. 3430; subsequently invalidated statutes, *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); inaccurate court records, *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995); and negligently maintained police records, *Herring*, 129 S.Ct. 695, 172 L.Ed.2d 496. In each of its decisions expanding the exception, the Court has concluded that the unlawful police conduct at issue was neither "sufficiently deliberate that exclusion [could] meaningfully deter it" nor "sufficiently culpable that such deterrence [would be] worth the price paid by the justice system." *Herring*, [555 US at 144] 129 S.Ct. at 702. [*Id.* at 1265.]

Like the officer in *Davis*, Trooper Sack did not intentionally violate defendant's rights and he cannot be "held responsible for the unlawfulness of the search he conducted." *Id*. As discussed, at the time Trooper Sack conducted the search, our courts adhered to the nearly universally accepted reading of *Belton* that an officer may search a vehicle incident to a lawful arrest. Law enforcement officers are entitled to, and indeed must, rely on court decisions that define appropriate police conduct, and it is illogical to impose "the extreme sanction of exclusion" when a clear rule of conduct is later abrograted by the Supreme Court. *Leon*, 468 US at 916. Accordingly, though the well-settled interpretation of *Belton* was changed by *Gant*, because it was objec-

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[2] As the court noted in *Davis*, 598 F3d at 1263, the Fifth Circuit ruled in 1987 that evidence should not be excluded if an officer conducted a search in good-faith reliance on caselaw from that circuit even if the caselaw was later overturned. *United States v Jackson*, 825 F2d 853, 866 (CA 5, 1987).

tively reasonable for Trooper Sack to have relied on that precedent, the good-faith exception to the exclusionary rule applies and the trial court correctly denied defendant's motion to suppress.

Affirmed.

PEOPLE v TERRELL

Docket No. 286834. Submitted December 8, 2009, at Detroit. Decided August 26, 2010, at 9:15 a.m.

Tion Terrell was convicted by a Wayne Circuit Court jury of assault with intent to commit murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. Terrell was jointly tried with a codefendant who had asserted his Fifth Amendment right not to testify at trial and who was acquitted by the jury. After his conviction, Terrell moved for a new trial on the basis of newly discovered evidence, specifically, that a codefendant would testify that the victim had been armed and that another codefendant, not Terrell, shot the victim. The court, James A. Callahan, J., granted the motion, concluding that although the proffered testimony of the codefendant was not newly discovered, it had been unavailable to Terrell at the time of his trial. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. A new trial is warranted on the basis of newly discovered evidence when (1) the evidence itself, not merely its materiality, is newly discovered, (2) the newly discovered evidence is not cumulative, (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial. A codefendant's posttrial or postconviction testimony, however, does not constitute newly discovered evidence sufficient to warrant a new trial when the defendant was aware of the evidence before trial. Moreover, MCR 6.431(B) does not authorize the grant of a new trial on the basis of such evidence because the evidence is not newly discovered, but merely newly available. The rule applies even when a codefendant invokes his or her Fifth Amendment right to not testify.

2. The trial court should not have granted Terrell's motion for a new trial because the record revealed that he knew or should have known before trial that his codefendant could have provided material testimony. Thus, the evidence was only newly available, not newly discovered, and therefore was not sufficient to warrant a new trial.

Reversed and remanded.

SHAPIRO, J., concurring, concurred in the result because Terrell did not provide an adequate basis for the trial court to grant his motion. Because there was other evidence that Terrell acted in self-defense, defense counsel made no attempt to interview the codefendant, there was no attempt to call him as a witness, there was no attempt to seek severed trials, and there was no offer of proof, Terrell failed to show that the evidence was genuinely unavailable, and the trial court should have denied the motion for a new trial. Judge SHAPIRO would hold, however, that testimony of a codefendant who asserted his or her Fifth Amendment privilege at trial should not be categorically excluded but should be considered on a case-by-case basis.

CRIMINAL LAW — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — CODEFENDANT'S TESTIMONY.

A codefendant's posttrial or postconviction testimony does not constitute newly discovered evidence sufficient to warrant a new trial when the defendant was aware of the evidence before trial; such evidence is not newly discovered, but merely newly available, even when the codefendant invoked his or her Fifth Amendment right to not testify at trial (MCR 6.431[B]).

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 *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

Marvin Barnett for defendant.

Before: METER, P.J., and BORRELLO and SHAPIRO, JJ.

BORRELLO, J. Following a jury trial, defendant Tion Terrell[1] was convicted of assault with intent to commit murder, MCL 750.83; being a felon in possession of a firearm, MCL 750.224f; and possession of a firearm

[1] Tion Terrell was tried with codefendant, Dana Hudson, who was acquitted on all charges. Another codefendant, Reginald Myers, was included on the felony information, but he was not tried with defendant and Hudson.

during the commission of a felony (felony-firearm), MCL 750.227b. The prosecution appeals by leave granted an order granting defendant a new trial on the basis of newly discovered evidence. The issue on appeal is whether the posttrial statements of a codefendant that exculpated the defendant constituted newly discovered evidence sufficient to warrant a new trial when the codefendant invoked his Fifth Amendment right not to testify at trial. For the reasons set forth in this opinion, we adopt the rule expressed by the majority of federal circuit courts that when a defendant knew or should have known that a codefendant could provide exculpatory testimony, but did not obtain that testimony because the codefendant invoked the privilege against self-incrimination, the codefendant's posttrial statements do not constitute newly discovered evidence, but are merely newly available evidence. Accordingly, we reverse the trial court's order granting defendant a new trial and remand this matter to the trial court.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the nonfatal shooting of Deshawn Evans on October 28, 2007. On that date, Evans was on Yacama Street in Detroit, Michigan. Evans's friend, Dana Hudson, was sitting in Hudson's car having a friendly conversation with Evans. A few minutes later, another man, Reginald Myers, drove onto Yacama Street, and Evans and Myers had an argument. According to Evans, during or shortly after the argument with Myers, he received a telephone call from Derrick Steward, whose nickname was "Twin."[2] Twin informed him that he could come over and retrieve his

[2] At trial, Evans identified as "Twin" the individual who called him, and asserted that he did not know Twin's real name. However, subsequent testimony revealed that Twin's real name is Derrick Steward.

cell phone charger. Evans testified that he left to retrieve his charger and that as he left, he saw defendant, who was also his friend, turning onto Yacama Street in a white Impala. Although Evans asserted that he left to retrieve the cell phone charger from a home on Coventry Street[3] and denied that he went to the home to obtain a gun, a defense witness testified that Evans came to the home and "basically asked everybody that was there" "for a pistol, a gun." The witness testified that Twin gave Evans a gun. According to Evans, he returned to Yacama Street about 30 to 45 minutes later. Evans testified that when he returned, defendant hit him in the face and head with a gun and then shot him twice, and Myers also shot him in both thighs. Another witness, who lived on Yacama Street, testified that after the shooting, a man drove up in a car, approached the victim, and asked: " 'What I want to know is where's the gun. I know he had a gun because I gave him one.' " According to Evans, after they shot him, defendant and Myers ran to Hudson's car, and the men drove off, with Hudson driving.

Defendant and Hudson were tried together. Defendant was convicted of the offenses indicated earlier. Hudson invoked his Fifth Amendment privilege against self-incrimination and was acquitted.

Defendant moved for a new trial on the basis of newly discovered evidence in the form of the testimony of Derrick Steward.[4] The trial court held a hearing on defendant's motion. At the hearing, defendant pre-

[3] The testimony referred to the street on which the home was located both as Coventry and Covington.

[4] Defendant's motion for a new trial is not included in the lower court record. We have gleaned defendant's arguments in support of his motion for a new trial from the relevant motion hearings and the prosecution's response to the motion.

sented the testimony of Steward and the testimony of defendant's codefendant, Hudson, as well as affidavits signed by both men, in support of his motion. The trial court ruled that the testimony of Steward would have been cumulative and therefore did not warrant a new trial. Defendant has not appealed the trial court's ruling in this regard. What is at issue on appeal is the trial court's granting of defendant's motion for a new trial on the basis of the testimony of Hudson. At the hearing, Hudson acknowledged that he and defendant were close friends and had known each other since childhood. Hudson further testified that he was present on October 28, 2007, when Evans was shot and that he observed Evans in possession of a chrome and silver, black-handled nine-millimeter handgun before Evans was shot. According to Hudson, only ten minutes elapsed between the time Evans initially left Yacama Street and the time he returned. Hudson saw Evans approach defendant and Myers and observed Evans pull the gun from underneath his shirt when he was about four feet away from them. According to Hudson, defendant and Evans struggled and fought over the gun, and the gun fell to the ground. Hudson asserted that Myers, not defendant, shot Evans with the gun that had fallen. Hudson testified that he drove away in his car, alone, after the shooting.

In granting defendant a new trial on the basis of Hudson's testimony, the trial court found that although the testimony was not newly discovered evidence, it was not available to defendant at the time of trial:

> The seminal issue in this case from the standpoint of the Court is the unavailability, the impossibility of Mr. Dana Hudson's testimony, which is supportive of the fact that Mr. Evans, at the time this incident occurred, was specifi-

> cally armed and had drawn a handgun prior to this shooting taking place. . . .
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> * * *
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> Addressing the testimony of Mr. Hudson and the trial testimony of the defendant, the obligation to disprove self-defense is ostensibly that of the prosecution. It is not the obligation of the prosecution to disprove, but in this particular case, the defendant was totally denied the opportunity of presenting the testimony of Mr. Hudson which may have been corroborative of the anticipated testimony of [defendant], had he given testimony concerning self-defense. Because Mr. Hudson had the right to assert his Fifth Amendment right and therefore denied the defendant Terrell his testimony, which clearly lent to the fact that Mr. Evans was armed at the time, had brandished the handgun prior to the altercation between he and Mr. Meyers [sic], and most importantly that the shooting was not at the hands of [defendant], but at the hands of Mr. Meyers [sic], bears directly upon the facts of this particular case. Even though this may not have been newly discovered evidence, it certainly was not available to the defendant at the time this particular trial took place, it was therefore incapable of the defendant Terrell to have presented that testimony and in the interest of justice the Court grants the defendant Terrell a new trial.

In an opinion and order dated July 14, 2008, the trial court granted defendant's motion for a new trial on the basis of Hudson's testimony. This Court granted the prosecution's request for leave to appeal.[5]

II. ANALYSIS

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision to grant or deny a new trial. *People v Miller*,

[5] *People v Terrell*, unpublished order of the Court of Appeals, entered August 15, 2008 (Docket No. 286834). Defendant did not file a brief on appeal.

482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 467; 751 NW2d 408 (2008). Underlying questions of law are reviewed de novo, *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003), while a trial court's factual findings are reviewed for clear error, MCR 2.613(C); *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice." *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999), citing MCR 6.431(B). Newly discovered evidence does not require a new trial when it would merely be used for impeachment purposes or when it relates only to a witness's credibility. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

B. NEW TRIAL

A new trial is warranted on the basis of newly discovered evidence when the defendant satisfies a four-part test: "(1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

At issue in this case is whether Hudson's testimony satisfied the first element of this test, i.e., whether his testimony was newly discovered. Hudson chose to invoke his Fifth Amendment right not to incriminate himself and therefore did not testify at trial. After trial, at which defendant was convicted and Hudson was acquitted, Hud-

son made statements that Evans possessed a gun and struggled with defendant at the time of the shooting and that Myers perpetrated the actual shooting of Evans, not defendant. Defendant did not prepare a brief on appeal, but argued before the trial court that Hudson's posttrial statements constituted newly discovered evidence. According to the prosecution, Hudson's posttrial statements did not constitute newly discovered evidence, but were merely newly available evidence, which is not sufficient to warrant a new trial. Relying on the majority of federal circuit courts that have considered this issue, the prosecution argues that newly available evidence does not equate with newly discovered evidence and, as a consequence, the trial court's order granting defendant a new trial on the basis of Hudson's statements should be reversed. For reasons that we will explain more fully later, we agree with the majority of federal circuit courts that have decided this issue,[6] and we conclude that while Hudson's proffered testimony was newly available evidence, it was not newly discovered evidence sufficient to warrant a new trial. Accordingly, we hold that defendant has failed to establish the first element in the four-part test set forth by our Supreme Court in *Cress* to determine whether a new trial is warranted on the basis of newly discovered evidence.

Pursuant to FR Crim P 33,[7] nearly all the federal circuits have articulated the same test to determine whether a new trial is warranted on the basis of newly discovered evidence.

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[6] Neither this Court nor our Supreme Court has decided this issue. Therefore, it is proper to consider federal circuit court decisions as persuasive authority. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[7] FR Crim P 33 states:

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

> Each [circuit] essentially requires that: (1) the evidence be newly discovered after trial; (2) facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidence would likely result in an acquittal. [*United States v Owen*, 500 F3d 83, 88 (CA 2, 2007).]

Thus, the test adopted by the federal courts in interpreting FR Crim P 33 essentially mirrors the test for a new trial on the basis of newly discovered evidence that our Supreme Court articulated in *Cress*. See *Cress*, 468 Mich at 692.

A majority of federal circuits have concluded that a codefendant's posttrial or postconviction willingness to provide exculpatory testimony constitutes newly available evidence, not newly discovered evidence, and that if the defendant knew or should have known of the evidence before or during trial, the evidence was not discovered after trial and a new trial is not warranted:

> [A] decided majority of circuits have held that, when a defendant is aware that his codefendant could provide exculpatory testimony but is unable to obtain that testimony because the codefendant invokes his privilege against self-incrimination prior to and during trial, the codefendant's postconviction statement exculpating the defendant is not "newly discovered evidence" within the meaning of Rule 33. [*Owen*, 500 F3d at 88.]

(b) Time to File.

(1) *Newly Discovered Evidence*. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds*. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

Our review of the federal circuit court caselaw regarding this issue confirms that most federal circuit courts agree that newly available evidence is not synonymous with newly discovered evidence sufficient to warrant a new trial.[8] See, e.g., *United States v Lofton*, 333 F3d 874, 875-876 (CA 8, 2003) (holding that belated exculpatory testimony by a codefendant who did not testify at trial was not newly discovered evidence warranting the granting of a new trial); *United States v Jasin*, 280 F3d 355, 368 (CA 3, 2002) (following "the majority rule in concluding that a codefendant's testimony known to the defendant at the time of trial cannot be considered 'newly discovered evidence' under Rule 33, regardless of the codefendant's unavailability during trial because of invocation of his Fifth Amendment privilege"); *United States v Theodosopoulos*, 48 F3d 1438, 1448-1449 (CA 7, 1995) (holding that evidence was not newly discovered when the defendant was aware of the witness's testimony during trial); *United States v Glover*, 21 F3d 133, 138 (CA 6, 1994) (holding that evidence was not newly discovered when the defendant was aware of the evidence before trial, but the witness asserted his privilege against self-incrimination when called to testify at the defendant's trial); *United States v Muldrow*, 19 F3d 1332, 1339 (CA 10, 1994) (holding that "[i]f a former codefendant who originally chose not to testify subsequently comes forward and offers testimony exculpating a defendant, the evidence is not newly discovered if the defendant was aware of the proposed testimony prior to trial"); *United States v Reyes-Alvarado*, 963 F2d 1184, 1188 (CA 9, 1992) (affirming the view

[8] See, generally, Note, *Interpreting the phrase "newly discovered evidence": May previously unavailable exculpatory testimony serve as the basis for a motion for a new trial under Rule 33?*, 77 Fordham L R 1095 (2008).

that when a defendant who chose not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not newly discovered); *United States v DiBernardo*, 880 F2d 1216, 1224 (CA 11, 1989) (holding that newly available testimony of a witness was not considered newly discovered evidence when the defendant was aware of the evidence before trial); *United States v Metz*, 652 F2d 478, 480 (CA 5, 1981) (holding that because defense counsel was aware of the codefendant's testimony before trial, that testimony could not be considered newly discovered even if the codefendant was unavailable to testify at their joint trial because he invoked the Fifth Amendment).

In *Owen*, the United States Court of Appeals for the Second Circuit based its decision that newly available evidence did not constitute newly discovered evidence on the defendant's awareness of the evidence before trial and the plain meaning of the word "discover":

> One does not "discover" evidence after trial that one was *aware of* prior to trial. To hold otherwise stretches the meaning of the word "discover" beyond its common understanding. *See Webster's Third New Int'l Dictionary* 647 (2002) (defining "discover" as "to make known (something secret, hidden, unknown, or previously unnoticed)"). We are not inclined to expand the scope of Rule 33 beyond its textual limits. *See Jasin*, 280 F.3d at 368 (noting that [the] rule that codefendant's testimony known to defendant at trial cannot be newly discovered "is anchored in the plain meaning of the text of Rule 33. . . . The unambiguous language of Rule 33 . . . contemplates granting of a new trial on the ground of 'newly discovered evidence' but says nothing about newly available evidence") . . . . [*Owen*, 500 F3d at 89-90.]

Other federal circuits that have rejected the notion that newly available evidence constitutes newly discovered evidence have recognized that a defendant's

awareness of the existence of evidence affects the determination regarding whether evidence was newly discovered or merely newly available. As the Sixth Circuit noted in *United States v Turns*, 198 F3d 584, 587 (CA 6, 2000), "[t]he key to deciding whether evidence is 'newly discovered' or only 'newly available' is to ascertain when the defendant found out about the information at issue. A witness's shifting desire to testify truthfully does not make that witness's testimony 'newly discovered' evidence." Similarly, the Sixth Circuit stated in *Glover*: "[The defendant] acknowledges that he was well aware of [the witness's] testimony prior to trial. . . . While [the witness's] testimony may have been newly available, it was not in fact 'newly discovered evidence' within the meaning of Rule 33." *Glover*, 21 F3d at 138. In addition, in *DiBernardo*, the Eleventh Circuit affirmed the denial of the defendant's motion for new trial, concluding that there was not newly discovered evidence sufficient to warrant a new trial: "Here, [the defendant was] well aware of [the witness's] proposed testimony prior to trial. Therefore, the testimony cannot be deemed 'newly discovered evidence' within the meaning of Rule 33." *DiBernardo*, 880 F2d at 1224.

This Court similarly has a long history of rejecting defendants' claims that evidence that the defendant knew existed before trial constituted newly discovered evidence. As far back as *People v Lewis*, 31 Mich App 433, 437; 188 NW2d 107 (1971), this Court stated:

> Defendant next claims a right to a new trial based on newly-discovered evidence. Mr. Warren, a fellow inmate of defendant at Jackson Prison before trial, issued a sworn statement alleging that the trial testimony of one Mr. Fisk was a complete fabrication. However, this sworn statement also admits that defendant was well aware of Warren's

> information prior to trial. This information cannot be classified as newly discovered.

There are also legal policy considerations that support the conclusion that a codefendant's posttrial testimony does not constitute newly discovered evidence when the defendant was aware of the evidence before trial. The first of these legal policy considerations involves the lack of reliability of a codefendant's posttrial statements and the concern that courts might encourage perjury by granting a new trial to another codefendant on the basis of such unreliable evidence. In *Jasin*, the Third Circuit explained this policy consideration:

> Courts generally consider exculpatory testimony offered by codefendants after they have been sentenced to be inherently suspect. Indeed, "a court must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify." *United States v. Jacobs*, 475 F.2d 270, 286 n. 33 (2d Cir.1973). The rationale for casting a skeptical eye on such exculpatory testimony is manifest.
>
> "It would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged." [*Jasin*, 280 F3d at 365, quoting *Reyes-Alvarado*, 963 F2d at 1188.]

Although defendant's codefendant in this case was acquitted rather than convicted, the policy rationale against encouraging perjury is no less applicable. Irrespective of whether a codefendant's trial ends in an acquittal or a conviction, the codefendant cannot be retried, and in either case posttrial testimony from a

codefendant would be equally untrustworthy. Hudson's testimony would be no more trustworthy than the testimony of a codefendant who had been convicted.

Another legal policy consideration that supports the conclusion that newly available evidence does not constitute newly discovered evidence concerns the potential for defendants to engage in a form of legal gamesmanship through "judicial sandbagging." In *Turns*, the Sixth Circuit explained this concern:

> "Baumann's evidence is not newly discovered because allowing criminal defendants to raise such allegations [i.e., that an uncalled witness's proposed testimony is newly discovered evidence] after a judgment of conviction has been entered . . . would permit them to "sandbag" the fairness of the trial by withholding or failing to seek material, probative evidence and later attempting to collaterally attack their convictions . . . ." [*Turns*, 198 F3d at 588, quoting *Baumann v United States*, 692 F2d 565, 580 (CA 9, 1982).]

Although the majority of federal circuit courts have ruled that that a codefendant's posttrial or postconviction testimony did not constitute newly discovered evidence sufficient to warrant a new trial when the defendant was aware of the evidence before trial, the First Circuit has reached a contrary conclusion on this issue. See *United States v Montilla-Rivera*, 115 F3d 1060, 1066 (CA 1, 1997). In *Montilla-Rivera*, the First Circuit held that the trial court erred by denying the defendant's motion for new trial, ruling that the posttrial testimony of codefendants who did not testify at trial because they exercised their Fifth Amendment privilege constituted newly discovered evidence. In so ruling, the First Circuit stated that its decision was based on years of precedent: "This circuit has, for almost twenty years, held that the 'newly discovered' language of Rule 33 encompasses evidence that was 'unavailable.' " *Id.* at 1066, citing *Vega Pelegrina v United States*, 601 F2d 18, 21 (CA 1, 1979). The First Circuit

reasoned that the codefendants were not available to testify given the defendant's inability to compel their testimony in light of their assertion of the Fifth Amendment privilege and stated that "there seems little distinction between evidence which a defendant could not present because he did not know of it and evidence which he could not present because the witness was unavailable despite exercising due diligence."[9] *Montilla-Rivera*, 115 F3d at 1066.

We are not persuaded by the First Circuit's minority position regarding this issue. To the contrary, we are persuaded by the majority of federal circuit courts that a codefendant's posttrial or postconviction testimony does not constitute newly discovered evidence sufficient to warrant a new trial when the defendant was aware of the evidence before trial, and we hold that MCR 6.431(B)[10] does not authorize the grant of a new trial on the basis of such evidence because it is not newly discovered, but merely newly available. In so holding, we are mindful that courts "must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavail[a]ble only because a codefendant, since convicted, had availed himself of his privilege not to testify." *Jacobs*, 475 F2d at 286 n 33. Although neither this Court nor our Supreme Court has

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[9] As the Second Circuit observed in *Owen*, "the first prong of the First Circuit's Rule 33 test is broader than that of the other circuits, requiring that 'the evidence was unknown *or unavailable* to the defendant at [the] time of trial.' " *Owen*, 500 F3d at 89, quoting *Montilla-Rivera*, 115 F3d at 1066.

[10] MCR 6.431(B) governs motions for new trial and provides, in relevant part:

> Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

issued an opinion regarding this issue, we note that our Supreme Court has stated that the first prong of the test to determine whether a defendant is entitled to a new trial on the basis of newly discovered evidence is whether " 'the evidence itself, not merely its materiality, was newly discovered[.]' " *Cress*, 468 Mich at 692, quoting *Johnson*, 451 Mich at 118 n 6. This is consistent with the holding in *Owen* that "[o]ne does not 'discover' evidence after trial that one was *aware of* prior to trial. To hold otherwise stretches the meaning of the word 'discover' beyond its common understanding." *Owen*, 500 F3d at 89-90.

We are aware of the fact that when a codefendant invokes the privilege against self-incrimination and refuses to testify, a defendant can be denied the benefit of any potentially exculpatory testimony the codefendant might have provided. See *Owen*, 500 F3d at 91. This is a consequence of the Fifth Amendment privilege.[11] However, we stress that in such cases there exist proper procedural remedies. As noted in *Owen*, a trial court could grant a severance if it is persuaded that the deprivation would cause the defendant prejudice. *Id.* The court in *Owen* also noted that in the severed trial the prosecutor could confer limited immunity on the codefendant so that the codefendant might testify truthfully and that, as a last resort, a defendant could take the stand and convey his or her story. *Id.* at 92. Indeed, pursuant to MCR 6.121(C), in this case, defendant would have been entitled to a severance if he had made a "showing that severance is necessary to avoid prejudice to substantial rights of the defendant." This is not a case in which defendant had no clue of the existence of Hudson's testimony before trial. Our re-

[11] Another consequence of invocation of the Fifth Amendment privilege is that a defendant may not comment on a codefendant's refusal to take the stand. See *Owen*, 500 F3d at 92 n 6.

view of the record leads us to conclude that defendant was, or should have been, aware of Hudson's testimony before trial and that he should have engaged in due diligence and employed the proper procedural avenues, including trial severance and limited immunity for Hudson, to secure Hudson's testimony at trial.[12] Had he done so, he would not have been denied the benefit of any potentially exculpatory testimony that Hudson could have offered. We decline to characterize Hudson's testimony as newly discovered evidence because to do so would negate defendant's duty to engage in due diligence to secure the proffered testimony and effectively condone defendant's attempt at judicial sandbagging.

Having adopted the view of the majority of federal circuits, we must determine what defendant knew about the evidence at issue before and during trial. The Second Circuit in *Owen* held that the pertinent inquiry is whether the defendant knew or should have known that the codefendant could offer material testimony regarding the defendant's role in the charged crime. *Owen*, 500 F3d at 91. Application of this test requires an examination of the facts presented in this case to ascertain whether defendant knew or should have known that his codefendant had exculpatory information.

Examination of the record in the instant case reveals that although Hudson testified at the hearing on defendant's motion for a new trial that he had never spoken

[12] We observe that we would reach the same result in this case even if we were to adopt the First Circuit's reasoning because the record in this case does not support a conclusion that "the witness was unavailable despite [the defendant's] exercising due diligence." *Montillo-Rivera*, 115 F3d at 1066. With due diligence, defendant could have remedied the potential denial of the benefit of Hudson's exculpatory evidence by seeking trial severance and asking the prosecutor to grant Hudson limited immunity so that Hudson could testify truthfully without fear of self-incrimination.

with defense counsel about the case until it was over, defendant knew or should have known that Hudson could have offered material testimony regarding defendant's role in the charged crime. Defendant and Hudson had known each other since childhood. Hudson testified that he and defendant were close friends. According to Hudson, he was present with defendant at the scene of the shooting. Even if Hudson and defendant never had a conversation about Hudson's testimony before or during their trial, defendant was certainly aware at all times that Hudson had the ability to provide his proffered testimony.[13] Therefore, the record clearly leads us to conclude that defendant knew or should have known before trial that Hudson could have provided the testimony.

In holding that newly available evidence does not constitute newly discovered evidence sufficient to warrant a new trial, we note that our holding does not preclude the possibility that a codefendant's posttrial or postconviction exculpatory statements might qualify as newly discovered evidence under MCR 6.431(B). There may be cases in which such evidence does indeed constitute newly discovered evidence. However, in this case, defendant knew or should have known that his codefendant could offer material testimony regarding defendant's role in the charged crime; therefore, defendant cannot claim that he "discovered" that evidence only after trial. Consequently, because defendant knew or should have known that his codefendant could offer material testimony about defendant's role in the charged crime, his inability or unwillingness to procure that testimony before or during trial should not be redressed by granting him a new trial.

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[13] No one asked Hudson if he had spoken to defendant about his testimony before or during trial.

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

METER, P.J., concurred.

SHAPIRO, J. (*concurring*). I concur in the result in this case because I do not believe that defendant provided an adequate basis for the trial court to grant his motion for a new trial pursuant to MCR 6.431(B), whether we apply the test employed by the majority of federal circuits or the test enunciated by the United States Court of Appeals for the First Circuit. Therefore, I do not believe we need to reach the question of which test to apply. However, the majority having reached it, I respectfully suggest that the more appropriate test is that enunciated by the First Circuit.

In *United States v Montilla-Rivera*, 115 F3d 1060, 1066 (CA 1, 1997), the First Circuit held that "the better rule is not to categorically exclude the testimony of a codefendant who asserted his Fifth Amendment privilege at trial under the first prong but to consider it, albeit with great skepticism . . . ." The court recognized that "[i]t is true that there is a greater need for caution in considering [such] motions where the new evidence comes from a codefendant who was 'unavailable' at trial because he chose to exercise his privilege." *Id.* Indeed, the First Circuit did not order a new trial, but merely directed that the trial court hold a hearing to hear the "new" evidence, and further noted that even having such a hearing is "[not] required in the usual course."[1]

[1] In *Montilla-Rivera*, the court reversed the trial court's denial of a motion for a new trial, but only after a careful review of the facts and circumstances of the case. *Montilla-Rivera*, 115 F3d at 1067-1068. First, the court noted that although the evidence against the defendant was sufficient, "[t]he evidence [was] thin . . . ." *Id.* at 1064. Second, the court

Id. at 1067. The First Circuit's approach would not open the floodgates for new trials on the basis of "newly available" codefendant testimony. Rather, it would take the prudent and limited step of not foreclosing the possibility that justice may require the granting of a new trial in a particular case involving newly available evidence.

In this case, defendant is not entitled to a new trial under the First Circuit's test. First, there was other evidence admitted that showed the victim was armed. Thus, defendant was able to present evidence in support of his self-defense claim. Second, defense counsel did not interview or attempt to interview the codefendant, thus undercutting the likelihood that there was a good-faith belief that he could offer exculpatory testimony. Third, there was no request for severance or for the codefendant's trial to occur first, a mechanism that might have avoided the Fifth Amendment problem. Fourth, there was no attempt to call the codefendant at trial and to require him to assert his Fifth Amendment privilege outside the presence of the jury. Fifth, there was no offer of proof at trial about what defendant believed his codefendant could testify to if he did not assert his Fifth Amendment privilege. These failures

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noted that the defendant had "diligently attempted to secure [the codefendants'] testimony . . . ." *Id.* at 1065. The defendant's attorney tried on two separate occasions to interview the codefendants, but they refused to speak with him. *Id.* at 1065 n 3. He also moved to have the two codefendants subpoenaed to testify, and his client had "insisted that the testimony would exculpate him rather than hurt him." *Id.* At the defendant's trial, the codefendants informed the court that they would not testify despite the defendant's request, and the court noted that each of the codefendants' attorneys had advised his client not to testify because the testimony might be incriminating with regard to other transactions and because the codefendants were still awaiting sentencing. *Id.* at 1065. Finally, the court noted that the new testimony was neither cumulative nor implausible. *Id.* at 1066.

strongly suggest that the issue in this case related more to the desirability of an appellate parachute rather than the existence of known exculpatory testimony that was genuinely unavailable before defendant's conviction.

I agree with the majority that postconviction claims of exculpatory testimony from a codefendant should be viewed with a high degree of suspicion. However, that is a matter best addressed on a case-by-case basis and not with a bright-line rule. I also recognize that the majority does not view the rule it adopts today as foreclosing a case-by-case approach. Indeed, the majority makes this clear by positing that "[t]here may be cases in which [a codefendant's posttrial or postconviction exculpatory statement] does indeed constitute newly discovered evidence." I believe the majority and I are in agreement that a trial court should not be precluded from granting a new trial when the defendant made appropriate efforts to obtain the testimony at trial and the trial court, in an exercise of sound discretion after hearing all the evidence, concluded that a miscarriage of justice may have occurred. I am concerned, however, that this critical exception to the rule otherwise excluding newly available evidence might be lost in subsequent cases. I believe that in order to assure that it is not, the more prudent course would be to adopt the First Circuit's standard, which more explicitly provides for the exception.

In re LEIX ESTATE

Docket No. 291406. Submitted June 8, 2010, at Detroit. Decided August 26, 2010, at 9:20 a.m.

Carlton E. Leix and Melinda Triplett petitioned the Genesee County Probate Court for the imposition of a constructive trust on certain assets in the control of respondents, Melady A. and Jeffrey Perry. Petitioners alleged that Carlton J. Leix had transferred the assets to Melady Perry in violation of a 1982 agreement between Carlton J. Leix and his wife, Viola Leix, to execute mutual wills. Carlton J. and Viola Leix had executed identical wills, a revocable-trust agreement, and an agreement to execute mutual wills in 1982. The wills, trust, and agreement for mutual wills reflected an estate plan calling for the establishment of a trust for the benefit of Melady Perry for life, with the remainder to the issue of Carlton J. and Viola Leix. Carlton E. Leix is the son of Carlton J. and Viola Leix, and Melady Perry and Melinda Triplett are the daughters of Arletta Cady, their deceased daughter. Viola Leix died in 1983. Carlton J. Leix died in 2008 and, at that time, nearly all the disputed assets were titled jointly in his and Melady Perry's names or named Melady Perry as the beneficiary. Petitioners moved for summary disposition and, following a hearing on the motion, the court, Jennie E. Barkey, J., granted summary disposition in favor of Melady and Jeffery Perry, holding that the agreement to execute mutual wills was valid and binding and that Carlton J. Leix's transfers of assets into joint ownership with Melady Perry after Viola Leix's death were not in breach of the agreement to execute mutual wills because the agreement contained no restrictions against transfers. Carlton E. Leix appealed.

The Court of Appeals *held*:

Implied limitations on the transfer of assets by the surviving spouse in the case of an agreement to make mutual wills are not recognized in Michigan. Nor does Michigan recognize a cause of action for breach of an implied covenant of good faith and fair dealing. A contract to make a mutual will is subject to the following principles: (1) the main goal of contract interpretation is to enforce the parties' intent, (2) when the language of a document is clear and unambiguous, interpretation is limited to the actual

words used, and parol evidence is inadmissible to prove a different intent, (3) an unambiguous contract must be enforced according to its terms, and (4) courts may not rewrite contracts on the basis of discerned reasonable expectations of the parties. The agreement did not restrict Carlton J. Leix from disposing of the assets as he saw fit regardless of whether the transfers were made for the purpose of avoiding the testamentary disposition.

Affirmed.

DECEDENTS' ESTATES — AGREEMENTS TO MAKE MUTUAL WILLS — IMPLIED LIMITATIONS ON TRANSFERS OF ASSETS — IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING.

Michigan does not recognize a cause of action for breach of an implied covenant of good faith and fair dealing and does not recognize implied limitations on the transfer of assets by the surviving spouse in the case of an agreement to make mutual wills.

Rizik & Rizik (by *George F. Rizik, II*) for Carlton E. Leix.

Reid & James, P.C. (by *Robert J. Reid* and *Robert Brace Reid*), for Melady A. and Jeffrey Perry.

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM. This case concerns the disposition of assets formerly owned by Carlton J. Leix (Carlton) and his wife, Viola Leix. After Viola's death, Carlton transferred the assets so that they were jointly owned with their granddaughter, respondent-appellee Melady A. Perry. Petitioner-appellant, Carlton E. Leix (appellant), the son of Carlton and Viola, contended that the transfers violated his parents' agreement to execute mutual wills. Appellant appeals as of right the judgment granting summary disposition pursuant to MCR 2.116(I)(1) in favor of Melady and her husband, respondent-appellee Jeffrey Perry (hereafter referred to jointly as "respondents"), on the ground that the agreement to execute mutual wills did not restrict Carlton from making the transfers. We affirm.

I

Carlton and Viola had two children, appellant and Arletta Cady. Arletta was the deceased mother of Melady and petitioner Melinda Triplett. On September 30, 1982, Carlton and Viola executed identical wills, a revocable-trust agreement, and an agreement to execute mutual wills. The wills, trust, and agreement for mutual wills reflected an estate plan that called for establishing a trust for the benefit of Melady for life, with the remainder to the issue of Carlton and Viola. Viola died on December 11, 1983.

Carlton executed amendments of the trust in July 1988 and October 2000.[1] He also transferred title to assets that had been owned by Viola and him. For example, Carlton withdrew money from bank accounts and, in 2001 and 2002, purchased annuities that named Melady as the beneficiary. He added Melady as a joint owner on a checking account in 1984, closed the account in 2006, and then opened a new checking account with Melady as a joint owner. In 1994, he conveyed real estate to himself, Arletta, and Melady as joint tenants with rights of survivorship.

In 2006, Melady became Carlton's guardian and conservator. Carlton died in July 2008. At the time of Carlton's death, nearly all the assets were titled jointly in his and Melady's names or named Melady as the beneficiary. After Carlton's death, Melady received the money from the annuities and placed some of it in certificates of deposit in her name and in the name of her husband.

Appellant and Melinda brought this action in the probate court, requesting that the court impose a constructive trust on certain assets in the control of respondents.

[1] Appellant does not claim that the amendments of the trust breached the agreement to execute mutual wills.

They alleged that Carlton transferred the assets in violation of his and Viola's 1982 agreement to execute mutual wills. They filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and, in support thereof, submitted the deposition transcripts of (1) Michael James, the attorney involved in drafting the original estate plan documents, (2) Robert Reid, the attorney who drafted an amendment of the trust, and (3) Melady. James could not recall Carlton and Viola's intent when executing the original documents, and Reid was not involved with the original documents. Melady testified about the family's relationships and the accounts, but stated that she had never discussed Carlton's estate plan with him.

Following a hearing on the motion, the trial court found the agreement to execute mutual wills to be valid and binding, that nothing in the agreement put any restrictions on what the surviving party could do with the parties' assets, and that Carlton's transfer of assets during his lifetime and his amendment of the trust did not constitute a breach of the agreement.[2] The court therefore granted summary disposition in favor of respondents.

II

Summary disposition pursuant to MCR 2.116(I)(1) is appropriate if "the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact . . . ." This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

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[2] The trial court relied on *In re VanConett Estate*, 262 Mich App 660; 687 NW2d 167 (2004), in support of its ruling.

The parties do not dispute the trial court's determination that Carlton and Viola's agreement to execute mutual wills is valid and that they agreed not to revoke the wills that they executed. The agreement stated, in pertinent part:

> The parties agree that on the death of the survivor, all of the property of which the survivor dies possessed is to be held in trust for the benefit of their granddaughter, Melady Cady, during her life. Upon the death of Melady Cady, the Trustee shall divide the balance of this Trust into equal separate shares so as to provide one (1) share for the issue of Melady Cady, one (1) share for Arletta Cady or her issue if she fails to survive said division, and one (1) share for Carlton Leix or his issue if he fails to survive said division.

The parties also do not dispute that after Viola's death, Carlton transferred money in various accounts so that Melady became a joint owner or beneficiary, and thereby upon Carlton's death she received the assets directly, rather than as a lifetime beneficiary of a trust. One of the effects of the transfers was to divest the trust of assets that the contingent trust beneficiaries might have received upon Melady's death.

The issue presented is whether an agreement to execute mutual wills limits a surviving spouse's ability to dispose of the assets that the parties held jointly as he or she chooses.

> An agreement to make mutual wills, or the execution of wills in pursuance of such an agreement, does not bind the testators to keep the property, covered thereby, for the intended beneficiaries under such wills, or prevent them from making such other disposition of it, either *inter vivos* or by will, as they may desire and mutually agree, while both or all still live. [*Phelps v Pipher*, 320 Mich 663, 670; 31 NW2d 836 (1948) (citation and quotation marks omitted).]

However, upon the death of one of the parties, the agreement (not the will) is irrevocable. *Id*. at 669.

"Upon the death of one party to a contract to make mutual will[s], the agreement underlying the will becomes irrevocable and right of action to enforce it [is] vested in the beneficiaries." *Schondelmayer v Schondelmayer*, 320 Mich 565, 572; 31 NW2d 721 (1948) (citation and quotation marks omitted). Thus, when the agreement to make mutual wills provides for the disposition of specific real property to a particular party, that party may obtain injunctive relief to prevent a surviving spouse from disposing of the specified property in a manner contrary to the agreement. *Id*.

As presented, the issue whether Carlton's transfer of assets breached his agreement with Viola involves two considerations: (1) whether assets that are held jointly by the contracting parties are subject to an agreement to make mutual wills and (2) to what extent does an agreement to make mutual wills restrict the surviving spouse's ability to transfer assets.

A

Respondents contend that *In re VanConett Estate*, 262 Mich App 660; 687 NW2d 167 (2004), controls this case and establishes that "jointly held assets are not subject to an agreement to make mutual wills." In *VanConett Estate*, Herbert and Ila VanConett (a married couple) and Florence VanConett owned real property as joint tenants with full rights of survivorship. *Id*. at 667. After Florence's death, Herbert and Ila continued to hold the property as joint tenants with full rights of survivorship. *Id*. This Court determined that Herbert's and Ila's wills revealed a clear expression of their intent to enter into a contract to dispose of their property in the manner expressed in their wills and that the surviving spouse's will would become irrevocable after the first spouse's death. *Id*. at 664-665. After Ila's death,

Herbert transferred the real property to the defendants. After Herbert's death, his estate brought an action to recover the property. This Court held that his estate lacked standing to seek return of the real property to the estate because the property was not covered by the couple's contact to make a will:

> Property held as joint tenants with full rights of survivorship automatically passes to the surviving tenant(s) at a tenant's death. 1 Cameron, Michigan Real Property Law (2d ed), § 9.11, pp 306-307. *Because title passed instantly at Ila's death, it would not have been part of her estate and would not be covered by the couple's contract to make a will*. Therefore, the estate has no right to seek its return. This is true even though the VanConetts' wills purported to apply to "all our property, whether owned by us as joint tenants, as tenants in common or in severalty." Certainly, the VanConetts could not destroy the survivorship right through their wills because a will has no effect until the testator's death. The VanConetts' contract to make a will did not expressly indicate that the couple wished to terminate their joint tenancy and destroy the survivorship rights attached to it. No authority suggests that merely expressing a desire to end a joint tenancy carries out the task of terminating a joint tenancy with rights of survivorship. Therefore, we conclude that the VanConetts' wills did not terminate the survivorship rights of their joint tenancy. The property passed to Herbert immediately at Ila's death and the estate lacked standing to seek its return to the estate. [*Id.* at 667-668 (emphasis added).]

In other words, "the estate did not have standing to bring a cause of action concerning the real property because the real property passes outside the VanConetts' wills." *Id*. at 662.

Respondents' contention—that *VanConett Estate* indicates that, in every instance, an agreement to make mutual wills does not apply to property that the contracting parties own jointly at the time the first testator dies—is incompatible with decisions of the Michigan Supreme Court.

For example, in *Schondelmayer*, Charles and Cathrin Schondelmayer jointly held title to real property as tenants by the entirety. *Schondelmayer*, 320 Mich at 568. The Court determined that they agreed to execute and did execute a joint and mutual will. The will stated that the survivor would pay the funeral expenses and just debts and " 'thereafter become the sole owner of any and all property owned by either or both of them. The said survivor shall live as he or she has been accustomed, using so much of the income or principal as may be necessary for his or her comfort of [sic] convenience.' " *Id*. at 571. The will then specified that each of the Schondelmayers' three sons was to receive a specific farm. *Id*. at 568, 571. Corna Schondelmayer, the plaintiff, was to receive real estate that included the home farm and the balance of the estate after certain costs. After Charles's death, the relationship between Cathrin and the plaintiff deteriorated. Cathrin claimed that she had the right to dispose of the property, including the home farm, by will and also stated that she intended to sell it. *Id*. at 573. The plaintiff sought specific performance of his parents' agreement to make a joint and mutual will and an injunction restraining Cathrin from disposing of the property in violation of the terms of the joint mutual will. The Court concluded that Charles and Cathrin had agreed that the will of the survivor would dispose of the estate in accordance with the terms of their joint and mutual will and that the agreement became irrevocable upon Charles's death. *Id*. at 571-572, 575. The Court affirmed the trial court's grant of injunctive relief, concluding that the property that Charles and Cathrin held jointly at the time of Charles's death was subject to the parties' agreement to execute a mutual will. See also *Getchell v Tinker*, 291 Mich 267; 289 NW 156 (1939) (involving an agreement to devise specified real property that the contracting parties owned jointly).

Respondents' contention that the agreement to make mutual wills did not apply to the assets that were jointly held by Carlton and Viola, and which therefore passed to Carlton after Viola's death, is unpersuasive. It is difficult to reconcile the statement in *VanConett Estate*, 262 Mich App at 668, that property that passed instantly at the death of the contracting party would not be covered by the couple's contract to make a will, with the Supreme Court's holdings in the cases cited earlier. We therefore conclude that the holding in *VanConett Estate* should be limited to the particular circumstances in that case, in which the contract to make a will was within the wills themselves.

B

In regard to whether an agreement to make mutual wills restricts the surviving spouse's ability to dispose of assets absent express limitations in the agreement, Michigan caselaw is not well developed. Appellant relies on *Schondelmayer*, 320 Mich 565, *Getchell*, 291 Mich 267, and *Carmichael v Carmichael*, 72 Mich 76; 40 NW 173 (1888). However, those cases involved agreements to convey specific property. Appellant does not claim that the agreement in this case contained language designating specific property or language prohibiting the surviving spouse from transferring assets. Rather, appellant asserts, "A corollary of the rule that the surviving co-maker of an agreement to make a mutual will is irrevocably bound by that agreement after the death of the other co-maker, is that the surviving co-maker cannot transfer assets in a manner that would defeat the agreement."[3]

[3] This Court's decision in *VanConett Estate*, 262 Mich App at 665, touched on that issue very briefly. Before the Court explained that the contract did not apply to the real estate at issue, the Court considered the

The uncertainty in the law is reflected in an order that the Supreme Court entered when it initially granted leave to appeal in *VanConett Estate*. The order directed the parties to address, in part,

> whether the mere fact that Herbert and Ila VanConett entered into a mutual will imposes restrictions on the surviving spouse's power of disposal despite the absence of express contractual or testamentary limitations on the power of alienation, (3) the source and nature of such a restraint if it is contended that Herbert VanConett was so restrained from disposing of his estate, and (4) whether any secondary authority in wills and estates law (e.g., hornbooks and treatises), or practice in the field, supports the proposition that a mutual will imposes restrictions on the surviving spouse's power of disposal in the absence of express contractual language or testamentary limitations on the power of alienation. [*In re Vanconnett Estate*, 474 Mich 999 (2006), vacated and lv den sub nom *In re VanConett*, 477 Mich 969 (2006).]

The directive to consult secondary authority suggests that the Court believed that the issue was unsettled in Michigan.

Courts in other jurisdictions have differing views concerning whether the surviving party to a contract to make mutual wills is limited in the right to dispose of property after the death of the first party. See Anno: *Right of party to joint or mutual will, made pursuant to*

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plaintiffs' argument that Herbert received only a life estate and therefore had no right to dispose of the property. This Court stated, "Unlike in *Quarton* [*v Barton*, 249 Mich 474; 229 NW 465 (1930)], Herbert received a fee simple estate in the couple's property at Ila's death; hence, he was free to dispose of the property as he wished, and his beneficiaries were only entitled to the remainder." *Id*. Arguably, the statement supports the position that absent limiting language in the agreement, an agreement to make a will does not impose any limitations on a surviving spouse's right to dispose of property. However, because the Court ultimately concluded that the real estate was not covered by the agreement, the Court's statement that Herbert was free to dispose of the property as he wished (evidently without regard to any obligations from the agreement) was dictum.

agreement as to disposition of property at death, to dispose of such property during life, 85 ALR3d 8; 79 Am Jur 2d, Wills, §§ 687-688, pp 736-738; 97 CJS, Wills, § 2056, pp 659-661. Some jurisdictions allow the surviving spouse in that circumstance to use the property for support and ordinary expenditures, but not to give away considerable portions of it or make gifts that defeat the purpose of the agreement:

> Where an agreement as to mutual wills does not define the survivor's power over the property, but merely provides as to the disposition of the property at his or her death, the survivor may use not only the income, but reasonable portions of the principal, for his or her support and for ordinary expenditures, and he or she may change the form of the property by reinvestment, but must not give away any considerable portions of it or do anything else with it that is inconsistent with the spirit or the obvious intent and purpose of the agreement.
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> . . . [T]he surviving spouse cannot make a gift in the nature, or in lieu, of a testamentary disposition, or to defeat the purpose of the agreement. [97 CJS, Wills, § 2056, pp 660-661.]

Conversely, in other jurisdictions,

> [t]he courts do not assume that the parties to a joint and mutual will intended to restrict either party from disposing of property in good faith by transfers effective during his or her lifetime, unless a plain intention to this effect is expressed in the will or in the contract pursuant to which it was executed. Nothing short of plain and express words to that effect in a contract to execute wills with mutual and reciprocal provisions is sufficient to prevent one of the testators from disposing of his or her property in good faith during his or her lifetime, notwithstanding the death of the other testator. [72 Am Jur 2d, Wills, § 688, p 738.]

Section 17 of the ALR annotation collects cases that address the surviving spouse's authority to dispose of

property when the agreement or will leaves to designated beneficiaries property that the survivor may own at the time of the survivor's death or contains similar provisions. The annotation states in § 17[a] that such provisions "have been construed by some courts as indicating a desire on the part of the testators to give the survivor full authority to dispose of the property during the survivor's lifetime." 85 ALR3d, pp 50-51. Section 17[b] of the annotation collects cases taking a more limited view as well, including those "[h]olding that the survivor could dispose of the property only for such things as necessities or reasonable needs" and rejecting claims "that the survivor was given full power of disposition by the provision in a joint or mutual will which left to the beneficiary, at the survivor's death, only that property which the survivor might own at his death, or the like." *Id*. at 52.

As quoted in *Murphy v Glenn*, another treatise states:

> "A general covenant to devise, which does not refer to specific property, does not prevent the promisor from making conveyances during his lifetime. Such a covenant has been held not to prevent him from making gifts during his lifetime, if reasonable in amount and not made to evade performance. If the contract provides for devising or bequeathing all that the promisor owns at his death, he may convey his property during his lifetime if such conveyance is not in fraud of the rights of the promisee. A contract to devise all of the property of which the promisor should die possessed was held not to reserve to the promisor the right to convey any considerable part of the property gratuitously." [*Murphy v Glenn*, 964 P2d 581, 586 (Colo App, 1998), quoting 1 W Page, Wills, § 10.23 (Bowe-Parker rev ed, 1960).]

In *Murphy*, 964 P2d at 586, the court cited eight cases from other jurisdictions as supporting

> the proposition that a party who is bound by a contract to make a will may make reasonable gifts during his or her lifetime and use the property for reasonable living expenses, but may not transfer the bulk of the estate in a way contrary to the terms of the agreement embodied in a mutual will.

In re Chayka Estate, 47 Wis 2d 102; 176 NW2d 561 (1970), provides an example of a court invalidating *inter vivos* transfers of property to avoid commitments made in a mutual will on the basis that the transfers breached the covenant of good faith that accompanies every contract. As indicated in the syllabus of the Wisconsin Supreme Court, a husband and wife executed a joint, mutual, and reciprocal will in which they bequeathed to each other all their real and personal property and provided that "after the decease of both of us, the whole of said real estate and personal property of whatever nature and wherever located that we may own at the time of the decease of the survivor of us" was to go to a specified beneficiary. *Id*. at 104. After the husband died, the wife married the appellants. She conveyed parcels of real property to herself and the appellant as joint tenants, gave the appellant bonds as a gift, and transferred funds into a joint account in her and the appellant's names. After her death, the probate court ordered the appellant to deliver the bonds and determined that the properties the wife had placed in joint tenancy were part of her estate. The Wisconsin Supreme Court rejected the appellant's contention that the transfers were valid, stating:

> Appellant contends that Evelyn Flanagan Chayka complied with her agreement with her first husband by leaving unrevoked the will giving all of the property she possessed at the time of her death to Robert W. Flanagan. This, as another court has well stated it to be, is "a mere play upon words." What she in fact has done has stripped nearly all of

> the flesh from the bones, leaving only a skeleton for testamentary disposition to Robert W. Flanagan. This is a compliance in form, not in substance, that breaches the covenant of good faith that accompanies every contract, by accomplishing exactly what the agreement of the parties sought to prevent.
>
> . . . The duty of good faith is an implied condition in every contract, including a contract to make a joint will, and the transfers here violate such good faith standard by leaving the will in effect but giving away the properties which the parties agreed were to be bequeathed at the death of both to a designated party. The contract to make a will, once partially executed and irrevocable, is not to be defeated or evaded by what has been termed "completely and deliberately denuding himself of his assets after entering into a bargain."[8]

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[8] "Should it be held that the promisor is always left free to defeat the effect of his promise by completely and deliberately denuding himself of his assets immediately after entering into the bargain, it would seem that the contracts could serve very little purpose other than that of being either gambling devices or instruments of fraud and would be unworthy of legal protection. * * * A party to such a contract should be made to understand clearly that the law does not permit a man to have his cake and eat it too." Sparks, Contracts to Make Wills, (1956), pages 51, 52. See also: 94 C.J.S. Wills s 119, p. 881, stating: "Agreements based on valuable consideration to make a particular disposition of property will not be allowed to be defeated by a conveyance to persons who are not bona fide purchasers, during the lifetime of the promisor."

[*Chayka Estate*, 47 Wis 2d at 107-108 (citations omitted).]

Similarly, in *In re Erickson Estate*, 363 Ill App 3d 279; 841 NE2d 1104 (2006), the court invalidated transfers as being violative of the implied duty to act in good faith

and contrary to the purpose of a joint and mutual will. The husband and wife executed a joint and mutual will in which each bequeathed to the survivor the entire estate "as the survivor's property absolutely," and after the survivor's death, to specified children in specified amounts. *Id*. at 280. The husband died first. Five days before the wife's death, she conveyed three tracts of real property, each for $10, to two daughters and a grandson. A son filed a complaint to have the parcels returned to the estate. The defendants argued that the agreement gave the property to the survivor absolutely and that she was free to dispose of it as she saw fit as long as she did not revoke the joint and mutual will. After noting that the contract underlying a joint and mutual will becomes irrevocable upon the death of the first testator, the Illinois Appellate Court stated:

> Here, five days before her death, Lea attempted to circumvent both the terms of the joint and mutual will and her contractual obligations thereunder to dispose of her property by essentially giving it away. Lea's actions violate the spirit and purpose of the joint and mutual will, as well as the implied duty to act in good faith—a duty that is part of every contract. See *Bank One, Springfield v. Roscetti*, 309 Ill.App.3d 1048, 1059-60, 243 Ill.Dec. 452, 723 N.E.2d 755, 764 (1999) ("Good faith requires the party vested with contractual discretion to exercise it reasonably, and he may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectation of the parties"). The term "absolutely" does not give Lea the power to upset the dispositive scheme.
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> We agree with defendants that *Helms* [*v Darmstatter*, 34 Ill 2d 295; 215 NE2d 245 (1966)], *Rauch* [*v Rauch*, 112 Ill App 3d 198; 445 NE2d 77 (1983)], and other decisions (see, *e.g., Orso v. Lindsey*, 233 Ill.App.3d 881, 887, 174 Ill.Dec. 403, 598 N.E.2d 1035, 1039 (1992)) leave open the question to what extent the surviving spouse may use the property upon the death of the other testator: "It may well be that they intended that the survivor should have the absolute

> right to use the entire *corpus* for life, but only upon the condition that the property owned by the survivor upon his or her death would pass in accordance with the terms of the joint will." *Helms*, 34 Ill.2d at 301-02, 215 N.E.2d at 249. Interesting questions remain as to whether Lea could have sold some property to make a modest gift to a charity or to travel the world. We need not analyze those possibilities, and we need not decide whether Lea, after Charles's death, could have sold or given this property at a different time or under different circumstances. The undisputed facts establish Lea disposed of the property five days before her death. She received $10 for each parcel. No facts establish Lea could have had any intention other than to circumvent the dispositional scheme. These transfers are not permitted by the will. [*Id*. at 284.]

In contrast, the approach adopted in *Ohms v Church of the Nazarene, Weiser, Idaho, Inc*, 64 Idaho 262; 130 P2d 679 (1942), focused on enforcing the terms of agreements to make wills as they are written. In that case, the husband and wife made mutual, reciprocal, and concurrent wills in which each bequeathed to the survivor all real and personal property owned at the time of his or her death, and in the event that the spouse predeceased the testator, to the husband's children and grandchildren. The husband and wife also executed a mutual contract in which they agreed that all property owned by the last one dying should go to the husband's children and grandchildren. After the husband died, the wife made other wills that conflicted with the agreement. After being advised that she could not will the challenged property to the church, she revoked the inconsistent wills and instead deeded the property to the church. After the wife's death, her husband's children and grandchildren brought an action to set aside the deed on the basis that the transfer violated the purpose and intent of the couple's contract. The Idaho Supreme Court recognized that there were

decisions supporting the view that the transfer was invalid as a subterfuge, but ultimately concluded, "It is better to give effect to the contract as made by the parties than attempt construction by implication or insertion by inference." *Id*. at 682. "If it was the intention of the parties that what each might receive upon the death of the other should be kept intact and passed on without any diminution thereof to Otto Ohms' children, the contract should have so stated, which it did not." *Id*. In addition to noting the absence of any limitation in the parties' agreement, the court referred to other facts that bolstered the reasonableness of validating the disposition (e.g., the support provided by the church, the wife's contribution to retention of the property, the husband's evident desire that the realty be in a different category than other property). However, the crux of the decision was the recognition that "[c]ourts should construe contracts according to the plain language used by the parties in making them, and . . . should not, in this or any other case, substitute what we may think the parties should have agreed to for what their contract shows they did agree to." *Id*.

We reject appellant's invitation to recognize implied limitations on the transfer of assets by the surviving spouse in the case of an agreement to make mutual wills. With respect to other contracts, this Court has explained:

> The main goal of contract interpretation generally is to enforce the parties' intent. But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent. An unambiguous contract must be enforced according to its terms. The judiciary may not rewrite contracts on the basis of discerned "reasonable expectations" of the parties because to

> do so is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. [*Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004) (citations and quotation marks omitted).]

These principles apply to a contract to make a mutual will. Appellant acknowledges that the contract does not expressly limit the parties from transferring assets. Unlike some other jurisdictions, "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1, 13; 730 NW2d 29 (2006) (citations and quotation marks omitted), vacated in part on other grounds 480 Mich 913 (2007). Regardless of whether the transfers were made for the purpose of avoiding the testamentary disposition, the agreement did not restrict Carlton from disposing of the assets as he saw fit.[4]

Affirmed.

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[4] We need not consider appellant's challenge to respondents' assertion that jointly held assets are not assets "possessed" by the decedent at the time of his death. The complaint did not present this theory; rather, the complaint concerned whether Carlton breached the agreement by disposing of the assets during his life. Moreover, the issue is inadequately briefed by appellant. He raises it in his reply brief and only cites two cases, neither of which addresses the meaning of "dies possessed."

MCLEAN v MCELHANEY

Docket No. 290781. Submitted May 11, 2010, at Marquette. Decided August 26, 2010, at 9:25 a.m.

Donald and Christine McLean, personal representatives of the estate of their deceased daughter, Karen McLean, brought a medical malpractice action in the Chippewa Circuit Court against Robert B. McElhaney, M.D.; a community mental health services agency, Hiawatha Behavioral Health; Maureen Phenix, an employee of Hiawatha; and Samuel W. Harma, the chief executive officer of Hiawatha. After defendants unsuccessfully sought summary disposition, Hiawatha, Phenix, and Harma moved for summary disposition on the grounds of governmental immunity. The court, Nicholas J. Lambros, J., denied their summary disposition motion, determining that they could not invoke the defense of governmental immunity because by providing mental health services to Karen McLean, they were providing medical care or treatment to a patient and thus fell under the "medical care or treatment" exception to governmental immunity, MCL 691.1407(4). Hiawatha, Phenix, and Harma appealed.

The Court of Appeals *held*:

1. The trial court correctly concluded that, under the plain language of MCL 691.1407(4), the exception to governmental immunity is not limited to the care or treatment of physical illness or disease alone, but includes the care or treatment of mental illness or disease.

2. For the "medical care or treatment" exception to apply, the decedent must have been a patient of the defendant. The trial court correctly determined that Karen McLean had been a patient of Hiawatha, Phenix, and Harma as required by MCL 691.1407(4). "Patient" includes a person who is under treatment for a behavioral disorder. While Karen McLean was formally terminated from treatment five weeks before she died, plaintiffs alleged that she had telephoned and received advice from Hiawatha's mental health workers between the time of her formal discharge from treatment and her death and had been scheduled to begin outpatient treatment. The trial court prop-

erly concluded that the exception to governmental immunity applied to Hiawatha and Phenix.

3. The trial court erred by applying the "medical care or treatment" exception to Harma because plaintiffs did not allege that Harma had provided medical care to the decedent. Because the trial court did not determine whether Harma was entitled to absolute immunity under MCL 691.1407(5) as the highest executive official of the agency or qualified immunity under MCL 691.1407(2), a remand was necessary to allow the trial court to address whether Harma was entitled to immunity under either of those provisions.

Affirmed in part, reversed in part, and remanded.

GOVERNMENTAL IMMUNITY — EXCEPTIONS — MEDICAL CARE OR TREATMENT EXCEPTION — MENTAL ILLNESS OR DISEASE.

The "medical care or treatment" exception to governmental immunity is not limited to the medical care or treatment of physical illness or disease alone, but includes the care or treatment of mental illness or disease (MCL 691.1407[4]).

White, Clark & Mock (by *Daniel W. White*) for Donald and Christine McLean.

Johnson, Rosati, LaBarge, Aseltyne & Field (by *Christopher J. Johnson* and *Marcelyn A. Stepanski*) for Maureen Phenix, Samuel W. Harma, and Hiawatha Behavioral Health.

Amicus Curiae:

Cohl, Stoker, Toskey & McGlinchey, P.C. (by *Bonnie G. Toskey*), and *Allan Falk, P.C.* (by *Allan S. Falk*), for the Michigan Association of Community Mental Health Boards.

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

BORRELLO, J. This case requires this Court to construe the "medical care or treatment" exception to governmental immunity, MCL 691.1407(4). Defendants appeal as of right the trial court's denial of their motion for

summary disposition. In denying defendants' motion, the trial court concluded that the "medical care or treatment" exception to governmental immunity applied and that plaintiffs' claims against defendants were therefore not barred by governmental immunity. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs filed suit against defendants after the decedent, who was their daughter, died at age 30. Plaintiffs are the decedent's personal representatives. Defendants include Hiawatha Behavioral Health (HBH), a community mental health services agency; Maureen Phenix,[1] a clinical social worker and employee of HBH; and Samuel W. Harma, the chief executive officer of HBH (collectively "defendants"). For approximately 12 years, plaintiffs' decedent had suffered from a variety of mental and physical illnesses, including major depression, bipolar disorder, borderline personality disorder, anorexia nervosa, bulimia, and hypoglycemia. She had also been an alcoholic for about five years and had an extensive psychiatric history that included several suicide attempts. Following her death, plaintiffs filed suit against defendants,[2] asserting that the decedent died "from cardiopulmonary arrest secondary to seizures brought on by her withdrawal from alcohol" after she "unsuccessfully attempt[ed] detoxification without assistance or intervention by health care professionals." Plaintiffs' complaint alleged ordinary negligence, gross negligence, intentional misconduct, and civil conspiracy. The complaint also asserted that defendants

[1] Defendant Maureen Phenix died on May 22, 2007.

[2] Plaintiffs' suit also included Robert B. McElhaney, M.D., as a defendant, but he is not part of this appeal.

provided medical care or treatment to patients and therefore, under MCL 691.1407(4), were not immune from liability under the governmental immunity act.

HBH, Phenix, and Harma moved for summary disposition under MCR 2.116(C)(7) and (8).[3] In relevant part, defendants argued that HBH and Phenix were entitled to governmental immunity because they did not provide plaintiffs' decedent with "medical care or treatment" under the "medical care or treatment" exception to governmental immunity, MCL 691.1407(4), and plaintiffs' decedent was not a patient at the time of her death; that Phenix and Harma were not grossly negligent, MCL 691.1407(2)(c); and that Harma was entitled to absolute immunity under MCL 691.1407(5) as the highest executive official of HBH. Defendants also argued that the decedent's own conduct, not their conduct, was the proximate cause of her death.

Plaintiffs argued that defendants were not entitled to governmental immunity because the "medical care or treatment" exception to governmental immunity applied since "medical care or treatment" includes mental health care or treatment. Plaintiffs also argued that because the "medical care or treatment" exception applies to employees or agents of governmental agencies, Harma was not entitled to absolute immunity as the highest executive

[3] This was defendants' second motion for summary disposition. Defendants and McElhaney first moved for summary disposition in 2004, arguing that plaintiffs' claims were barred by the statute of limitations. The trial court granted the motion, and this Court affirmed. *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), rev'd 480 Mich 978 (2007). Our Supreme Court held the application for leave to appeal in abeyance pending its decision in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007). After *Mullins* was decided, our Supreme Court reversed this Court's opinion and remanded the "case to the Chippewa Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*." *McLean*, 480 Mich at 978.

official of HBH under MCL 691.1407(5). Plaintiffs further argued that even if, for some reason, the "medical care or treatment" exception did not apply, Phenix was not immune from suit because her conduct was grossly negligent and her conduct was the proximate cause of the decedent's death.

The trial court denied defendants' motion for summary disposition, ruling that defendants were providing "medical care or treatment" to patients within the exception to governmental immunity and that the decedent was a patient under the exception. The trial court acknowledged that the Legislature "could have been more specific in what they said in this statute," but concluded that mental health care and treatment was included in the exception. Thus, the trial court ruled that defendants did not have governmental immunity. The trial court did not rule on whether Harma was absolutely immune as the highest executive official of HBH or whether Harma and Phenix were grossly negligent. Following the trial court's denial of defendants' motion, Harma moved for reconsideration, and the trial court denied the motion.

II. STANDARDS OF REVIEW

This case involves the construction of MCL 691.1407(4). 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). Similarly, the applicability of governmental immunity is a question of law that this Court reviews de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). Furthermore, we also review de novo a trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Defendants moved for summary disposition under MCR 2.116(C)(7) and (8). Because the trial court's

statements on the record and in its order denying summary disposition indicate that the basis for its ruling was its determination that the "medical care or treatment" exception to governmental immunity applied, we review the trial court's decision as a denial of defendants' motion under MCR 2.116(C)(7). A trial court may grant a motion for summary disposition under MCR 2.116(C)(7) on the ground that a claim is barred because of immunity granted by law. To survive a motion raised under MCR 2.116(C)(7), the plaintiff must allege specific facts warranting the application of an exception to governmental immunity. *Renny v Dep't of Transp*, 270 Mich App 318, 322; 716 NW2d 1 (2006), rev'd in part on other grounds 478 Mich 490 (2007). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, 461 Mich at 119. In deciding a motion brought pursuant to MCR 2.116(C)(7), a court may consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Holmes*, 242 Mich App at 706.

III. ANALYSIS

A. MEDICAL CARE OR TREATMENT EXCEPTION TO GOVERNMENTAL IMMUNITY

The issue in this case is whether the "medical care or treatment" exception to governmental immunity, MCL 691.1407(4), encompasses mental health care or treatment or whether it is limited to care or treatment for physical illness or disease. Resolving this question requires this Court to construe MCL 691.1407(4). 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). If the language of the statute is clear and unambiguous, this Court must presume that the Legislature intended the meaning clearly expressed and enforce it as written; further judicial construction is neither permitted nor required. *Id.*

The governmental immunity act, MCL 691.1401 *et seq.*, provides, in relevant part: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The immunity from tort liability provided by the governmental immunity act is expressed in the broadest possible language; it extends to all governmental agencies and applies to all tort liability when governmental agencies are engaged in the exercise or discharge of governmental functions. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). Further, the exceptions to governmental immunity are to be narrowly construed. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). Because the statutory exceptions to governmental immunity are to be narrowly construed, this Court must apply a narrow definition of the undefined phrase "medical care or treatment" in MCL 691.1407(4). See *Stanton v Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002).

The "medical care or treatment" exception to governmental immunity provides:

> This act does not grant immunity to a governmental agency or an employee or agent of a governmental agency with respect to providing medical care or treatment to a patient, except medical care or treatment provided to a

> patient in a hospital owned or operated by the department of community health or a hospital owned or operated by the department of corrections and except care or treatment provided by an uncompensated search and rescue operation medical assistant or tactical operation medical assistant. [MCL 691.1407(4).]

In *Briggs v Oakland Co*, 276 Mich App 369, 373-374; 742 NW2d 136 (2007), this Court concluded that the language in the "medical care or treatment" exception to governmental immunity was clear and unambiguous, and therefore the Court declined to examine the legislative history behind the current language of the statute, which was enacted by a 2000 amendment. 2000 PA 318.[4] We likewise conclude that the language in the "medical care or treatment" exception is plain and clear. Therefore, in resolving the issue in this case, we do not examine legislative history or references to "medical care or treatment" or similar phrases in other statutes for guidance in interpreting the exception.[5] Rather, we simply consider the plain and clear language of the "medical care or treatment" exception itself.

The plain language of the exception uses the broad phrase "medical care or treatment" and does not contain any language restricting or limiting the exception to medical care or treatment of physical illness or disease alone. If the Legislature had intended to exclude care or treatment for mental illness or disease from the exception, it could have done so by specifically limiting medical care or treatment to care and treatment for physical disease or illness, by specifically excluding care

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[4] Although the statute was further amended after 2000, the relevant language excepting from immunity those "providing medical care or treatment" has remained unchanged since its adoption in 2000.

[5] Only if "statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

and treatment for mental conditions, or by defining "medical care or treatment" in such a manner as to exclude care or treatment of mental conditions. The Legislature did not do so. Our obligation to narrowly construe the "medical care or treatment" exception to governmental immunity does not require this Court to ignore the plain and broad language used by the Legislature or the fact that the Legislature chose not to exclude care or treatment for mental health infirmities. "We 'may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007), quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The absence of any limiting language in the exception suggests a recognition of the interconnectedness of an individual's physical and mental health, and this Court must not read a limitation into the "medical care or treatment" exception that is not manifest from the plain language of the statute itself. To do so would be tantamount to the establishment of a judicially created exception or limitation to the "medical care or treatment" exception to governmental immunity that does not exist under the plain and clear language of the statute.

There is additional language in the "medical care or treatment" exception that also supports the conclusion that the Legislature did not intend to limit the exception to the care or treatment of physical illness or disease alone. MCL 691.1407(4) contains an exception to the exception, which provides for governmental immunity for "medical care or treatment provided to a patient in a hospital owned or operated by the department of community health . . . ." The website for the Department of Community Health (DCH) indicates that there are three state-operated psychiatric hospi-

tals.[6] This exception to the exception clearly does not apply in this case because there is no dispute that plaintiff's decedent was not a patient in a hospital owned or operated by the DCH at the time of her death. However, the plain language of the exception, by which the Legislature specifically provided for immunity for medical care or treatment provided to a patient in such hospitals, is telling. The Legislature would have been aware that the primary medical care provided by a psychiatric hospital would be mental health care, although the care and treatment of mental illness or disease would in some cases require treatment for physical conditions as well. The fact that the Legislature specifically provided for governmental immunity for patients in psychiatric hospitals owned or operated by the DCH supports the conclusion that the Legislature otherwise intended for the "medical care or treatment" exception to apply to the medical care or treatment of mental disease or illness.

In order for the "medical care or treatment" exception to apply, plaintiffs' decedent must have also been defendants' "patient." MCL 691.1407(4). Relying on *Saur v Probes*, 190 Mich App 636; 476 NW2d 496 (1991), defendants contend that plaintiffs' decedent was a "recipient," not a patient. In *Saur*, this Court held that the plaintiff-patient did not fit into the statutory definition of the term "recipient" in the Mental Health Code, in a prior version of MCL 330.1700.[7] *Saur*, 190 Mich App at 641. However, even if plaintiffs' decedent had fit the current definition

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[6] See Department of Community Health, State-Operated Psychiatric Hospitals <http://www.michigan.gov/mdch/0,1607,7-132-2941_4868_4896_-14451--,00.html.>

[7] The term "recipient" is now defined in MCL 330.1100c(12). It means, as it did when *Saur* was decided, a person who receives mental health services from a state or community mental health program. 1974 PA 258; MCL 330.1100c(12). Although the *Saur* Court provided no reasoning for

of a "recipient" in the Mental Health Code, this would not have precluded plaintiffs' decedent from also being a "patient" under the "medical care or treatment" exception to governmental immunity. The two are not mutually exclusive. Therefore, we are not persuaded by defendants' reliance on *Saur*.

The term "patient" is not defined in the governmental immunity act. *Stedman's Medical Dictionary* (26th ed) defines the word "patient" as "[o]ne who is suffering from any disease or behavioral disorder and is under treatment for it." This Court may consult dictionary definitions of terms that are not defined by statute. *Woodard v Custer*, 476 Mich 545, 561; 719 NW2d 842 (2006). The definition of the term "patient" in *Stedman's Medical Dictionary* includes a person who is under treatment for a behavioral disorder and supports our holding that the plain language of MCL 691.1407(4) ("medical care or treatment") is broad enough to include the care or treatment of mental illness or disease.

In their complaint, plaintiffs asserted that the decedent was under defendants' care "from on or about January 19, 1996 until December 13, 2000 when treatment services were effectively discontinued although not formally terminated until January 4, 2001." Plaintiffs' decedent died on February 14, 2001, which was after she was formally terminated from treatment with defendants. To survive defendants' motion for summary disposition under MCR 2.116(C)(7), plaintiffs must have alleged facts warranting the application of an exception to governmental immunity. *Renny*, 270 Mich App at 322. Plaintiffs' assertion that defendants' treatment of the decedent was formally terminated on

its conclusion, there was no indication that the defendant in that case provided services under contract with the state or a community mental health program.

January 4, 2001, which was approximately five weeks before she died, suggests that decedent was not a "patient" at the time of her death. However, elsewhere in their complaint, plaintiffs asserted that after her treatment was formally terminated, plaintiffs' decedent made more than 50 telephone calls to HBH's crisis intervention workers "seeking emergency counseling for her deepening depression, feelings of hopelessness, eating disorder and alcoholism." During one of these telephone calls, plaintiffs' decedent advised the crisis worker that she was feeling suicidal. The complaint also asserted that employees of HBH "completed or approved an 'Individual Plan of Service' which indicated that [the decedent] suffered from 'major depression and alcohol abuse.' " In addition, plaintiffs' complaint asserted that plaintiffs' decedent was scheduled to begin outpatient therapy for mental illness on February 15, 2001.[8] Under these circumstances, plaintiffs established an issue of fact regarding whether the decedent was a "patient" under MCL 691.1407(4) at the time of her death, notwithstanding their acknowledgement in the complaint that the decedent was formally discharged from treatment on January 4, 2001.[9]

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[8] Elsewhere in the complaint, plaintiffs asserted that outpatient therapy was scheduled to begin on April 15, 2001.

[9] We observe that the definition of "patient" in *Stedman's Medical Dictionary* does not contain any requirement of a formal arrangement for a person to be considered "under treatment." Furthermore, because of the nature of mental illness and addictions, there is often no discrete event marking a person's recovery from such a condition. Often, recovery is a gradual and lifelong process, marked by progress and setbacks, that requires continuous care and treatment. Although not in the context of a mental illness or addiction, our Supreme Court has recognized that "[p]atients are often discharged from hospitals when their conditions still require active treatment under the daily direction or supervision of a physician." *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 137 n 8; 545 NW2d 642 (1996).

Although we hold that the trial court properly concluded that the "medical care or treatment" exception to governmental immunity includes care and treatment for mental illness or disease and that plaintiffs' decedent was a "patient" under the exception, we hold that the trial court erred by concluding that the exception applied to Harma. While plaintiffs' complaint contains factual allegations that HBH and Phenix provided medical care to plaintiff's decedent, there were no factual allegations that Harma did so. Therefore, while the trial court properly concluded that the "medical care or treatment" exception applied to HBH and Phenix, it erroneously concluded that the exception also applied to Harma.

B. INDIVIDUAL IMMUNITY

In ruling that the "medical care or treatment" exception applied and that defendants were therefore not immune from liability, the trial court did not rule on whether Harma was individually immune under MCL 691.1407(5) as the chief executive officer of HBH, or whether Harma and Phenix were entitled to individual immunity under MCL 691.1407(2). In light of our holding that the trial court erred by concluding that the "medical care or treatment" exception applied to Harma given the absence of any factual allegations in plaintiffs' complaint that Harma provided medical care or treatment to plaintiffs' decedent, we remand this matter for the trial court to address whether Harma was entitled to absolute immunity under MCL 691.1407(5) or qualified immunity under MCL 691.1407(2).[10] *Odom v Wayne Co*, 482 Mich 459,

[10] We note that if the trial court determines that Harma was entitled to absolute immunity under MCL 691.1407(5), it need not also determine whether he was entitled to qualified immunity under MCL 691.1407(2). See *Nalepa v Plymouth-Canton Community Sch Dist*, 207 Mich App 580, 587-589; 525 NW2d 897 (1994), result only aff'd 450 Mich 934 (1995).

479-480; 760 NW2d 217 (2008). However, because the trial court properly concluded that the "medical care or treatment" exception applied to Phenix, there is no need for the trial court to determine whether she was entitled to qualified immunity under MCL 691.1407(2).[11]

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. No taxable costs under MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

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[11] MCL 691.1407(2) applies only in the absence of other applicable statutory provisions. *Grahovac v Munising Twp*, 263 Mich App 589, 597; 689 NW2d 498 (2004).

AUTO CLUB GROUP INSURANCE COMPANY v BOOTH

Docket No. 290403. Submitted April 13, 2010, at Detroit. Decided August 31, 2010, at 9:00 a.m.

Auto Club Group Insurance Company brought an action in the Macomb Circuit Court against John A. Booth and Michael Bordo, seeking a declaratory judgment that a homeowner's insurance policy issued by Auto Club to Booth did not provide coverage for injuries received by Bordo when Booth shot him with a handgun that Booth knew had a loaded magazine but thought did not have a shell in the chamber. Auto Club conceded for purposes of a motion for summary disposition that the shooting was accidental, that Booth had not intended or expected injury to Bordo, and that the injury was covered under the "occurrence/accident" portion of the policy, but contended that coverage was excluded under the policy's criminal-act exclusion. Booth had pleaded no contest to a misdemeanor charge of careless, reckless, or negligent discharge of a firearm resulting in injury, MCL 752.861, and had been sentenced to probation. The court, Peter J. Maceroni, J., denied Auto Club's motion for summary disposition and granted summary disposition in favor of Booth and Bordo. The court applied the two-pronged test in *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283 (2004), and held that although Booth had committed an intentional act, a reasonable person would not have expected bodily harm to result when Booth pulled the trigger of what he thought was an unloaded gun. Auto Club appealed.

The Court of Appeals *held*:

1. Although Booth pleaded no contest to the charge of violating MCL 752.861, his no-contest plea alone did not provide conclusive proof that he committed a crime. Nevertheless, the facts that Booth admitted established that his conduct undisputedly constituted at least one criminal act. There was sufficient evidence to establish Booth's carelessness, which in turn was sufficient to establish a misdemeanor under MCL 752.861.

2. *McCarn* was a plurality opinion and not binding under stare decisis. Moreover, the criminal-act exclusion considered by the Supreme Court in *McCarn* was notably different from the criminal-act exclusion in Auto Club's policy because Auto Club's

policy did not contain the reasonable-expectation clause found in the policy in *McCarn*. The trial court erred when it applied the two-pronged test employed in *McCarn* to determine whether the exclusion in Auto Club's policy applied to the shooting by Booth. Instead the criminal-act exclusion contained in Auto Club's policy did apply to Booth's actions, and Auto Club was entitled to summary disposition.

3. The criminal-act exclusion was not contrary to public policy because the insurance policy language was clear and unambiguous and Auto Club was free to limit its liability. The order granting summary disposition in favor of Booth and Bordo must be reversed, and the case must be remanded for the entry of an order of summary disposition in favor of Auto Club.

Reversed and remanded.

Hom, Killeen, Siefer, Arene & Hoehn (by *Michael J. Schaefer*) and *Gross & Nemeth, P.L.C.* (by *Mary T. Nemeth*), for Auto Club Group Insurance Company.

Femminineo Attorneys, P.L.L.C. (by *David C. Femminineo*), for John A. Booth.

Thomas P. Casey, P.C. (by *Thomas P. Casey*), and *Bendure & Thomas* (by *Mark R. Bendure*) for Michael Bordo.

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

WILDER, J. Plaintiff appeals as of right the trial court's order granting summary disposition in defendants' favor and holding that defendants were entitled to coverage under defendant John Allen Booth's homeowner's insurance policy. We reverse and remand for the entry of summary disposition in plaintiff's favor. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This dispute concerns coverage for a personal injury that resulted from a shooting. According to deposition testimony, defendant Michael Bordo had been living at

Booth's home and paying rent for approximately six months. On the day of the shooting, Booth, Bordo, and Bordo's friends were socializing in the home. Booth, who admitted that he was intoxicated, entered into a conversation with Bordo about how much pain he could endure. During the conversation, Booth went to his gun safe and retrieved his automatic handgun. The ammunition clip, containing 10 shells, was in the pistol. Booth pulled back the slide, allegedly to make sure that the gun was not loaded, and saw that no shell was in the chamber. However, according to Booth, he inadvertently loaded a shell from the ammunition clip into the chamber when he released the slide mechanism. Booth walked into the kitchen and pointed the gun at the ceiling. Bordo could not see whether the gun contained an ammunition clip. Booth grabbed Bordo's left hand, held it against the kitchen table, and placed the barrel of the gun against Bordo's left wrist. Booth testified that he did not recall pulling the trigger, but admitted that he must have done so. Bordo did not see Booth pull the trigger, and did not immediately realize that he had been shot. Bordo sustained substantial and permanent damage to his wrist and hand.

Booth was charged with the felony of discharging a firearm while under the influence of alcohol resulting in a serious impairment of bodily function, MCL 750.237(3). He pleaded no contest to a reduced misdemeanor charge of careless, reckless, or negligent discharge of a firearm resulting in injury, MCL 752.861, and received a sentence of two years' probation.

Bordo filed suit against Booth, alleging that Booth negligently caused Bordo's injuries. Plaintiff then filed this action for a declaratory judgment and moved for summary disposition on the ground that Booth's homeowner's policy with plaintiff did not cover Booth's

actions. Plaintiff conceded for purposes of the motion that the shooting was accidental, that Booth had not intended or expected injury to Bordo, and that the injury was covered under the "occurrence/accident" portion of plaintiff's policy. Plaintiff argued, however, that regardless, coverage was excluded under the policy's "criminal act" exclusion. Pursuant to MCR 2.116(I)(2), the trial court granted summary disposition in favor of defendants. The trial court reasoned that the criminal-act exclusion in the instant policy contained language similar to the criminal-act exclusion language in *Allstate Ins Co v McCarn* (*After Remand*), 471 Mich 283; 683 NW2d 656 (2004) (*McCarn II*), and that under the two-pronged test in *McCarn II*, while an intentional act was committed in the instant case, thus satisfying the first prong, the second prong of *McCarn II* was not satisfied because, in the trial court's judgment, a reasonable person would not have expected bodily harm to result when Booth pulled the trigger of what he thought was an unloaded gun. This appeal ensued.

Plaintiff argues that the trial court erred when it determined that plaintiff's criminal-act exclusion did not preclude coverage and further argues that plaintiff was entitled to summary disposition. We agree. We review summary disposition decisions de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Summary disposition is appropriate if the record contains no material factual issues and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). We consider the entire record, examining 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). We also review de novo legal questions concerning the interpretation of insurance contracts. *Rory*, 473 Mich at 464.

When deciding an insurance-coverage issue, we must apply the terms of the policy. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999), citing *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991). Unless the policy terms are ambiguous, we will enforce the policy as written. *Masters*, 460 Mich at 111. Here, neither party argues that the terms of the exclusion at issue are ambiguous. Accordingly, we apply the policy as written. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007), citing *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999). "While exclusions are strictly construed in favor of the insured, this Court will read the insurance contract as a whole to effectuate the intent of the parties and enforce clear and specific exclusions." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). The insurance company has the burden of demonstrating that an exclusion applies. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995).

The relevant exclusions in plaintiff's policy provide:

> Under [liability insurance coverages], we will not cover:
>
> * * *
>
> 5. bodily injury or property damage resulting from an act or omission by an insured person which is intended or could reasonably be expected to cause bodily injury or property damage. This exclusion applies even if the bodily injury or property damage is different from, or greater than, that which is expected or intended. . . .
>
> * * *
>
> 10. bodily injury or property damage resulting from:
>
> a. a criminal act or omission committed by anyone; or

> b. an act or omission, criminal in nature, committed by an insured person even if the insured person lacked the mental capacity to:
>
> (1) appreciate the criminal nature or wrongfulness of the act or omission; or
>
> (2) conform his or her conduct to the requirements of the law; or
>
> (3) form the necessary intent under the law.
>
> This exclusion will apply whether or not anyone, including the insured person:
>
> (a) is charged with a crime;
>
> (b) is convicted of a crime whether by a court, jury or plea of nolo contendere; or
>
> (c) enters a plea of guilty whether or not accepted by the court[.]

Plaintiff asserts that Booth committed a criminal act, that the criminal-act exclusion in ¶ 10 applies to Booth's criminal act, and that summary disposition in its favor was warranted. While Booth pleaded no contest to a charge of violating MCL 752.861, his no-contest plea alone does not provide conclusive proof that Booth committed a crime. *Akyan v Auto Club Ins Ass'n*, 207 Mich App 92, 98; 523 NW2d 838 (1994); *Akyan v Auto Club Ins Ass'n* (*On Rehearing*), 208 Mich App 271, 273-277; 527 NW2d 63 (1994). Nevertheless, the facts admitted by Booth establish that his conduct undisputedly constituted at least one criminal act.

MCL 752.861 provides, "Any person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor . . . ." The record plainly established that Booth had control of the gun and that the gun was discharged. The record also established that at the time

the gun was discharged, Booth's actions were at least careless. Booth testified that he knew that the gun had a loaded magazine. He also admitted that he was familiar with the firearm, which was his own, and that he had had weapons training in the military and in preparation for his license to carry a concealed weapon. Booth admitted that he was told on numerous occasions never to point a gun at someone and was also told to always assume that a gun was loaded. He also admitted that he decided to get his gun and hold the barrel against Bordo's wrist, acting on impulse, while intoxicated. Booth admitted that he must have pulled the trigger, although he did not remember doing so. Taken together, these facts were sufficient to establish carelessness, which in turn was sufficient to establish a misdemeanor under MCL 752.861.[1]

Bordo argues that the trial court correctly applied the two-pronged test in *McCarn II* and found that the exclusion did not apply on the basis that Booth had reasonably believed that the gun was not loaded. Bordo's reliance on the *McCarn II* decision is unfounded.

In *Allstate Ins Co v McCarn*, 466 Mich 277, 279; 645 NW2d 20 (2002) (*McCarn I*), the insureds sought coverage for an unintended shooting death that occurred on their property. The death occurred when two teenaged boys were playing with a shotgun. One boy, mistakenly believing that the gun was unloaded, pointed the gun at the other boy and intentionally pulled the trigger, killing him. The personal representative of the dead boy's estate sued the insureds. The Court in *McCarn I* addressed whether the shooting was a cov-

[1] We also note that Bordo acknowledged that "Booth's conduct in discharging a firearm he did not believe was loaded, was negligent and careless . . . ." Thus, Bordo admitted that even if Booth's actions were not intentional, they were still criminal under MCL 752.861.

ered occurrence. *Id*. at 282. In *McCarn II*, a plurality of our Supreme Court determined that coverage for the shooting was not excluded under the policy's criminal-act exclusion. The plurality found that the exclusion's language directed it to use a two-pronged test. "There is no insurance coverage if, first, the insured acted either intentionally or criminally, and second, the resulting injuries were the reasonably expected result of an insured's intentional or criminal act." *McCarn II*, 471 Mich at 289-290 (opinion by TAYLOR, J.). While the plurality determined that the first prong of the test had been met, it found that the second prong had not been met because the shooter believed that the gun was unloaded and thus believed the gun could not fire. *Id.* at 291.

Defendants argue that this case presents legally identical facts and thus the trial court's decision to find that plaintiff's criminal-act exclusion did not bar coverage was correct. However, plurality opinions in which no majority of the participating justices agree with respect to the reasoning for the holding are not generally considered authoritative interpretations that are binding under the doctrine of stare decisis. See *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976). Moreover, as plaintiff points out, the exclusion in *McCarn II* was significantly different from the exclusion at issue here. In *McCarn*, the pertinent criminal-act exclusion provided:

> "We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:
>
> "a) such insured person lacks the mental capacity to govern his or her conduct;
>
> "b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or

> "c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.
>
> "This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime." [*McCarn II*, 471 Mich at 289.]

Plaintiff argues that this "hybrid" criminal-act exclusion is notably different from plaintiff's "pure" criminal-act exclusion and that the trial court erred when it applied the two-pronged test in *McCarn II* to determine whether the exclusion in the instant case applied to the shooting. We agree. The exclusion in *McCarn II* was significantly different from the criminal-act exclusion here. Plaintiff's policy exclusion for criminal acts does not contain the reasonable-expectation clause found in *McCarn II*, and we conclude that it applies to Booth's actions.

Defendants also contend that, given the discussion in *McCarn II* concerning the purpose and societal benefits of insurance coverage, see *McCarn II*, 471 Mich at 292, this Court should find that the criminal-act exclusion in this case is overbroad, is against public policy, and should be construed to provide coverage for Booth's negligent, but unintentional conduct.

However, this Court has previously rejected this aspect of defendants' arguments, in a case discussing substantially similar exclusion language. See *Auto Club Group Ins Co v Daniel*, 254 Mich App 1; 658 NW2d 193 (2002). The injured party in *Daniel* also contended that public policy favored insurance coverage. *Id.* at 4-5. In explicitly rejecting that contention, this Court concluded:

> The criminal act exclusion is not contrary to public policy because the policy language is clear and unambiguous and [the insurance company] is free to limit its liability. . . . We further note that, as a matter of public policy, an

> insurance policy that excludes coverage for a person's criminal acts serves to *deter* crime, while a policy that provides benefits to those who commit crimes would *encourage* it. [*Id*.]

Our Supreme Court has determined that "the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government." *Rory*, 473 Mich at 476.

For these reasons, we conclude that the trial court erred when it granted summary disposition to defendants concerning the applicability of the criminal-act exclusion contained in Booth's homeowner's insurance policy. Plaintiff is entitled to summary disposition.

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

BENNETT v MACKINAC BRIDGE AUTHORITY

Docket No. 287628. Submitted February 3, 2010, at Lansing. Decided August 31, 2010, at 9:05 a.m.

Ricky S. Bennett was injured while working as a painter on the Mackinac Bridge. He initially sought workers' compensation benefits from his direct employer, Allstate Painting Company. Allstate did not appear in the action, and the magistrate awarded Bennett an open award of benefits. Bennett was unable to collect on the award from Allstate, which did not have workers' compensation insurance, and he began a second action seeking benefits from his purported statutory employers, American Painting Company, Inc., and the Mackinac Bridge Authority. Citing the doctrine of res judicata, the magistrate dismissed Bennett's claims against American Painting and the authority. The Workers' Compensation Appellate Commission (WCAC) affirmed in a 2-1 decision. Bennett sought leave to appeal, which the Court of Appeals denied in an unpublished order entered December 29, 2008. Bennett then sought leave to appeal in the Michigan Supreme Court. In lieu of granting leave, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 483 Mich 1031 (2009).

The Court of Appeals *held*:

1. Res judicata applies in workers' compensation proceedings. The Legislature did not, however, include in MCL 418.171 language requiring the joinder of an injured employee's direct and statutory employers in a single action. The magistrate and the WCAC erred by applying the judicially created doctrine of res judicata to bar plaintiff's action against his purported statutory employers because doing so impermissibly subverted the intent of the Legislature by effectively reading a rule of mandatory party joinder into the text of MCL 418.171.

2. Although it may have been unwise for plaintiff to believe that Allstate would have sufficient assets to pay his workers' compensation benefits even though the company did not have workers' compensation insurance, it was not improper for plaintiff to initially proceed against Allstate alone. MCL 418.863 allows an injured employee to present an order awarding workers' compensation benefits to the circuit court, and any

judgment the court renders in accordance with the award may be executed against an employer that failed to purchase workers' compensation insurance or act as a self-insurer as required by MCL 418.611.

3. An injured employee may not invoke the doctrine of res judicata offensively against his or her statutory employers in a subsequent proceeding if those statutory employers did not have adequate notice of the previous proceeding against the direct employer.

Reversed and remanded to the magistrate for reinstatement of plaintiff's claim.

WORKERS' COMPENSATION — RES JUDICATA — JOINDER OF PARTIES — STATUTORY EMPLOYERS — DIRECT EMPLOYERS.

An injured employee may bring separate workers' compensation actions against his or her direct employer and statutory employer without joining all potentially liable parties in one proceeding, and the doctrine of res judicata may not be applied to bar the employee's action against his or her statutory employer even though his or her direct employer has already been ordered to pay benefits in a separate action (MCL 418.171).

Daryl Royal and *Moher & Cannello*, *P.C.* (by *Timothy S. Moher*), for Ricky S. Bennett.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Morrison Zack*, Assistant Attorney General, for the Mackinac Bridge Authority.

Varga & Varga, *P.C.* (by *Judith Fleming Varga*), for American Painting Company, Inc., and Amerisure Insurance Company.

Before: K. F. KELLY, P.J., and JANSEN and ZAHRA, JJ.

JANSEN, J. In this workers' compensation case, plaintiff appeals as on leave granted[1] the decision of the

[1] This appeal is before us on remand from our Supreme Court for consideration as on leave granted. *Bennett v Mackinac Bridge Auth*, 483 Mich 1031 (2009).

Workers' Compensation Appellate Commission (WCAC) affirming the magistrate's dismissal of his claim against defendants, the Mackinac Bridge Authority (the Authority) and American Painting Company, Inc., on the ground of res judicata. We reverse the decision of the WCAC and remand this case to the magistrate for reinstatement of plaintiff's claim against defendants[2] consistent with this opinion.

I

For more than 25 years, plaintiff worked as a painter on the Mackinac Bridge. Throughout that time, he worked for various employers. In May 2005, plaintiff was working for Allstate Painting Company, Inc. While at work on May 6 and 9, 2005, plaintiff injured his right knee. Allstate did not have workers' compensation insurance.

Although plaintiff was apparently aware that his employer lacked workers' compensation insurance at the time, he nonetheless filed a petition seeking benefits from Allstate. Allstate did not appear in the action. On May 26, 2006, the magistrate granted plaintiff an open award of benefits. Allstate did not appeal the magistrate's decision. However, plaintiff was unable to collect under the magistrate's award.

Plaintiff thereafter filed the instant action seeking benefits from American Painting and the Authority pursuant to § 171 of the Worker's Disability Compensation Act (WDCA),[3] MCL 418.171, the statutory employment provision. MCL 418.171(1) provides:

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[2] Amerisure Insurance Company is involved in this appeal only indirectly as American Painting's insurer. We therefore use the term "defendants" to refer to American Painting and the Authority only.

[3] MCL 418.101 *et seq*.

> If any employer subject to the provisions of this act, in this section referred to as the principal,[4] contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of [MCL 418.611], and who does not become subject to this act or comply with the provisions of [MCL 418.611] prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. If compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the person under the employer by whom he or she is immediately employed. A contractor shall be deemed to include subcontractors in all cases where the principal gives permission that the work or any part thereof be performed under subcontract.

Defendants requested, among other things, that the magistrate dismiss plaintiff's § 171 claim against them because res judicata barred plaintiff's second action. In response, plaintiff argued that res judicata did not bar his second action because no mandatory joinder of parties exists in workers' compensation cases, because defendants had not been parties to the first action, and because defendants were not in privity with Allstate.

The magistrate acknowledged that a plaintiff is not generally required to bring all possible workers' compensation claims in one single action. Nevertheless, she

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[4] "Principals subject to workers' compensation liability under [MCL 418.171] are commonly called 'statutory employers.' " *Smith v Park Chem Co*, 154 Mich App 180, 183; 397 NW2d 260 (1986).

noted that a broad application of res judicata would bar certain workers' compensation claims that a plaintiff could have brought, but did not bring, in the first action. The magistrate concluded that plaintiff could have brought his § 171 claim against defendants in the earlier action:

> The statutory employer theory was available for pursuit in the original litigation against Allstate Painting . . . if Plaintiff had "exercised reasonable diligence" and added the alleged statutory employers to that litigation. Plaintiff testified at his first trial that he has worked painting the Mackinaw Bridge for approximately 27 years and has worked for a number of different employers, whether private companies or the State of Michigan directly. That fact, in combination with Plaintiff's knowledge that Allstate Painting lacked Michigan Worker's Compensation Insurance coverage would give a reasonable man pause to consider exploring the theory of statutory employment to identify a contractor with insurance coverage. Therefore, reasonable diligence by Plaintiff and his counsel would have revealed that the State of Michigan and A[merican] Painting had insurance coverage and could have and should have been added to the original litigation.
>
> Additionally, the litigation Plaintiff advanced against Allstate Painting is the same transaction for which Plaintiff is now trying to advance against American Painting Inc. and Mackinaw Bridge Authority. . . . [T]he same facts are being asserted in the case against American Painting and Mackinaw Bridge Authority as were asserted against Allstate Painting. These facts arise out of the same time, space, and origin. The only difference is the motivation.
>
> Plaintiff admits in his brief that the motivation for pursuing the current litigation against American Painting and Mackinaw Bridge Authority is that Allstate Painting has failed to pay benefits pursuant to the Open Award authored by [the initial magistrate]. Plaintiff is now seeking enforcement of the Order through Circuit Court. This is not a sufficient legal explanation for Plaintiff's failure to add American Painting and Mackinaw Bridge Authority to the original litigation against Allstate Painting.

> "Res judicata bars every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair* [*v Michigan*, 470 Mich 105, 123; 680 NW2d 386 (2004)]. For the reasons outlined above, the pending litigation of Ricky S. Bennett versus American Painting and Mackinaw Bridge Authority is hereby dismissed pursuant to res judicata.

Plaintiff appealed the magistrate's dismissal of his claim to the WCAC, which affirmed in a 2-1 decision. The WCAC majority agreed with the magistrate's determination that res judicata barred plaintiff's action against the alleged statutory employers:

> We agree with the magistrate. The claims against the direct employer and the statutory employers are virtually the same. Both claims involve the same two alleged knee injuries, occurring on the same two alleged dates. They involve the same medical, disability and wage loss proofs. Both claims seek weekly wage loss benefits and medicals benefits for the same time periods. The claims against the direct employer and the statutory employers certainly would have made a convenient trial unit.
>
> The plaintiff does not even argue there was an impediment to adding the statutory employers in the first litigation. He knew the direct employer was uninsured, but did not add the statutory employers until he was unable to collect against the uninsured employer. [*Bennett v Mackinac Bridge Auth*, 2008 Mich ACO 163, p 9.]

In his arguments to the WCAC, plaintiff relied on *Viele v DCMA*, 167 Mich App 571; 423 NW2d 270 (1988), modified in part on other grounds 431 Mich 898 (1988), in which this Court ruled that res judicata did not bar the plaintiff's claim against his alleged statutory employers even though his direct employer had already been ordered to pay benefits after a separate hearing. However, the WCAC majority distinguished the facts of the present case from those presented in *Viele*:

> We do not believe *Viele* supports . . . plaintiff's position. *Viele* involved a situation where the plaintiff tried to proceed against the direct employer and the statutory employers. The Bureau [of Workers' Disability Compensation] decided to proceed to trial against the direct employer, even though the plaintiff had filed an amended petition adding the statutory employers before trial. The Court noted the plaintiff was not able to pursue the claims against the statutory employers in [the] first trial. The reason the plaintiff could not have "raised" the statutory employment issue in the first trial was because the Bureau bifurcated the issues by insisting on separate trials.
>
> There is another reason we cannot accept [dissenting Commissioner Martha M. Glaser's] reasoned interpretation of *Viele*. If the only reason the Court in *Viele* ruled in the plaintiff's favor was because proving statutory employment required a bit more evidence than proving direct employment, then the Court would have been violating the "same transaction" test outlined in *Gose* [*v Monroe Auto Equip Co*, 409 Mich 147; 294 NW2d 165 (1980)]. We do not believe the decision in *Viele* was contrary to the *Gose* "same transaction" test. To the contrary, the *Viele* decision cites and follows the *Gose* standard. We believe [Commissioner Glaser's] interpretation of *Viele* forces *Viele* into conflict with *Gose* and the later decision in *Adair*, by adopting a "same evidence" standard. [*Bennett*, 2008 Mich ACO 163, at 9-10.]

WCAC Commissioner Glaser dissented, concluding that plaintiff's subsequent § 171 claim against defendants was not identical to the claim raised against Allstate in the first action:

> [T]he instant claim is not identical for res judicata purposes because the facts or evidence essential to [the] maintenance of the two claims is not the same. In the initial action against Allstate, plaintiff was required to present evidence to prove that he was disabled as a result of a work injury. In the instant action, plaintiff is required first to present evidence to prove that either or both of these defendants are statutory employers. [*Id*. at 5.]

Commissioner Glaser also disputed the WCAC majority's determination that *Viele* was distinguishable:

> Plaintiff cannot claim res judicata on the merits of the case finding him to be compensably disabled, so he would once again have to present evidence to prove compensability. While some of the required evidence may overlap between the two claims, they are not identical.
>
> The *Viele* Court explained that the party seeking the subsequent litigation would not be able to assert res judicata to protect a previous award. However, if plaintiff had not established a compensable disability in the first case, defendants would be able to claim res judicata, so that plaintiff would not be able to obtain a different result, by filing multiple claims.
>
> The *Viele* Court also relied on the absence of any language in § 171 which could be read as mandating joinder of the alleged statutory employers with the direct employer. In fact, § 171 refers to a claim taken against the principal and indicates that the "principal shall be substituted for reference to the employer..." [sic] This language could be read as indicating a separate cause of action.
>
> The Supreme Court modified *Viele* . . . but left standing its holdings referenced above. *Viele v DCMA*, 431 Mich 898 (1988)[.] There are no subsequent, published Court of Appeals decisions which deviate from *Viele*. [*Id*. at 5-6.]

Plaintiff filed an application for leave to appeal the decision of the WCAC, which this Court initially denied. Our Supreme Court then remanded the matter to this Court for consideration as on leave granted.

II

Appellate review of WCAC decisions is limited. *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003). "In the absence of fraud, we must consider the WCAC's findings of fact conclusive if there is any competent evidence in the record to support them." *Id*.; see also MCL 418.861a(14).

On the other hand, questions of law in workers' compensation cases are reviewed de novo. MCL 418.861; MCL 418.861a(14); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). We review de novo as a question of law whether res judicata applies in a given case. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). Questions of statutory interpretation are also reviewed de novo on appeal. *Brackett v Focus Hope, Inc*, 482 Mich 269, 275; 753 NW2d 207 (2008); *Rakestraw*, 469 Mich at 224.

III

Much of the actual dispute in this case arises out of the parties' varying interpretations of this Court's opinion in *Viele*. In *Viele*, 167 Mich App at 574, the plaintiff filed separate petitions for workers' compensation benefits against his direct employer and his alleged statutory employers. However, "[f]or reasons unclear from the record," the plaintiff's claim against his direct employer and his claim against his alleged statutory employers were not consolidated, and the case initially proceeded to trial against the direct employer only. *Id*. at 574-575. Following trial, the direct employer was ordered to pay benefits. *Id*. at 575. Shortly thereafter, the direct employer filed for bankruptcy. *Id*.

The case subsequently proceeded to trial on plaintiff's § 171 claim against his alleged statutory employers, and plaintiff was again awarded benefits. *Id*. at 575-576. The alleged statutory employers appealed the award to the Workers' Compensation Appeal Board (WCAB).[5] *Id*. at 576. The WCAB ruled that res judicata barred the subsequent trial on the plaintiff's § 171 claim, as well as the

[5] The WCAB was the "predecessor appellate body to the WCAC . . . ." *Sell v Mitchell Corp of Owosso*, 241 Mich App 235, 241; 615 NW2d 748 (2000). The WCAB has been eliminated. Former MCL 418.266.

award of benefits emanating from that trial. *Id*. at 576-577. Consequently, the WCAB ruled that the plaintiff could collect benefits from his direct employer only, and not from any of his alleged statutory employers. *Id*. at 577.

On appeal, this Court held that the WCAB had erred by ruling that res judicata barred the subsequent proceedings on plaintiff's § 171 claim. *Id*. at 578-579. This Court reviewed the relevant text of § 171, which discusses the relationship between a statutory employer and a direct employer. *Id*. at 580. On the basis of the statutory text, the *Viele* Court held that a "statutory employer is in privity with the direct employer and may properly invoke the doctrine of res judicata defensively to bar the relitigation of claims which could have been raised in the prior action between the disabled person and the direct employer, but were not." *Id*. at 580. However, despite the fact that the plaintiff's statutory employers were in privity with the plaintiff's direct employer, the *Viele* Court went on to explain:

> Here, the claim which the alleged statutory employers sought to bar was plaintiff's claim against them under § 171. This is not a claim which plaintiff could have raised in his prior action against [the direct employer]. Thus, while the alleged statutory employers may invoke the doctrine of res judicata to bar the relitigation of plaintiff's claim for disability benefits to the extent that [the direct employer] was exonerated from liability, they cannot invoke the doctrine to bar a hearing on the issue of their own liability as statutory employers. We, therefore, conclude that the WCAB applied erroneous legal reasoning in ruling that the [subsequent] hearing, and the decision emanating from that hearing, was barred under the doctrine of res judicata. [*Id*. at 581.]

Turning to the present case, plaintiff argues that this Court's opinion in *Viele* is directly on point and should control the outcome of this appeal. Plaintiff maintains that the specific reasons underlying the bifurcation of

the plaintiff's claims in *Viele* were unimportant to the outcome. Instead, plaintiff contends, the *Viele* Court held as a matter of law that an injured employee is entitled to proceed separately against his or her direct employer and his or her alleged statutory employers and that an injured employee necessarily cannot raise a § 171 claim in an action brought against the direct employer only. Plaintiff also notes the WCAC's longstanding recognition that there is no mandatory joinder of parties in workers' compensation proceedings. On the basis of *Viele*, and given the absence of a mandatory party-joinder rule in workers' compensation cases, plaintiff argues that he was fully entitled to sue his direct employer first, reserving for a later action any additional claim that he may have had against his alleged statutory employers under § 171. He further contends that, like the plaintiff in *Viele*, he necessarily could not have raised his § 171 claim in the first action, which was brought against Allstate only, and that the doctrine of res judicata therefore did not preclude him from raising the § 171 claim in his subsequent action against defendants.

Defendants respond by contending that the *Viele* opinion is distinguishable from the case at bar for several reasons. First, they point out that unlike plaintiff's § 171 claim in the instant case, which was not filed until after a decision had already been rendered with respect to plaintiff's claim against Allstate, the plaintiff's § 171 claim in *Viele* had been filed *before* the plaintiff's claim against his direct employer was litigated. Further, defendants suggest that the plaintiff's claim against his direct and alleged statutory employers in *Viele* were not consolidated because the Bureau of Workers' Disability Compensation (Bureau)[6] mandated the bifurcation of the claims in that case. Accordingly, they contend that the plaintiff in

[6] The Bureau is now known as the Workers' Compensation Agency.

Viele was powerless to consolidate his direct-employer and statutory-employer claims in one action. In contrast, defendants argue that there was no requirement mandating the bifurcation of plaintiff's claims in the present case and that plaintiff consequently could have consolidated his § 171 claim with his direct-employer claim against Allstate, bringing all claims in one single action. Defendants argue that because plaintiff could have brought his § 171 claim in the first action but did not, the doctrine of res judicata bars him from pursuing his § 171 claim in this subsequent proceeding. They also assert that plaintiff has offered no plausible or reasonable explanation for failing to join his alleged statutory employers in the first action against Allstate.

While some of this Court's holdings in *Viele* are unmistakable, others are not so clear. For example, as noted previously, the *Viele* Court observed that the plaintiff's § 171 claim in that case was "not a claim which plaintiff could have raised in his prior action against [the direct employer]." *Viele*, 167 Mich App at 581. The parties do not agree concerning what, exactly, the *Viele* Court meant by this statement. As explained earlier, plaintiff interprets this statement as a broad holding that injured employees are entitled to proceed separately against their direct and statutory employers and that such employees necessarily cannot raise a § 171 claim in an action brought against their direct employers only. On the other hand, defendants argue that the essential rationale for this statement—i.e., the reason why the *Viele* Court stated that the plaintiff in that case could not have raised his § 171 claim in the first action against his direct employer—was that the Bureau had bifurcated the claims in *Viele* contrary to the plaintiff's wishes. Defendants find support for their argument in the WCAC majority's opinion in this case, which stated that "[t]he reason the [*Viele*] plaintiff

could not have 'raised' the statutory employment issue in the first trial was because the Bureau bifurcated the issues by insisting on separate trials." *Bennett*, 2008 Mich ACO 163 at 9.

The obvious problem with defendants' argument (and the WCAC majority's statement) concerning this issue is that the *Viele* Court's opinion contained absolutely no language to suggest that the Bureau mandated the bifurcation of the plaintiff's claims in that case. Indeed, the *Viele* Court specifically observed that it was "unclear from the record" why the plaintiff's § 171 claim against his alleged statutory employers had not been consolidated with his claim against the direct employer. *Viele*, 167 Mich App at 574-575. We seriously doubt that the *Viele* Court would have characterized this matter as "unclear from the record" if it had been generally known, as defendants now assert, that the Bureau prevented the plaintiff from consolidating his claims by insisting on two separate trials.

The language of *Viele*'s footnote 2 belies defendants' argument as well. In footnote 2, the *Viele* Court clearly held that an injured worker is entitled to sue his or her direct employer, alleged statutory employer, or both, and that the decision to sue one of these entities instead of the other is within the sole discretion of the injured worker. *Id.* at 579-580 n 2. Specifically, the Court noted that even though a plaintiff is entitled to only "one award of compensation benefits for his disability under the WDCA," "[w]hether [a] plaintiff proceeds against his direct employer or the statutory employer, if any, has been viewed as being at the option of the disabled employee." *Id*. The *Viele* Court further suggested that a judgment against a plaintiff's direct employer generally does not bar or terminate that plaintiff's subsequent claim against his or her potential statutory employer,

which is liable for the same injury. *Id*., citing 2 Restatement Judgments, 2d, § 49, p 34. Thus, through the language of footnote 2, the *Viele* Court appears to have implicitly held that an injured employee may sue his or her direct employer first, and may reserve for a subsequent proceeding any additional claim that he or she may have against his or her alleged statutory employers under § 171. Whatever truth there may be to the proposition that the Bureau insisted on bifurcating the plaintiff's claims in *Viele*, it simply does not appear that the *Viele* Court considered this to have been decisive to the outcome of that case.

Given the language of footnote 2, we are inclined to adopt plaintiff's broad reading of *Viele*. It strikes us that the *Viele* Court endorsed plaintiff's view, holding that an injured employee is entitled to proceed separately against his or her direct and statutory employers and that an award of benefits against a plaintiff's direct employer does not bar that plaintiff from asserting a § 171 claim against his or her statutory employer in a subsequent action. See *Viele*, 167 Mich App at 580 n 2. There is simply no other reasonable way to read the text of footnote 2. Nevertheless, for the reasons that follow, we need not definitively decide which interpretation of *Viele* is correct. As we will explain, there exist compelling reasons, wholly apart from this Court's opinion in *Viele*, to conclude that the doctrine of res judicata does not bar plaintiff's § 171 claim against defendants in this case.

IV

It is true, of course, that res judicata (also known as claim preclusion) applies in workers' compensation proceedings. *Gose*, 409 Mich at 159; *Banks v LAB Lansing Body Assembly*, 271 Mich App 227, 229; 720 NW2d 756 (2006).

> The doctrine of res judicata applies where: (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies. [*Paige v Sterling Hts*, 476 Mich 495, 521-522 n 46; 720 NW2d 219 (2006).]

To be sure, the "broad application" of res judicata applicable in Michigan workers' compensation cases bars not only "a second action . . . if the same question was actually litigated in the first proceeding," but also "those claims arising out of the same transaction which plaintiff could have brought, but did not." *Gose*, 409 Mich at 160; see also *Adair*, 470 Mich at 123-125.

It is equally true, however, that res judicata is a "judicially created" doctrine, *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999), and must not be applied when its application would subvert the intent of the Legislature, *Riley v Northland Geriatric Ctr (After Remand)*, 431 Mich 632, 642; 433 NW2d 787 (1988) (opinion by GRIFFIN, J.); *Juncaj v C & H Indus*, 161 Mich App 724, 734; 411 NW2d 839 (1987), vacated on other grounds 434 NW2d 644 (1989); see also *Texas Instruments Inc v Cypress Semiconductor Corp*, 90 F3d 1558, 1568 (CA Fed, 1996) (observing that "an administrative agency decision, issued pursuant to a statute, cannot have preclusive effect when [the Legislature], either expressly or impliedly, indicated that it intended otherwise").

We conclude that application of res judicata to bar plaintiff's subsequent action in the present case would subvert the intent of the Legislature because it would effectively read a rule of mandatory party joinder into the text of § 171. The WCAC has consistently recognized that the WDCA does not require the joinder of parties in workers' compensation proceedings. See, e.g., *Woodard v*

Sebro Plastics, Inc, 2002 ACO 263; *Hubbard v Laidlaw Transit Co*, 2000 ACO 406. We agree with the WCAC's determination that the WDCA generally does not require the joinder of parties, especially in the context of the statutory employment provision of § 171.

Our primary responsibility when interpreting a statute such as § 171 is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The best evidence of the Legislature's intent is the language of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). Section 171 contains no language mandating the joinder of parties. But it is clear that the Legislature could have included such language had it wanted to. For example, in several other statutes the Legislature has expressly mandated the joinder of parties as defendants. See, e.g., MCL 500.3172(3)(d) (mandating the joinder of certain parties as defendants in "assigned claims" litigation under the no-fault act); MCL 560.224a(1) (mandating the joinder of various parties as defendants in actions to revise or vacate recorded plats under the Land Division Act); MCL 600.3810(2) (mandating the joinder of chattel mortgagees, assignees, and lienholders as defendants in nuisance-abatement actions brought against vehicle owners under chapter 38 of the Revised Judicature Act). Although none of these statutory provisions is contained in the WDCA, these examples make clear that the Legislature knows how to enact a statute requiring the joinder of parties when it so desires. See *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 403-404; 760 NW2d 510 (2008).

Even more persuasive, the Legislature has on occasion provided mechanisms for compelling the joinder of parties in certain sections of the WDCA itself. Specifically, the Legislature has provided that when a voca-

tionally disabled worker is employed under the provisions of chapter 9 of the WDCA[7] and the vocationally disabled worker files a claim for benefits against his or her employer, the Second Injury Fund must be joined as a party defendant upon motion of the employer. MCL 418.931(1). Likewise, another section of the WDCA formerly provided that when an employee disabled by an occupational disease filed a claim for benefits against his or her "last employer," the last employer could compel the joinder of the disabled employee's prior employers as defendants under certain circumstances. Former MCL 418.435.[8] In light of these current and former provisions of the WDCA—both establishing means to compel the joinder of parties in certain situations—we view the Legislature's omission of a party-joinder provision from § 171 as "very strong evidence of . . . legislative intent . . . ." *McSloy v Ryan*, 27 Mich 110, 115 (1873); see also *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005) (noting that "[t]he omission of a provision in one part of a statute that is included in another should be construed as intentional").

As the aforementioned statutory provisions demonstrate, the Legislature knows how to (1) require the joinder of parties outright and (2) prescribe methods by which one party may compel the joinder of other parties.

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[7] MCL 418.901 *et seq*.

[8] This version of MCL 418.435, permitting a disabled employee's last employer to compel the joinder of prior employers under certain circumstances, was amended by 1980 PA 357. MCL 418.435 now provides that

> [t]he total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If any dispute or controversy arises as to the payment of compensation or as to liability for the compensation, the employee shall make claim upon the last employer only and apply for a hearing against the last employer only.

Section 171 contains neither type of provision. Had the Legislature wanted to require the joinder of direct and statutory employers in a single action, it easily could have done so by including language to that effect in the text of § 171. See *Potter v McLeary*, 484 Mich 397, 422 n 30; 774 NW2d 1 (2009) (observing, albeit in an unrelated context, that "[i]f the Legislature wanted such a requirement, it could have easily included it"). However, it did not. Accordingly, we conclude that the Legislature intended to allow an injured employee to bring separate actions against his or her direct employer and statutory employer without joining all potentially liable parties as defendants in one single proceeding.

Res judicata and party joinder are naturally distinct concepts. However, the ideas underlying these two concepts are, at least to some extent, interrelated. See 2 Restatement Judgments, 2d, § 51, comment *c*, pp 51-52. For instance, it has been suggested that one of the essential purposes underlying a rule of mandatory party joinder is to ensure that any ensuing judgment will have res judicata effect. *Patterson Enterprises, Inc*, *v Bridgestone/Firestone, Inc*, 812 F Supp 1152, 1155 (D Kan, 1993). Similarly, application of the doctrine of res judicata can work to create a de facto rule of compulsory party joinder. See *United States v Lacey*, 982 F2d 410, 412 (CA 10, 1992); *Drug Purchase, Inc v Dubroff*, 485 F Supp 887, 890 (SD NY, 1980); see also *Day v Kerkorian*, 61 Mass App 804, 812; 814 NE2d 745 (2004). This is because a plaintiff who sues one party will be required to join as defendants all other parties sharing the same interest in the litigation in order to avoid the res judicata bar. *Lacey*, 982 F2d at 412.

This is precisely what has happened here. Given the particular contractual relationship between statutory employers and direct employers, it is beyond dispute

that statutory employers are in privity with direct employers for purposes of res judicata. MCL 418.171(1); *Viele*, 167 Mich App at 580. Accordingly, application of res judicata in a case such as this will essentially create a de facto rule of mandatory party joinder, requiring an injured employee who sues his or her direct employer to join at the outset all possible statutory employers in the same action in order to avoid the res judicata bar that would otherwise inevitably result. One need not look any further than the circumstances of the case at bar. By applying the doctrine of res judicata to preclude plaintiff's subsequent action against his alleged statutory employers, the magistrate and the WCAC majority have read into § 171 a rule of compulsory party joinder that finds no support in the statutory text.

For reasons already explained, we have concluded that the Legislature intended to allow an injured employee to bring separate workers' compensation actions against his or her direct employer and statutory employer without joining all potentially liable parties in one proceeding. Application of the judicially created doctrine of res judicata in a case like this would impermissibly subvert this legislative intent. *Riley*, 431 Mich at 642 (opinion by GRIFFIN, J.); *Juncaj*, 161 Mich App at 734. Consequently, we hold that the magistrate and the WCAC erred by applying res judicata to bar this subsequent action against plaintiff's alleged statutory employers under § 171. We reverse the decision of the WCAC and remand this matter to the magistrate with instructions to reinstate plaintiff's § 171 claim against American Painting and the Authority.

V

We wish to address briefly defendants' suggestion that because plaintiff knew Allstate was uninsured, it

was somehow improper or unreasonable for him to proceed initially against Allstate only. As plaintiff's counsel pointed out at oral argument before this Court, plaintiff apparently believed that although Allstate was uninsured, it would still have sufficient assets to pay any resulting award of workers' compensation benefits. However unreasonable this belief might seem with the benefit of hindsight, it is clear that plaintiff was nevertheless entitled to proceed against his uninsured direct employer without joining defendants in the first action. It is true that employers who are subject to the WDCA must either purchase workers' compensation insurance from an authorized insurer or operate as a self-insurer. MCL 418.611(1); see also *Wyrybkowski v Cobra Pre-Hung Doors, Inc*, 66 Mich App 555, 557; 239 NW2d 660 (1976). However, the WDCA does not prohibit an injured worker from bringing a workers' compensation claim against an employer who is not insured and has not complied with MCL 418.611. The Legislature has specifically provided that an injured employee may present an order awarding workers' compensation benefits to the circuit court, that the circuit court "shall render judgment in accordance with the order unless proof of payment is made," and that the court's judgment "shall have the same effect as though rendered in an action tried and determined in the court and shall be entered and docketed with like effect." MCL 418.863.[9] This Court has held that even if an employer has failed to purchase workers' compensation insurance or operate as a self-insurer in accordance with MCL 418.611, such a judgment may be executed against the uninsured employer's assets. *Wyrybkowski*, 66 Mich App at 558-

[9] The purpose of this statute is "to protect the interests of persons with work[ers'] compensation awards by providing for prompt enforcement through the judicial machinery of the circuit courts . . . ." *Wyrybkowski*, 66 Mich App at 558.

559. Thus, although it may have been unwise for plaintiff to believe that Allstate would have sufficient assets to pay his workers' compensation benefits, there was nothing inherently improper in plaintiff's initial decision to proceed against his uninsured direct employer only.[10]

VI

We also wish to address defendants' prediction that our decision will result in severe prejudice on remand because plaintiff will now be able to invoke the doctrine of res judicata offensively against them. We do not share defendants' concerns. An injured employee may not invoke the doctrine of res judicata offensively against his or her statutory employers in a subsequent proceeding if those statutory employers did not have adequate notice of the previous proceeding against the direct employer. *Viele*, 167 Mich App at 582; see also 2 Restate-

[10] There has been some suggestion that the real reason plaintiff was unable to collect from Allstate under the original magistrate's award was that Allstate filed for bankruptcy soon after the award was issued. Indeed, WCAC Commissioner Glaser stated in her dissenting opinion that "[p]laintiff, having won against Allstate [in the first action], was unable to collect, due to a subsequent bankruptcy action." Despite Commissioner Glaser's statement in this regard, we find no evidence in the record to indicate that Allstate actually filed for bankruptcy. However, we wish to make clear that if Allstate *did* file for bankruptcy after the original award was issued, this would provide an additional reason for concluding that res judicata does not bar plaintiff's § 171 claim against defendants. Res judicata does not bar a subsequent action between the same parties or their privies when the facts have changed or new facts have developed. *Labor Council, Michigan Fraternal Order of Police v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994). Assuming arguendo that Allstate did file for bankruptcy after the original award was issued, thereby effectively cutting off plaintiff's ability to collect under the award, this surely would have constituted a change in facts and circumstances sufficient to overcome the applicability of res judicata in this case. *Id*.

ment Judgments, 2d, § 83(2)(a), p 266. Unlike the uncertain language from *Viele* discussed earlier, the *Viele* Court's holding on this issue was clear. Because American Painting and the Authority did not have adequate notice of plaintiff's previous action against Allstate, their concern is unfounded.[11]

VII

Lastly, we turn to American Painting's remaining argument that it does not qualify as plaintiff's statutory employer under § 171 because it did not have the requisite contractual relationship with Allstate. Whether an entity such as American Painting constitutes a "principal" within the meaning of § 171 is a question of law. *Woody v American Tank Co*, 49 Mich App 217, 230; 211 NW2d 666 (1973). Because this legal issue was not addressed or decided by the WCAC, we lack the authority to consider it on appeal. MCL 418.861a(14); *Calovecchi v Michigan*, 461 Mich 616, 626; 611 NW2d 300 (2000).

VIII

The magistrate and the WCAC erred by determining, contrary to the intent of the Legislature, that res judicata barred plaintiff's subsequent action against defendants. Plaintiff was entitled to seek benefits from his direct employer first, reserving for a subsequent proceeding any claim against his alleged statutory employers under § 171. We therefore reverse the decision

[11] Nor will plaintiff be entitled to invoke the doctrine of collateral estoppel (also known as issue preclusion) offensively against defendants on remand. Allstate did not appear for trial or meaningfully defend itself in the previous action. Accordingly, even if it is determined that defendants are in privity with Allstate, they have not had a full and fair opportunity to litigate the issues in this matter. See *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004).

of the WCAC and remand this matter to the magistrate with instructions to reinstate plaintiff's § 171 claim against American Painting and the Authority.

Reversed and remanded to the magistrate for reinstatement of plaintiff's claim against defendants consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

AJAX PAVING INDUSTRIES, INC v VANOPDENBOSCH CONSTRUCTION CO

Docket No. 288452. Submitted March 2, 2010, at Detroit. Decided July 1, 2010. Approved for publication August 31, 2010, at 9:10 a.m.

Ajax Paving Industries, Inc., a contractor hired with regard to roadway resurfacing operations in the city of Detroit, brought an action in the Wayne Circuit Court against two of Ajax's subcontractors, Vanopdenbosch Construction Co. and Tenmile Creek Excavating, LLC, seeking indemnification under the subcontracts for Ajax's costs resulting from the settlement of two underlying lawsuits that sought to impose liability on Ajax for the work performed pursuant to the subcontracts. The court, Isidore B. Torres, J., granted summary disposition in favor of Ajax. Ajax then moved for the entry of a judgment awarding it the costs of settling the underlying lawsuits and the reasonable attorney fees and costs associated with defending those actions. The court entered an order for partial summary disposition that provided that each defendant would be liable for one-half of the total amount Ajax paid in the underlying lawsuits. The court also ordered an evidentiary hearing to address the issue of costs and attorney fees. Following that hearing, the court ruled that Ajax could recover from Vanopdenbosch only those attorney fees and costs incurred after the date Ajax provided Vanopdenbosch notice of the underlying actions. The court, further noting that Tenmile Creek had already paid Ajax a higher amount for fees and costs and had been dismissed from the action, determined that Ajax had been adequately compensated and denied the motion for the entry of a judgment regarding costs and fees. Vanopdenbosch appealed the order granting summary disposition in favor of Ajax. Ajax cross-appealed the order denying the motion for the entry of a judgment regarding costs and fees.

The Court of Appeals *held*:

1. The indemnity provision contained in Vanopdenbosch's subcontract was broad and provided that Vanopdenbosch would indemnify Ajax not only for actions directly or indirectly caused, occasioned, or contributed to by an act, omission, or fault of Vanopdenbosch, but also for those actions that were "claimed" to

be directly or indirectly caused, occasioned, or contributed to by an act, omission, or fault of Vanopdenbosch. There was nothing in the provision requiring the party initiating an action or obtaining damages to claim that an incident was directly or indirectly caused or contributed to by Vanopdenbosch. The language provided only that a claim must be made and did not specify who must make the claim or that the claim even need be proved. The trial court did not err by determining under the facts of this case that the claims presented in the underlying actions were covered by the parties' subcontract. With regard to the claim of trespass in the second underlying action, that cause of action was properly construed as pertaining to Vanopdenbosch, and, therefore, the indemnity provision in the subcontracts applied to the claim. Summary disposition in favor of Ajax with regard to the indemnity provision was thus appropriate.

2. The indemnity provision in the subcontract did not require that Vanopdenbosch be put on notice of an underlying lawsuit or that there be a tender of defense for the provision to apply. Ajax was entitled to recover the entirety of the fees and costs from the underlying lawsuits because the subcontract contained no notice or tender-of-defense requirement and expressly provided for the recovery of all fees and costs associated with defending the underlying actions. The lack of notification of the underlying actions did not preclude a finding that Vanopdenbosch was liable under the indemnification provision for the monies paid by Ajax to those involved in the underlying lawsuits and the attorney fees and costs associated with defending those lawsuits. The case must be remanded for a determination regarding Ajax's claimed attorney fees and costs and for the entry of a judgment consistent with that determination. The case must be affirmed in all other respects.

Affirmed and remanded.

Plunkett Cooney (by *Ernest R. Bazzana*) for Ajax Paving Industries, Inc.

Berry, Johnston, Sztykiel & Hunt, P.C. (by *Timothy J. Clifford*), for Vanopdenbosch Construction Co.

Before: SERVITTO, P.J., and BANDSTRA and FORT HOOD, JJ.

SERVITTO, P.J. Defendant Vanopdenbosch Construction Co. appeals as of right the trial court's order granting

summary disposition in plaintiff's favor. Plaintiff, Ajax Paving Industries, Inc., cross-appeals the trial court's order denying plaintiff's motion for the entry of a judgment regarding costs and fees. Because the trial court did not err by granting summary disposition in plaintiff's favor on the basis of the parties' indemnity contract, but erred in its determination that costs and fees recoverable pursuant to the indemnity contract were limited to those incurred after the date Vanopdenbosch Construction Co. was notified of the underlying lawsuits, we remand to the trial court for a determination regarding the reasonableness of plaintiff's claimed attorney fees and costs and entry of a judgment consistent with those findings, and affirm in all other respects.

Plaintiff filed a complaint against defendants, Tenmile Creek Excavating, LLC, and Vanopdenbosch Construction Co., on May 21, 2007. According to plaintiff, the Michigan Department of Transportation (MDOT) hired plaintiff as a contractor with regard to roadway resurfacing in the city of Detroit, and plaintiff entered into separate subcontracts with both Tenmile Creek and Vanopdenbosch to perform specific work on the resurfacing project. The subcontracts each contained an indemnity clause whereby Tenmile Creek and Vanopdenbosch agreed to indemnify plaintiff and to hold it harmless for any actions associated with or arising out of their respective work. The subcontracts also required Tenmile Creek and Vanopdenbosch to obtain, at their expense, workers' compensation insurance, general-liability insurance, and automobile insurance, naming plaintiff as an additional insured party on the policies.

Plaintiff alleged that it was named as a defendant in a lawsuit that sought to impose liability on plaintiff relating to the work performed by Tenmile Creek and Vanopdenbosch pursuant to the parties' subcontracts.

Specifically, a woman was allegedly injured when the car in which she was a passenger struck a protruding manhole cover located on the street where defendants had performed resurfacing work pursuant to their contracts with plaintiff. The injured passenger brought suit against plaintiff and Wayne County, and the arbitration of that matter ultimately resulted in an award in the injured passenger's favor of $40,000. Plaintiff was thereafter named as a defendant in a lawsuit initiated by Wayne County, which sought indemnity from plaintiff concerning the prior lawsuit and, additionally, set forth a claim for trespass. Wayne County settled its lawsuit against plaintiff for a payment of $5,000. According to plaintiff, both defendants in the instant lawsuit had refused to defend or hold plaintiff harmless from the claims of the injured passenger and Wayne County, thereby beaching the parties' subcontracts. Plaintiff also alleged that both defendants breached the parties' subcontracts by failing to secure the required insurance coverage.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that the lawsuits at issue were expressly covered by the parties' contracts and that there was no material question of fact that defendants breached the parties' agreements by failing to indemnify plaintiff in the lawsuits and to obtain primary, rather than excess, general-liability-insurance coverage. The trial court granted plaintiff's motion for summary disposition.

Thereafter, plaintiff moved for the entry of a judgment, contending that because its motion for summary disposition was granted, it was entitled to reimbursement of the costs of settling the underlying two lawsuits, as well as its reasonable attorney fees and costs associated with defending the two lawsuits. The trial

court entered an order for partial summary disposition that provided that each defendant would be liable for one-half of the total amount plaintiff paid in the underlying lawsuits ($45,000) and ordered an evidentiary hearing to address the issue of costs and attorney fees.[1]

The trial court ultimately ruled that plaintiff was limited in its recovery from Vanopdenbosch to only those attorney fees and costs incurred after the date plaintiff provided Vanopdenbosch with notice of the underlying proceedings—April 4, 2007. The trial court determined that only $1,417.47 in attorney fees were incurred after that date, but also noted that plaintiff had already received $10,500 in fees and costs from Tenmile Creek. As a result, the trial court ruled that plaintiff had been more than adequately compensated for attorney fees and costs and denied plaintiff's motion. This appeal followed.

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. We also review de novo issues of contract interpretation. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

On appeal, defendant[2] first contends that the trial court erred by ruling that the injured passenger's

[1] The trial court entered a stipulated order for dismissal of Tenmile Creek before the evidentiary hearing. Tenmile Creek therefore did not participate in the hearing.

[2] Because Tenmile Creek is not a party to this appeal, "defendant" hereafter refers to Vanopdenbosch only.

claims were covered by the parties' subcontract when there was no indication that the work performed by defendant caused the manhole cover to protrude above the milled road surface. We disagree.

A contract must be interpreted according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). When the language of the contract is clear and unambiguous, interpretation is limited to the actual words used, and an unambiguous contract must be enforced according to its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). This Court applies to indemnity contracts the same contract construction principles that govern any other type of contract. *Zahn v Kroger Co of Mich*, 483 Mich 34, 40; 764 NW2d 207 (2009). On appeal, this Court interprets an indemnification provision in a manner that will serve to provide a reasonable meaning to all the terms contained therein. *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). In essence, an indemnification provision is to be construed to effectuate the intentions of the parties to the contract, which is determined through review of the contract language, the situation of the parties, and the circumstances involved in the initiation of the contract. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995).

Plaintiff and defendant's contract contained the following indemnity provision:

> Subcontractor agrees to indemnify Ajax and MDOT and to hold each of them forever harmless from and against all suits, actions, legal or administrative proceedings, claims, demands, damages, judgments, liabilities, interest, attorney's fees, costs and expenses of whatsoever kind or nature whether arising before or after completion of Subcontractor's work and in any manner directly or indirectly caused,

> occasioned or contributed to, or claimed to be caused, occasioned or contributed to, by any act, omission[,] fault or breach of Subcontractor or of anyone acting under its direction, control, or on its behalf in connection with or incidental to the work of Subcontractor and regardless whether directly or indirectly caused, occasioned or contributed to, or claimed to be caused, occasioned or contributed to in part by a party indemnified hereunder or by anyone acting under their direction, control, or on their behalf.

This language is broad and provides for indemnity not only for actions directly or indirectly "caused, occasioned or contributed to" by an act, omission, or fault of defendant, but also those actions that are "*claimed*" to be "directly or indirectly caused, occasioned or contributed to" by an act, omission, or fault of defendant. (Emphasis added.)

Apparently, defendant is of the belief that in the underlying lawsuit there must have been an allegation by plaintiff that defendant caused or contributed to the accident in order for the indemnity provision to be applicable. However, there is nothing in the provision requiring the party initiating an action or obtaining damages to claim that an incident was directly or indirectly caused or contributed to by defendant. Instead, the language provides only that a claim must be made—without specifying who must make the claim or, more importantly, that the claim even need be proved.

As admitted by defendant, the scope of its work under the subcontract included adjusting the manhole cover. Though it is unclear what "adjustments" were made, the adjustments were alleged to have been made a short time before the accident. The injured party alleged in her arbitration summary that an "Ajax paving subcontractor" adjusted the manhole cover and that the cover protruded above the roadway, causing the

accident that led to her injuries. Because of the facts that defendant made some adjustments and that the accident in the underlying lawsuit was caused by the protruding manhole cover, it could be asserted that the lawsuit was "in any manner directly or indirectly caused, occasioned or contributed to, or claimed to be caused, occasioned or contributed to, by any act, omission[,] fault or breach of [Vanopdenbosch]." Thus, the expansive and unambiguous indemnity provision was triggered, and the trial court did not err by determining that the injured passenger's claim was covered by the parties' subcontract.

Defendant next contends that the trial court erred by ruling that the claims of Wayne County fell within the parties' subcontract when there was no evidence that these claims were caused by any action or omission of defendant in connection with its structural work. Again, we disagree.

Wayne County's complaint against plaintiff contained an allegation that "Wayne County is entitled to common-law indemnity from Ajax Paving where the evidence is undisputed that Ajax Paving and/or its subcontractors caused the condition that [the injured passenger] claims caused her injuries, and Wayne County had no involvement in creating the condition." Because Wayne County's complaint specifically alleged that plaintiff or its subcontractors (including Vanopdenbosch) caused the road condition leading to the asserted injuries, the indemnity clause in plaintiff and defendant's agreement is applicable.

As defendant points out, Wayne County's complaint against plaintiff included a claim of trespass. This does not, however, render the indemnity provision at issue inapplicable. As previously indicated, Wayne County and plaintiff settled their dispute by agreeing to a

$5,000 payment from plaintiff. This settled all of Wayne County's and plaintiff's claims with no indication whether the payment was intended to compensate Wayne County for only the trespass claim, only the indemnity claim, or both equally. Nevertheless, Wayne County's complaint for trespass specifically encompassed the actions of plaintiff or its subcontractors in performing the roadwork. Wayne County alleged that plaintiff proceeded with roadwork without its consent, but also alleged that plaintiff removed the asphalt around the manhole cover and that plaintiff admitted that it "or its subcontractors" were at fault in creating the condition causing the accident. Because defendant admittedly entered onto the roadway and performed work there, and because the allegations of trespass included a claim that plaintiff or its subcontractors created a condition that caused the accident, the trespass cause of action could be construed as pertaining to defendant, and the indemnity provision would still apply.

Defendant's final argument on appeal is that the trial court erred in its determination that defendant breached its contractual duty to obtain insurance when it did, in fact, obtain insurance coverage in favor of plaintiff on an excess basis and when the contract did not specify that insurance coverage was to be on a primary basis. Because we have determined that summary disposition was appropriate in plaintiff's favor on the basis of the indemnity provision, we need not address this insurance issue. As indicated by plaintiff, the insurance issue "provides an alternate basis upon which to premise the grant of partial summary disposition in favor of Ajax with respect to the $22,500 amount (after setoff) that it paid to settle the underlying actions." An appropriate judgment having been entered requiring defendant to pay one-half of the amount plaintiff paid to the injured passenger, even if we were to reverse the determination of the trial court on the

insurance issue, plaintiff would not be entitled to any relief additional to that already received pursuant to the indemnity provision.

Plaintiff's sole issue on cross-appeal concerns the trial court's determination that defendant's obligation to reimburse plaintiff for its fees and costs incurred in defending the underlying actions was limited to those incurred after the date plaintiff notified defendant of the actions. According to plaintiff, the parties' contract expressly entitled plaintiff to recover all costs and attorney fees, without limitation, and in holding otherwise, the trial court did not read and apply the contract as specifically written. Defendant contends, however, that defendant was not made aware of the lawsuits until 18 months after Wayne County initiated its lawsuit. According to defendant, if it breached the parties' indemnity contract, then the breach could only have occurred after notice was given of the underlying lawsuits and plaintiff's damages for the breach must be, as the trial court correctly determined, limited to those that arose naturally from the breach (i.e., those that were incurred after the breach).

As previously indicated, the parties' contract required defendant to

> indemnify Ajax and MDOT and to hold each of them forever harmless from and against all suits, actions, legal or administrative proceedings, claims, demands, damages, judgments, liabilities, interest, attorney's fees, costs and expenses of whatsoever kind or nature whether arising before or after completion of Subcontractor's work and in any manner directly or indirectly caused, occasioned or contributed to, or claimed to be caused, occasioned or contributed to, by any act, omission[,] fault or breach of Subcontractor . . . .

Plaintiff asserted that defendant breached this contractual provision by failing to indemnify it concerning the underlying lawsuits. It is undisputed that the action by

the injured passenger was initiated on October 12, 2005. It is also undisputed that neither defendant nor its insurer was advised of that lawsuit or the lawsuit by Wayne County until April 4, 2007. Notably, however, there is no contractual provision in this matter requiring that defendant be put on notice of an underlying lawsuit or that there be a tender of defense for the indemnification provision to apply. And, as previously stated, a contract must be interpreted according to its plain and ordinary meaning. When the contractual language is clear and unambiguous, interpretation is limited to the actual words used, and the contract is enforced according to its unambiguous terms. *St Paul*, 228 Mich App at 107; *Burkhardt*, 260 Mich App at 656. Because the contract itself contains no notice or tender-of-defense requirement and expressly provides for the recovery of all fees and costs associated with defending the underlying litigation, without limitation, plaintiff is entitled to recover the entirety of those fees and costs.

In support of its position otherwise, defendant asserts that the duties to defend and to indemnify stated in the subcontract are coextensive. However, the parties' contract contains no "duty to defend" provision. In addition, the two concepts are not interdependent; they relate to distinctly different matters. "Defend" means to "deny, contest, or oppose (an allegation or claim)." Black's Law Dictionary (7th ed). "Indemnity," however, is defined as a "duty to make good any loss, damage, or liability incurred by another." *Id*. Because a person cannot oppose an allegation or claim unless he or she is aware of the same, it could be reasonably argued that one who desires to trigger a contractual duty to defend must necessarily tender notice of the litigation to the defender. The same does not hold true for indemnification, however, because indemnity contemplates reimbursement for injuries/losses that have already been incurred.

Defendant's reliance on certain authority suggesting that fees and costs subject to reimbursement are limited to those incurred only after a tender of a defense is misplaced because the cited cases addressed contracts that expressly established both a duty to indemnify *and* a duty to defend. See, e.g., *Hayes v Gen Motors Corp*, 106 Mich App 188; 308 NW2d 452 (1981); *Grand Trunk W R Co v Auto Warehousing Co*, 262 Mich App 345; 686 NW2d 756 (2004). Plaintiff's reliance on *Dep't of Transp v Christensen*, 229 Mich App 417; 581 NW2d 807 (1998), is also misplaced because that case is factually distinguishable from the matter at hand. Most notably, in *Christensen*, a panel of this Court found the existence of an implied contract for indemnification, whereas, in the instant matter there is a specific, unambiguous contract for indemnification that must be enforced as written. Additionally, *Christensen* did not address costs and fees recoverable under an indemnification contract. Instead, it addressed the indemnification of the amount MDOT paid as a result of a consent judgment in the underlying action. Finally, while *Christensen* determined that there was no requirement that a defense be tendered to the plaintiff because of a direct conflict of legal interests between the parties, it did not rule or announce that a tender of defense is required in all indemnification matters in which a conflict of interest is *not* present. The lack of notification in this matter did not preclude a finding that defendant was liable under the indemnification provision for the monies paid by plaintiff to those involved in the underlying lawsuits, and it does not preclude a finding that defendant is liable for the attorney fees and costs associated with defending the underlying actions.

Having determined that plaintiff is not limited in its recovery of fees and costs to only those incurred after it notified defendant of the underlying actions, we turn to

the amount of fees and costs that should be awarded. At a hearing on plaintiff's motion for the entry of a judgment concerning costs and attorney fees, plaintiff submitted that the total costs and fees incurred in the defense of the underlying actions were $25,446. Plaintiff also acknowledged that it had already received $10,500 of those fees and costs from Tenmile Creek and later indicated that because of some erroneous calculations, and some agreements with defendant, it was actually only seeking to recover $11,627 from defendant as reimbursement for the remaining fees and costs. While defendant challenged the reasonableness of some of plaintiff's fees, the trial court made no ruling on these challenges. Remand is therefore necessary for the trial court to consider and rule on any challenges to the disputed fees and costs.

Remanded for a determination of plaintiff's claimed attorney fees and costs and for entry of a judgment consistent with the trial court's determination. This matter is affirmed in all other respects. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

BARKSDALE v BERT'S MARKETPLACE

Docket No. 290329. Submitted April 8, 2010, at Detroit. Decided August 31, 2010, at 9:15 a.m.

Laneeka Barksdale brought an action in the Wayne Circuit Court against her employer, Bert's Marketplace, and its manager, Jai-Lee Dearing, alleging sexual harassment and retaliation. During the jury trial, the court, John H. Gillis, Jr., J., stopped plaintiff's examination of one witness after half an hour, refused to allow redirect examination of that witness, and denied plaintiff's request to make an offer of proof about what further testimony the witness would have given had the court allowed more time. The court also ruled inadmissible as hearsay the deposition testimony of another witness for plaintiff. The jury returned a verdict of no cause of action, and plaintiff appealed.

The Court of Appeals *held*:

MRE 611(a) provides that the trial court must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment. While the decisions of trial courts to limit the time for examination of witnesses have been upheld, the trial court here abused its discretion by imposing an arbitrary time limit on the examination of a witness when the limit was not necessary to advance any of the trial-management goals set forth in MRE 611(a). The trial court further abused its discretion by refusing to permit plaintiff to make an offer of proof in accordance with MRE 103(a)(2). These errors were not harmless because they prejudiced plaintiff's substantial rights, and a new trial is required.

Reversed and remanded for a new trial.

1. WITNESSES — EXAMINATION — TIME LIMITS ON EXAMINATION — ARBITRARY TIME LIMITS.

A trial court must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of truth, avoid needless consumption of time, and protect

witnesses from harassment or undue embarrassment; a trial court abuses its discretion by imposing a time limit on the examination of a witness that is arbitrary and not necessary to advance trial-management goals (MRE 611[a]).

2. EVIDENCE — EXCLUSION — OFFER OF PROOF.

A trial court's need to complete witness testimony, however urgent, does not absolve it from its obligation to permit an offer of proof in accordance with MRE 103(a)(2) after the court has excluded evidence.

I.A.B. Attorneys at Law, PLLC (by *Felicia Duncan*), for plaintiff.

The Draper Law Firm (by *David R. Draper* and *Jonathan M. Colman*) for defendants.

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM. In this action alleging sexual harassment, MCL 37.2103(i); MCL 37.2202(1)(a), and retaliation, MCL 37.2701(a), plaintiff, Laneeka Barksdale, appeals as of right the trial court's entry of a judgment of no cause of action that effectuated the jury's verdict. We reverse and remand for a new trial.

Plaintiff worked as a waitress and bartender at defendant Bert's Marketplace from May 10, 2007, until she resigned approximately two months later. During this brief period of employment, plaintiff also worked at Bert's on Broadway. Bert Dearing owned both establishments. His son, defendant Jai-Lee Dearing, managed Bert's Marketplace. Plaintiff alleged that Jai-Lee Dearing sexually harassed her by touching her inappropriately, commenting on her legs, and propositioning her "as if she was a prostitute." Plaintiff claimed that after she reported Jai-Lee Dearing's conduct to Bert Dearing, defendants retaliated by not scheduling her for work.

Trial commenced on December 10, 2008, with jury selection and arguments relating to several motions in limine. According to the court reporter's notes, these preliminary events consumed 1 hour and 13 minutes of the court's time. On the second day of trial, counsel gave brief opening statements during an abbreviated morning session.[1] Plaintiff testified as the first trial witness. The transcript of her direct and cross-examinations required fewer than 100 pages.

When trial resumed at 11:24 a.m. the next day, plaintiff called Bert Dearing for examination. On the twenty-fourth transcript page of Dearing's examination, the trial court announced, "It's [defense counsel's] turn, go ahead. . . . Time's up." Plaintiff's counsel protested, "[L]et me put on the record that I'm not finished with this witness and if you would like for me to stop now even though I haven't done all of the testimony I need, I would like to place that objection on the record so that on appeal—" The trial court interrupted, advising plaintiff's counsel, "Each side gets a half hour with this witness." After defense counsel examined Dearing, plaintiff's counsel requested an opportunity to ask redirect questions, which prompted the following colloquy:

> [*Plaintiff's counsel*]: Well, I've got kind of a couple questions. I don't get a redirect?
>
> *The Court*: No, no. The rule is I announce the time and when the time's up, the questions stop.
>
> [*Plaintiff's counsel*]: Okay.
>
> I just wanted to ask if I can make an offer of proof on the record?

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[1] Opening statements began at 11:49 a.m. The transcript does not reflect the times of the lunch recess that day, but plaintiff's brief identifies that the court recessed for lunch at 12:41 p.m. and resumed proceedings at 2:16 p.m. The transcript also does not state at what time the proceedings concluded that day.

> *The Court*: No.
>
> You've made an objection, that's sufficient for appeal. I've been taken up on appeal on this issue many, many times. You've made an objection, that's all you have to do.

Plaintiff then sought to introduce the deposition testimony of Roy Lawhorn, who provided security for Bert's Marketplace. The trial court ruled that Lawhorn's testimony about plaintiff's out-of-court statements constituted inadmissible hearsay, and plaintiff opted not to read the deposition. The defense called no witnesses. The jury found that defendants had not sexually harassed or retaliated against plaintiff.

Plaintiff first challenges as improper the trial court's limitation of the total time for Bert Dearing's examinations. Plaintiff further asserts that the trial court erred in a related fashion by denying her an opportunity to make an offer of proof describing the testimony that counsel would have elicited had the court permitted more time. We review for an abuse of discretion a trial court's exercise of its power to control the interrogation of witnesses. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 615; 792 NW2d 344 (2010). To the extent that our inquiry requires an examination of the Michigan Rules of Evidence, we consider de novo the legal issues presented. *Id.*

Pursuant to MRE 611(a), "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." In *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595; 474 NW2d 306 (1991), this Court emphasized that "[t]he mode and order of admitting proofs and interrogating witnesses rests within the discretion of the trial court." The trial court in *Hartland Twp*, on the fifth day of a trial,

limited witness examinations to one hour each for direct and cross-examinations, but later amended its ruling to permit defense counsel more time with one expert witness. *Id*. at 596. On appeal, this Court held, "The record shows that the trial court properly exercised its discretion in limiting the time for examination of witnesses." *Id*.

We again upheld a trial court's decision to limit witness examination in *Alpha Capital Mgt*. There, the trial court permitted the plaintiff's counsel around 4½ hours for the direct examination of a witness. *Id*. at 616. After the witness's testimony concluded, the court "limited the entire time for additional witness examinations to 1½ hours, 45 minutes for each side." *Id*. at 617. We explained in *Alpha Capital Mgt*, that "[u]nder the specific circumstances presented," the trial court's decision to limit the examination of two witnesses did not amount to an abuse of discretion. *Id*. at 618. Our decision rested on the following dispositive findings:

> The record reveals that counsel had adequate time to develop the facts and issues at the center of the parties' dispute. Moreover, the trial court permitted [Alpha Capital Management, Inc.] more than three hours for its examination of Burrell on the basis of counsel's pledge that he could complete the rest of the witness examinations in a half hour.[12]
>
> [12] We emphasize our disapproval of utterly arbitrary time limitations unrelated to the nature and complexity of a case or the length of time consumed by other witnesses. Here, however, because the trial court selected a time limitation suggested by [Alpha Capital's] counsel, the period permitted did not qualify as arbitrary. And even if the time period selected could be fairly characterized as arbitrary, by proposing one-half hour for all witnesses other than Burrell, plaintiff's counsel waived any possible error.

[*Id*. at 618 n 12.]

We find this case readily distinguishable from *Alpha Capital Mgt*. The record reveals that counsel wasted no time in picking a jury or delivering opening statements. Plaintiff's counsel conducted her examination of plaintiff expeditiously, without repetitive or irrelevant questions. Given this record, we discern no reasonable basis for the trial court's determination that limiting witness examinations to 30 minutes for each side advanced the trial-management goals set forth in MRE 611(a). The record lacks any indication that curtailing counsel's time for witness examinations was necessary to "avoid needless consumption of time" or to "protect witnesses from harassment or undue embarrassment." MRE 611(a)(2). Moreover, the trial court entirely failed to explain how the severely restrictive time parameter it selected "ma[d]e the interrogation and presentation [of witnesses] effective for the ascertainment of the truth." *Id*. Accordingly, we conclude that the trial court abused its discretion by imposing an "utterly arbitrary" time limit "unrelated to the nature and complexity of [the] case or the length of time consumed by other witnesses." *Alpha Capital Mgt*, 287 Mich App at 618 n 12. Stated differently, by imposing an utterly arbitrary time limit for witness examinations, the trial court selected an outcome falling outside the range of principled outcomes. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 524; 780 NW2d 900 (2009).

The trial court further abused its discretion by ignoring or misapplying MRE 103(a)(2) when it precluded plaintiff's counsel from presenting an offer of proof. "The trial court's need to complete witness testimony, however urgent, does not absolve it from its obligation to permit an offer of proof in accordance with MRE 103(a)(2)." *Alpha Capital Mgt*, 287 Mich App at 619. The arbitrary 30-minute time limit prevented plaintiff's counsel from completing her examination of Bert Dear-

ing and deprived her of any opportunity for reexamination. The trial court's preclusion of allowing plaintiff to offer any proof concerning potential additional areas of inquiry further prejudiced plaintiff's substantial rights. MCR 2.613(A). Consequently, we cannot deem these errors harmless.

Plaintiff lastly challenges the trial court's decision to exclude the portions of Lawhorn's deposition testimony relating to plaintiff's statements that Jai-Lee Dearing had sexually harassed her. Although we need not reach this issue given our reversal of the judgment of no cause of action, we note for purposes of guidance on remand that we detect no error in the trial court's conclusion that Lawhorn's challenged statements fall within the category of inadmissible hearsay.

Reversed and remanded for a new trial. We do not retain jurisdiction.

WALTER TOEBE CONSTRUCTION COMPANY v
DEPARTMENT OF TREASURY

Docket No. 291764. Submitted July 14, 2010, at Detroit. Decided July 27, 2010. Approved for publication September 2, 2010, at 9:00 a.m.

Walter Toebe Construction Company petitioned the Tax Tribunal after the Department of Treasury disallowed a single business tax credit petitioner sought for taxes petitioner claimed to have paid on industrial personal property. The parties agreed that the property had been erroneously classified by the local assessor as commercial personal property, but the Tax Tribunal affirmed the disallowance, noting that the property had never been classified by the assessor as industrial personal property and holding that this classification was required under the Single Business Tax Act (SBTA), former MCL 208.1 *et seq*., before the credit could be claimed. Petitioner appealed.

The Court of Appeals *held*:

The Tax Tribunal correctly disallowed the credit. Former MCL 208.35d(6)(a) defined "industrial personal property" for which a tax credit may be claimed as "property classified as industrial personal property under [MCL 211.34c(3)]," a provision of the General Property Tax Act. By using this language, the Legislature intended to make the definition dependent on the assessor's classification. Because the assessor never classified the property at issue as industrial personal property, petitioner could not claim the credit.

Affirmed.

TAXATION — SINGLE BUSINESS TAX ACT — CLASSIFICATION OF PROPERTY — INDUSTRIAL PERSONAL PROPERTY.

A taxpayer may claim a tax credit under the former Single Business Tax Act for "industrial personal property," which is defined as property classified as industrial personal property under MCL 211.34c(3), a provision of the General Property Tax Act; property meets this definition only if it has been classified by the assessor as industrial personal property (former MCL 208.35d[6][a]).

Dickinson Wright PLLC (by *Robert F. Rhoades* and *Adam D. Grant*) for petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Steven B. Flancher*, Assistant Attorney General, for respondent.

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

PER CURIAM. Petitioner appeals as of right the order of the Tax Tribunal granting respondent's motion for summary disposition. We affirm.

Petitioner is a Michigan corporation engaged in the construction business. The local tax assessor classified a portion of petitioner's property as commercial personal property for tax year 2006. The parties agree that the property in question should have been classified as industrial personal property and that the assessor simply erred in the classification.

When filing its 2006 single business tax return, petitioner claimed a tax credit of $17,810 for $118,731 in taxes it claimed to have paid on industrial personal property. Respondent sent a notice of adjustment, informing petitioner that it was disallowing the credit because petitioner had not attached any statement that the taxes had been levied and paid or that the property was classified as industrial personal property.

Petitioner, through its accountant, responded that it had paid property taxes on the property at issue and that the property fit the definition of "industrial personal property" found in § 34c of the General Property Tax Act (GPTA), MCL 211.34c.

The hearing referee found that "[i]ndustrial personal property is defined by statute and not by an assessor." Because the property fit the definition in the GPTA, the referee recommended allowing the credit, despite the assessor's classification.

Respondent rejected the hearing referee's recommendation. It asserted that the definition in the GPTA was inapplicable and that the appropriate definition was that found in the Single Business Tax Act (SBTA), former MCL 208.1 *et seq*.[1] Countering petitioner's argument that the SBTA definition had simply imported the GPTA definition, respondent noted that the SBTA definition requires the property to be "classified as industrial personal property" under the GPTA. Former MCL 208.35d(6)(a). Because the property in question had never been classified as industrial personal property, according to respondent, it did not meet the SBTA definition, and petitioner was ineligible for the credit.

Petitioner petitioned the Tax Tribunal for a redetermination of the decision. The Tax Tribunal agreed with respondent's argument and affirmed its decision. Petitioner brings this appeal.

The sole issue on appeal is whether the Tax Tribunal erred by holding that the since-repealed SBTA definition of "industrial personal property" depended on the classification of the property by the tax assessor or whether it only indicated that the SBTA imported the definition of "industrial personal property" from the GPTA. We review de novo questions of statutory interpretation and application. *People v Stone Transp, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000). Our goal in interpreting a statute is to give effect to the Legislature's intent. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999).

Many sections of the SBTA imported definitions from other statutes. For example, the SBTA defined a "United States corporation" with reference to the Internal Revenue Code, specifically 26 USC 7701(a)(3) and (4), by using the words "as those terms are defined in," rather

[1] The SBTA was repealed by 2006 PA 325, effective December 31, 2007.

than "classified as." Former MCL 208.3(1). Similarly, the act defined "insurance company" with reference to section 106 of the Insurance Code, MCL 500.106, again with the words "as defined in," not "classified as." Former MCL 208.5a. Throughout the act, "as defined in" or "as defined by" were the phrases used to denote an adoption of a statutory definition from another statute. See, e.g., former MCL 208.9(3)(g)(*iii*); 208.9(7)(c)(*ii*); 208.10(4); 208.19(5)(d); 208.31a(5)(d). Significantly, the word "classified" was never used for this purpose.

It follows, then, that if the Legislature, in drafting the SBTA, had wished to import the definition of "industrial personal property" from the GPTA, it would have chosen to say, as it did throughout the SBTA, " 'Industrial personal property' means that term as defined in section 34c of the general property tax act," or something similar. Instead, the Legislature chose to define "industrial personal property" as "personal property *classified* as industrial personal property *under* section 34c of the general property tax act . . . ." Former MCL 208.35d(6)(a) (emphasis added); see also former MCL 208.35f(6)(a) and 208.35g(6)(a). Section 34c of the GPTA contains not only a definition of "industrial personal property," but also imposes on assessors a duty to classify property under that section. MCL 211.34c(1) and (3)(c). The most reasonable inference to be drawn from the Legislature's use of this language is that it intended to allow respondent to rely on the assessor's classification of property under MCL 211.34c(1) and did not intend to require respondent to make an independent assessment of whether taxpayers' property met the definition in MCL 211.34c(3).

We are bound, when interpreting a statute, to give effect to the Legislature's intent. Because it is clear from reading the SBTA that the Legislature intended to

make the definition of "industrial personal property" dependent on the assessor's classification, and because the property at issue in this case was never classified as industrial personal property by the assessor, we affirm the decision of the Tax Tribunal disallowing the tax credit.

Petitioner argues that respondent's interpretation of the statute, which we adopt today, leads to an absurd result. The tax credit at issue required a taxpayer to "file within the time required the statement of personal property described in section 19 of the general property tax act, 1893 PA 206, MCL 211.19 . . . ." Former MCL 208.35d(3). Petitioner notes, correctly, that the deadline for filing the statement of personal property is February 20, MCL 211.19(2), but the assessor has until March to classify the property, MCL 211.34c(1). Petitioner argues that it would therefore be impossible for a taxpayer to rely on the assessor's classification in making its statement of personal property, and therefore impossible to claim the tax credit. However, the statement of personal property described in MCL 211.19 does not require a taxpayer to know or assert how its personal property should be classified by the assessor. A taxpayer would then file its single business tax return four months after the close of its tax year. Former MCL 208.73(1). By this time, of course, the taxpayer would have had the classification of the property from the assessor, and there would be nothing impossible about claiming the tax credit. Further, if petitioner's argument were correct, the GPTA would be absurd regardless of the SBTA because the GPTA requires the statement of personal property to precede the assessor's classification of property. But there is no absurdity or impossibility in requiring this because the statement of personal property does not require knowledge of the assessor's classification.

Affirmed.

BUTLER v WAYNE COUNTY

Docket No. 290361. Submitted April 14, 2010, at Detroit. Decided May 27, 2010. Approved for publication September 7, 2010, at 9:00 a.m.

Rosemary Butler and others representing a class consisting of retirees of Wayne County who, before retirement, were represented by Michigan AFSCME Counsel 25, and its Locals 25, 101, 409, or 1659 and who purchased supplemental life insurance (SLI) from the county upon retirement, brought an action in the Wayne Circuit Court against the county and its retirement board, claiming that defendants breached their contract to provide a fixed flat-rate premium for the SLI of $2.36 per thousand dollars of insurance a month when defendants switched to an age-rated-premium structure for SLI coverage. The parties relied on two documents that they stipulated as joint exhibits: the collective-bargaining agreement between the county and the locals effective December 1, 2000, to November 30, 2004 (the CBA), and the Wayne County health and welfare benefit plan description effective December 1, 1990 (the plan). The parties also stipulated that the CBA and the plan were the only documents governing the dispute and that any prior collective-bargaining agreements were to be considered for background purposes only. Although initially disputed, the parties agreed by the time of trial that defendants had a contractual obligation to make SLI available to retirees. The court, Prentis Edwards, J., held that defendants were free to increase the amount of the premium charged for SLI from $2.36 per thousand a month, in light of evidence that the premiums had increased over time, determined that there was no evidence of an agreement to provide subsides to retirees for the cost of SLI, and concluded that the length, widespread knowledge, and consistency of the practice of providing SLI at a flat-rate premium created a reasonable expectation that the practice would continue, making the practice binding on the parties. Defendants appealed the holding that plaintiffs are entitled to a flat-rate-premium structure on the basis of a vested right created by the past practice of the parties.

The Court of Appeals *held*:

1. The CBA expressly provided that SLI would, at some point, be changed to an age-rated-premium structure and that retirees would be eligible to transfer to that plan. The express language of the CBA, as modified through the incorporation of the plan, provided that there was no express contractual right to a flat-rate-premium structure.

2. The past-practice doctrine is applicable in this case, although in a limited context. The doctrine may only be used in this case to establish that a contractual right to a flat-rate-premium structure existed at the time of retirement as a result of a past practice that modified the contract under which the retiree retired.

3. When a collective-bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be tacit agreement that the practice would continue. However, where a past practice is clearly contrary to clear contract language, the unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract. The party seeking to supplant the contract language must show that the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract.

4. There is no merit to plaintiffs' contention that there was no provision contained in the CBA that related to how the SLI rate would be calculated. Plaintiffs' allegation of a past practice prohibiting a change from a flat-rate-premium structure conflicts with the express contract language. The unambiguous contract language controls unless the past practice was so widely acknowledged and mutually accepted that it amended the contract.

5. The SLI provision contained in the plan was not ambiguous. The only way to read the CBA and the plan provisions to hold that retirees are entitled to SLI requires interpreting the SLI provisions related to "employees" as including "retirees." Once "retirees" are read into the plan's SLI provisions, it becomes clear that they are subject to the age-related-premium system that was to be provided to employees "at the County's option." The union had notice of these provisions. There was never a meeting of the minds with regard to whether the flat-rate-premium structure was to exist in perpetuity and, therefore, no agreement to modify the contract.

6. Because the plan and the CBA expressly permitted defendants, at their option, to implement an age-related-premium structure, the fact that defendants inserted the language regarding that option in 1991 but did not implement the change until 2007 did not, by itself, constitute a past practice that would amend

the CBA. The trial court erred when it concluded that there was a past practice that amended the CBA to provide a contractual right to a perpetual flat-rate-premium structure. The trial court's determination that plaintiffs are entitled to a flat-rate-premium structure on the basis of a vested contract right must be reversed and the case must be remanded to the trial court for the entry of an order permitting defendants to change the SLI premium structure to an age-rated structure.

Reversed and remanded.

1. MASTER AND SERVANT — PENSIONS — VESTED RETIREMENT RIGHTS — PAST-PRACTICE DOCTRINE.

Vested retirement rights may not be altered without the pensioner's consent; a retiree's contractual rights vest, if at all, at the time of retirement absent explicit contractual language to the contrary; a retiree relying on the past-practice doctrine to show that a past practice may have amended a contract covering the retiree before the retiree retired must show that the past practice had modified the contract under which the retiree retired; a claim based on the past-practice doctrine must fail if any of the actions upon which the retiree relies to assert a past practice occurred after the retiree's date of retirement.

2. CONTRACTS — PAST-PRACTICE DOCTRINE.

When a past practice of the parties to a contract is clearly contrary to the clear language of the contract, the clear language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract; the party seeking to supplant the contract language must show that the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract.

Miller Cohen, P.L.C. (by *Bruce A. Miller*), for plaintiffs.

Clark Hill PLC (by *Reginald M. Turner*, *Paul W. Coughenour*, and *Stephanie J. Clifford*) for defendants.

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO JJ.

PER CURIAM. This contract dispute arises from defendants' attempt to change the premium structure of

retiree supplemental life insurance (SLI) from a flat-rate-premium structure to an age-rated-premium structure, which resulted in higher premiums for older retirees. Defendants appeal as of right from the trial court's order after a bench trial holding that plaintiffs are entitled to a flat-rate-premium structure on the basis of a vested right created by the past practice of the parties. We reverse and remand for entry of an order permitting defendants to change the SLI premium structure to an age-rated structure.

I. BASIC FACTS AND PROCEDURAL HISTORY

In this class-action lawsuit, plaintiffs are named plaintiffs representing the class consisting of retirees of defendant Wayne County (the county) who, before retirement, were represented by Michigan AFSCME Council 25, and its Locals 25, 101, 409, or 1659,[1] and who purchased SLI from the county upon retirement.

The parties primarily rely on two documents, which they stipulated as joint exhibits: the collective-bargaining agreement between the county and AFSCME Locals 25, 101, 409, and 1659 effective December 1, 2000, to November 30, 2004 (the CBA), and the Wayne County health and welfare benefit plan description effective December 1, 1990 (the Plan).

The county provides, at its expense, $20,000 of life insurance coverage to current employees and $5,000 of life insurance coverage to retirees. Employees or retirees who wish to purchase SLI may do so at their own expense.

Plaintiff Nora Raymond retired in 1983. At retirement, Raymond originally paid $8.74 a month for

[1] The order that allowed the action to be maintained as a class action also ordered that the name of the union be removed from the caption of the pleadings.

$11,500 in SLI. Over time, this rate increased to $27.14 a month for the same amount of coverage. She never objected to the increase in premiums and continued to pay for coverage.

Plaintiff Rosemary Butler retired in 2002. She did not discuss SLI when she met with her retirement representative. She was, however, given a document titled "As You Retire. . . . Wayne County Retirees Fact and Information Guide" that provided that "[s]upplemental life insurance can be continued at a maximum of $11,500 by monthly payroll deduction, if applicable." Although she did not talk to anyone regarding SLI premium rates, she "was under the impression" that the premium rates were the same for retirees as for active employees because the document indicated that SLI was a continued benefit.

Before February 2005, the amount that retirees paid in premiums for SLI matched the cost to the county for the SLI. In February 2005, Prudential Insurance Company informed the county that the existing SLI premium rate of $2.36 per thousand dollars of insurance coverage was insufficient. Rather than permit the liability for the SLI to become unfunded and have the policies cancelled, Jack Underwood, Director of Risk Management for Wayne County, made the unilateral decision to use excess funds contained in an Insurance Continuation Fund (ICF), established to buy out the county's liability for basic life insurance for certain retirees, to pay the difference "until a decision was made as to whether or not the County was going to notify retirees that they would now be going to an age banded rate premium."

When the ICF funds were depleted by August 2005, Underwood unilaterally authorized the county to continue subsidizing the premium rate for retiree SLI from

the county's general fund to prevent the policies from being cancelled. Underwood had no authority to bind the county to an obligation to pay the benefits. When Underwood informed Carla Sledge, Chief Financial Officer for Wayne County, that the policies would be cancelled without the subsidization or a change in premium rates, Sledge said that it was inappropriate for the county to subsidize the "difference between the $2.36 and the amount that would need to be paid for the age-banded rate."

Prudential, the insurance company providing SLI, indicated that to properly fund the SLI, either a flat rate of $5.44 would be required of all employees, or an age-rated premium could be implemented, making costs "equitable for all participants, so a younger employee obviously would pay less premium than an older person." Rather than increasing the flat-rate premium to cover the SLI cost, the county elected to switch to the age-rated-premium structure, to become effective January 1, 2007. On October 12, 2006, Ronald Yee, on behalf of defendants, authored a letter notifying retirees of the new SLI premium rates and the age-rated-premium structure. Raymond and Butler both received this letter and, on the basis of the increased premium, elected to discontinue their coverage.

Plaintiffs subsequently filed this class-action suit on April 18, 2007, claiming that defendants breached their contract to provide a fixed flat-rate premium of $2.36 per thousand dollars of insurance a month for SLI. On April 25, 2008, plaintiffs filed their first-amended class-action complaint for injunctive relief. Despite the fact that the class clearly contained plaintiffs who retired before the enactment of the CBA and the Plan, plaintiffs argued that when defendants notified retirees on October 18, 2006, that defendants had changed to an

age-rated premium, "[t]his change was made in violation of Section 3 B *supra* of the various collective bargaining agreements (Plan incorporated by reference)" and that "[d]efendants violated the provisions of the Plan, and the collective bargaining agreements, by creating age related categories in an arbitrary and capricious manner that violated the provision of the Plan." Plaintiffs' complaint did not address the fact that at least one of the named plaintiffs retired under a different contract[2] and simply provided that the Plan was incorporated by reference into "various collective bargaining agreements."

At oral argument, plaintiffs indicated that there was a joint stipulation that the CBA and the Plan were the only documents governing the dispute and that references to any prior collective-bargaining agreements were for background purposes only. Accordingly, although Raymond retired under a different collective-bargaining agreement, she and all plaintiffs represented by her were bound by their counsel's stipulation and this Court has limited its analysis to rights established under the CBA and the Plan.

Although initially disputed, by the time of trial, the parties agreed that defendants had a contractual obligation to make SLI available to retirees. Thus, the only issues left to be decided at trial were (1) whether defendants could change the amount of the SLI premiums; (2) whether defendants were required to continue to subsidize plaintiffs' SLI premiums; and (3) whether defendants could change the structure of the SLI premium from a flat-rate structure to an age-rated structure.

The trial court concluded that the "fundamental question here is whether the Defendants are contractu-

[2] Raymond retired in 1983, clearly before the enactment of the Plan.

ally obligated to provide interminable SLI to the members of the Plaintiffs' class at a fixed flat rate premium of $2.36 per thousand per month, in the absence of an explicit or tacit agreement." The trial court held that defendants were free to increase the amount of the premium charged for SLI from $2.36 per thousand a month, in light of the evidence that the premiums had increased over time. The trial court also determined that there was no evidence of an agreement to provide subsidies to retirees for the cost of SLI. Finally, the trial court concluded that "[t]he length, wide spread knowledge, and consistency of the practice of providing SLI at a flat rate premium created a reasonable expectation that the practice would continue," making that practice "binding on the parties." The only issue on appeal is the last of these decisions—that defendants are required to provide SLI to plaintiffs at a flat-rate premium in perpetuity and are prohibited from changing to an age-rated-premium structure.

II. STANDARD OF REVIEW

When reviewing a trial court's decision after a bench trial, we review its findings of fact for clear error and review de novo its conclusions of law. *City of Flint v Chrisdom Props, Ltd*, 283 Mich App 494, 498; 770 NW2d 888 (2009).

We also review de novo a trial court's interpretation of a written contract. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). "The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of

fact." *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996) (citations omitted).

III. ANALYSIS

Generally, "a mid-term unilateral modification that concerns, not the benefits of active employees, but the benefits of already retired employees" does not constitute an unfair labor practice. *Allied Chem & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 160; 92 S Ct 383; 30 L Ed 2d 341 (1971). This is because retirees "are neither 'employees' nor bargaining unit members." *Id.* at 176. However, "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Id.* at 181 n 20. Therefore, in order for plaintiffs to sustain their claim that defendants could not unilaterally modify their SLI premiums from a flat-rate premium to an age-rated premium, plaintiffs must show that they had a contractual right to a flat-rate premium in perpetuity and that that right was contained in their contracts at the time they retired, so that it could be deemed to be vested. Accordingly, before the question of vesting arises, this Court must determine if such a contractual right exists, whether by express provision or past practice.

A. EXPRESS CONTRACTUAL RIGHT

The CBA's only explicit reference to SLI is in article 29.16 and provides, "Supplemental life insurance is available under a group plan at the option of the employee." It makes no mention of what the rate is or how it will be calculated and also contains no reference to SLI for retirees. However, article 29 of the CBA also provides, "Except where it is in conflict with the express

terms of this agreement, the *Wayne County Health and Welfare Benefit Plan* ('the Plan') effective December 1, 1990 is hereby incorporated by reference."

Section 3(B) of the Plan provides:

> Supplemental life insurance is available under a group plan at the option of the employee. Supplemental life insurance will soon be age rated at the County's option. Age groupings for rates will be as follows: 29 and under, 30 to 34, 35 to 39, 40 to 44, 45 to 49, 50 to 54, 55 to 59, 60 to 64, 65 to 69, 70 and up. The rate that the employee pays for supplemental life [insurance] will increase as the employee grows older. Employees and retirees will, subject to the terms and conditions of the life insurance company, be eligible to transfer to the age rated group life insurance plan. The amount of the life insurance available for any individual and the life insurance policy provisions shall be determined by the life insurance company.

Because § 3(B) is not in direct conflict with any provision of the CBA, it is incorporated through article 29.

Plaintiffs argue that § 3(B) of the Plan is inconsistent with the CBA because article 44.01 of the CBA provides that all fringe benefits not changed or covered by the contract are to remain in full force and effect.[3] This argument ignores that article 29.16 of the CBA provides the right to SLI. Therefore, SLI is covered by and, with the age-rated language in the Plan, arguably changed by, the contract. Accordingly, article 44.01 is

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[3] Article 44.01 provides:

> It is agreed that all established fringe benefits not changed or covered in this Agreement that are now being received by all the employees in the bargaining unit covered by this Agreement shall remain in full force and effect. The Employer shall not establish any benefit for the employees covered in this Agreement without first negotiating such benefit with the Union.

inapplicable because it only applies to those benefits *not* changed or covered by the CBA.

Because there is an express provision in the CBA that SLI will, at some point, be changing to an age-rated-premium structure and that retirees will be eligible to "transfer" to that plan, we conclude that, under the express language of the CBA as modified through the incorporation of the Plan, there is no express contractual right to a flat-rate-premium structure.

B. PAST PRACTICE

Because the CBA does not contain an express right to a flat-rate-premium structure, the only way plaintiffs could have a vested right to a flat-rate-premium structure would be based on a past practice amending the contract provisions.

1. APPLICABILITY OF THE DOCTRINE

Defendants argue that the past-practice doctrine is inapplicable to retirees. We agree in part, but still find the doctrine applicable in the present case.

"[A] past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties." *Amalgamated Transit Union v Southeastern Mich Transp Auth*, 437 Mich 441, 454; 473 NW2d 249 (1991). In *Port Huron*, 452 Mich at 325, our Supreme Court held:

> In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be "tacit agreement that the practice would continue." However,

> where the agreement unambiguously covers a term of employment that conflicts with a parties' past behavior, requiring a higher standard of proof facilitates the primary goal of the PERA[4]—to promote collective bargaining to reduce labor-management strife. [*Id.* at 325-326 (citations omitted).]

As previously noted, however, under *Allied Chem*, 404 US at 160, "a mid-term unilateral modification that concerns, not the benefits of active employees, but the benefits of already retired employees" does not constitute an unfair labor practice, and retirees "are neither 'employees' nor bargaining unit members," *id.* at 176. Taking these holdings together, there is a strong inference that the past-practice doctrine cannot amend retirees' contracts.

First, a past practice creates "a term or condition of employment . . . ." *Port Huron*, 452 Mich at 325; *Amalgated*, 437 Mich at 454. However, retirees are, by definition, no longer employed and cannot be considered employees. *Allied Chem*, 404 US at 176. Thus, a change in retiree benefits cannot be deemed a change in a term or condition of employment. Furthermore, the standard of proof to permit a past practice to override the express terms of a collective-bargaining agreement is based on facilitating "the primary goal of the PERA—to promote collective bargaining to reduce labor-management strife." *Port Huron*, 452 Mich at 326. Under *Allied Chem*, retirees are not bargaining-unit members and, therefore, fall outside the labor-management relationship. *Allied Chem*, 404 US at 176. If the purpose of giving deference to contract provisions over past practice is related to collective-bargaining goals, the standard, and therefore the doctrine, would

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[4] Public employees relations act, MCL 423.201 *et seq.*

seem to have little relevance to those people who no longer have any part to play in collective bargaining, namely, retirees.

However, a past practice may have amended a contract before someone's retirement. Accordingly, we find that the doctrine is applicable in this case, although in a limited context. That is, the past-practice doctrine may only be used to establish that a contractual right existed *at the time of retirement*. Absent explicit contractual language to the contrary, a retiree's contractual rights vest, if at all, at the time of retirement. See *Winnett v Caterpillar, Inc*, 553 F3d 1000, 1008-1012 (CA 6, 2009). Thus, the retiree must show that the past practice had already established the right at the time of retirement. Actions taken after a person's retirement that ultimately result in a finding of a past practice would not create a vested contractual right for that person because that person's rights were fixed on the basis of the contract that existed at the time of his or her retirement. Thus, it is too broad to say that past practice never applies to retirees. Rather, a retiree relying on the past-practice doctrine must show that the past practice had modified the contract under which the retiree retired. If any of the actions upon which a retiree relies to assert a past practice occurred after the retiree's date of retirement, the claim must fail.

2. EXISTENCE OF A PAST PRACTICE

"Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be 'tacit agreement that the practice would continue.' " *Port Huron*, 452 Mich at 325, quoting *Amalgamated*, 437 Mich at 454-455. However, where a past practice is clearly contrary to clear contract language,

> the unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract. The party seeking to supplant the contract language must show the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract. [*Port Huron*, 452 Mich at 312.]

Under this standard, we must first determine whether there is a contract provision that provides for how SLI premiums will be calculated and, if so, determine whether that contract provision is directly contrary to the past practice argued by plaintiffs.

As previously noted, the CBA's only explicit reference to SLI provides that "[s]upplemental life insurance is available under a group plan at the option of the employee." It makes no mention of what the rate is or how it will be calculated. However, because the CBA incorporates the Plan, it contains an express provision that SLI will, at some point, be changing to an age-rated-premium system and that retirees will be eligible to "transfer" to that plan. Accordingly, plaintiffs' contention that there is no provision contained in the CBA that relates to how the SLI rate will be calculated is without merit.

In light of the existence of an express provision in the CBA providing how the SLI rate will be calculated, plaintiffs' allegation of a past practice prohibiting a change from a flat-rate-premium structure is contrary to the express contract language, making the *Port Huron* standard the applicable standard in this case. Accordingly, "the unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract." *Id*.

The trial court avoided the *Port Huron* standard of requiring proof that "the parties had a meeting of the

minds with respect to the new terms or conditions so that there was an agreement to modify the contract," *id.*, by finding that the SLI provision contained in the Plan was ambiguous. We disagree with the trial court and hold that the provision is not ambiguous.

The trial court relied heavily on the fact that § 3(B) of the Plan provides that "[t]he rate that the *employee* pays . . . will increase" and that the section fails to mention retirees even though both "[e]mployees *and retirees*" are referenced with respect to the transfer provision. (Emphasis added.) However, after considering the use of the term "employee" throughout the Plan and the CBA as it relates to SLI, we disagree with the trial court's interpretation.

The CBA and the Plan *both* only provide that SLI "is available under a group plan at the option of the *employee.*" (Emphasis added.) Because SLI is expressly terminated on the first day of retirement under § 6 of the Plan,[5] and nothing within the CBA provides to the contrary, indeed the CBA makes no provision for SLI for retirees at all, unless the term "employee" also includes "retirees" in the SLI provisions in the Plan, there is no provision anywhere that requires the county to provide SLI to retirees. Therefore, the only way to read the CBA and the Plan provisions to hold that retirees are entitled to SLI requires interpreting the SLI provisions related to "employees" as including "retirees." Without such an understanding, there would seem to be no question that the county could unilaterally change how the premiums were calculated; indeed it could have

[5] Section 6 of the Plan, "Insurance Programs: Termination Date," provides that "[s]ubject to various provisions of labor agreements such as . . . eligibility for retiree health and life insurance benefits, the following health benefit programs shall terminate on the last day of the month following a . . . retirement" and includes both life insurance and SLI as benefits that are terminated.

unilaterally decided to stop providing SLI to retirees entirely, because there is no contractual requirement that it provide SLI to "retirees"—only "employees."

Similarly, the previous collective-bargaining agreements provided by plaintiffs, such as the 1981 to 1984 collective-bargaining agreement under which Raymond retired, also provide no express language for SLI for retirees. For example, article XXVI, "Insurance," § 1, "Life Insurance Program," subsection (C) of the 1981 to 1984 agreement provides: "The EMPLOYER shall make available the facility of payroll deduction for a (contributory) Supplemental Life Insurance Plan which premiums shall be paid entirely by the participating employees." Although the chart for the contributory plan provides a list of benefits and costs for "Active Employees age 65 and over and employees who retire on or after 11-1-64," no actual contract clause provides for SLI to be provided to retirees. The closest any provision comes is that, for those employees who elect "The New Plan," upon retirement, "the New Plan terminates. Everyone who is under the New Plan is also under the Old Plan (active employees age 65 and over and employees who retired on or after November 1, 1964)." Thus, reference is made that "the Old Plan" provides rates for retirees, but no actual provision specifically provides that retirees will be provided SLI at all. Accordingly, even the previous collective-bargaining agreements seem to rely on retirees' inclusion within the provision that SLI be provided to "employees." Once "retirees" are read into the Plan's SLI provisions, it becomes clear that they are subject to the age-rated-premium system that will be implemented "at the County's option."

The trial court also found ambiguity in the fact that the provision does not indicate when the change to an age-rated-premium system will take place. We find no

ambiguity, because the clause explicitly provides when the change will occur—it will occur "at the County's option."

Although the trial court determined that there was no evidence to indicate that SLI rates were ever the subject of collective bargaining and noted that the Plan provisions are not subject to the approval of the union, it recognized that "if the union does not agree with a provision of the Plan an attempt to change it may be made through the collective bargaining process." This finding was consistent with the testimony of Richard Johnson, staff representative at Michigan AFSCME Council 25, who testified that "if there's something in the Plan that the union could not agree to then we identify that or, or clarify it in the Collective Bargaining Agreement."

The record also contains evidence that the union exercised its right to bargain for changes to the Plan, because there are specific provisions related to insurance that alter the terms of the Plan. For example, although § 3(A) of the Plan only provides for $15,000 of employer-paid group life insurance, article 29.16 of the CBA provides that the amount is $20,000. The fact that the union did not bargain for any changes to § 3(B) of the Plan indicates its acceptance. Therefore, we conclude that the union did have notice of this provision, could have bargained to change it and, having not done so, is bound by it unless it can meet the burden of proof for a past practice to the contrary set forth in *Port Huron*.

Under *Port Huron*, 452 Mich at 312, plaintiffs' assertion that a flat-rate premium for SLI was a binding past practice required a showing that plaintiffs and the county "had a meeting of the minds with respect to" the flat-rate premium's existing in perpetuity "so that

there was an agreement to modify the contract." *Id.* Plaintiffs were required to "submit proofs illustrating that the parties had a meeting of the minds with respect to the new terms or conditions—intentionally choosing to reject the negotiated contract and knowingly act in accordance with the past practice." *Id.* at 329.

Although plaintiffs testified that *they* believed that such an agreement existed, they provided no evidence that *defendants* shared their belief. Indeed, the evidence supports that there was never a meeting of the minds on this issue.

Raymond testified that she was informed that she could purchase supplemental life insurance and that she "would have to pay 8 dollars and something or like 9 dollars a month." Exhibit 2 to her deposition was a letter that stated at the top, "Please do NOT destroy this form letter. Consult it before you call the Retirement Office." Paragraph 9 of the letter provides:

> The free $10,000 life insurance is reduced to $4,000 (Road Commission is reduced to $7,000). The most you can carry in Supplemental Life Insurance is $11,500 @ $8.74 per month. The premium is deducted from your monthly pension check.

Nothing in this letter indicates how the rate was calculated or how future rates would be calculated.

Butler testified that at her meeting with the retirement representative she did not discuss SLI coverage and was not told what the premium for SLI would be. Plaintiffs rely on the document provided to Butler upon her retirement, which provides:

> LIFE INSURANCE (*All Plans*)
>
> The basic life insurance you carried as an active employee will be reduced to $5,000, depending on your coverage group. Supplemental life insurance can be continued at

> a maximum of $11,500 by monthly payroll deduction, if applicable. You will not receive a policy, but a statement of coverage and beneficiaries can be obtained upon request.

Butler testified that she had no discussions regarding what the rate for SLI coverage would be, but that she "continued it, because I was under the impression that it was the same [as when she was an active employee]." However, she admitted that no one ever told her that the amount of the premium would not change, but she had simply assumed that the amount would remain the same because it was a benefit continued from when she was working. Furthermore, when counsel was attempting to clarify Butler's testimony regarding how rates had changed since she retired, she testified, "I don't know about a flat rate. I don't know anything about a flat rate."

Nothing in this evidence supports a conclusion that defendants intentionally chose to reject the express terms of the CBA that permitted them to implement an age-rated-premium structure at the county's option.

Plaintiffs' argument that a past practice was created because defendants waited 16 years to implement the age-rated-premium structure is also unavailing in light of the express language in the Plan. Defendants' failure to implement the change to an age-rated-premium structure as permitted by the Plan did not prevent them from doing so in the future. See *Amalgamated*, 437 Mich at 458 n 15 (noting that the Michigan Employment Relations Commission had previously "opined that merely refraining from action does not establish a 'past practice' precluding future action"). Further, "[s]imply because a party 'knew or should have known' it was acting contrary to the agreement is insufficient to overcome express language of the agreement." *Port Huron*, 452 Mich at 332. Thus, because the

Plan and, therefore, the CBA expressly permitted defendants, at their option, to implement an age-rated-premium structure, the fact that defendants inserted the language in 1991 but did not implement the change until 2007 did not, by itself, constitute a past practice that would amend the CBA.

Having shown no agreement that SLI premiums would forever remain at a flat rate and no actions by defendants that they intended to modify the CBA to supplant the express language in the Plan, plaintiffs failed to meet their burden. *Id.* at 312. Accordingly, the trial court erred when it concluded that there was a past practice that amended the CBA to provide a contractual right to a perpetual flat-rate-premium structure.

Furthermore, even if we were to evaluate this case under the reduced "tacit agreement" standard from *Amalgamated*, 437 Mich at 454-455, we would reach the same result.

Plaintiffs argued in closing before the trial court that a "past-practice case arises to fill a void in the agreement, and clearly there was a void in this agreement. How would you know what the cost of the insurance was unless the parties mutually, through tacit agreement established it." This argument actually benefits defendants. That is, retirees have always paid the rates set by the insurers. Thus, the past practice was that the insurers set the rates and, if retirees wanted to continue to receive the SLI, each retiree would be responsible for paying 100 percent of whatever rate the insurance companies set. Thus, if there is any past practice at all, it is that retirees simply pay the rates set by the insurers.

The evidence shows that rates were unilaterally set by the insurer and, although defendants might have negotiated rates to some degree, or shopped for differ-

ent rates from other insurers, defendants ultimately only had the power to accept or reject the rates provided by the insurers. As defendants noted in their closing arguments, "The practice testified to by [various witnesses] was that the premiums would be negotiated between the County and the carriers. They arrived at a premium and that premium would be incorporated." Our review of the record supports this conclusion.

Edward Maitland, owner of an insurance company that "worked with Wayne County on the retiree life contract through, with Prudential," indicated that he, as an insurance broker, presented age-banded premium rates to the county as a way to address the shortfall between what the insurance was costing the county and what the retirees were paying for the insurance. He believed that he provided the rates to Yee and Underwood. Underwood testified that "it was a determination made by Prudential that the $2.36 rate, flat rate was inadequate, that the County should have had an age-banded rate." Lyn Roberts, a division director employed by the Wayne County employees retirement system, testified that "[t]he County did not change the rates, . . . [t]he rates were changed."

Salvatore Saputo, former director of risk management for Wayne County, testified that it was his "responsibility to negotiate with the insurance carriers as to the renewal rates and, and then to transmit the new rates on to Retirement who had responsibility to do the billings and to process the payroll deductions." The negotiations occurred annually, at which time the insurers would submit proposals for rates for SLI. If the county was unhappy with the rates provided, it would attempt to negotiate and obtain alternative proposals to make the rates lower, but once a proposal was accepted, the proposal was transmitted to the retirement office so

it could take care of billing for the premiums. Thus, once the county and the carrier agreed on the rates, the rate sheets were transmitted to the retirement office and implemented for billing purposes, without further input.

Consistent with this testimony, Yee testified that he was a steward and ultimately a committee person for AFSCME Council 25, Local 1659, and that he attended bargaining sessions in the early 1980s representing Local 1659. He testified that he understood SLI to be "a voluntary life insurance program, so if you were in it you paid for it, regardless. I mean, whatever it was you paid for it." Yee further testified that when Prudential took over the insurance, it mentioned that there would be a problem continuing to charge a flat-rate premium because the premiums being collected would not pay for the benefit being provided. All this testimony supports the conclusion that it was the insurer who determined how rates were calculated and provided those rates to the county. Once the rates were implemented, retirees who wished to continue to receive the benefit would need to pay 100 percent of whatever the new rates were.

The evidence is clear that the premium rates were set by the insurance company and that the rates could and did change. Furthermore, there is no evidence that *anyone* was ever promised that the method for calculating premiums (flat-rate as opposed to age-rated) would remain the same. Plaintiffs' brief also points to language in the summary plan description for coverage under the employee term life insurance policy, which stated that coverage only ends when "you fail to pay, when due, any contribution required." However, as before, this language does not indicate what contribution is required or how it will be calculated. Indeed, it supports the position that the insurance companies

determine how premiums are calculated and that defendants' obligation is to simply provide plaintiffs with the opportunity to purchase the insurance at whatever premium rates the insurers set.

Accordingly, we find that the record shows no evidence of a tacit agreement between plaintiffs and defendants that the SLI premiums would retain a flat-rate-premium structure in perpetuity. Indeed, we hold that if any past practice was shown to exist by tacit agreement, it was that the insurers set the rates for SLI and determined how they were calculated, those rates were provided to the county, and once the county accepted the rates, retirees who wished to maintain the SLI benefit were required to pay 100 percent of whatever rates were accepted by the county. Under such circumstances, defendants' implementation of the new age-based SLI premium structure would have been consistent with that past practice and, therefore, entirely permissible.

However, because we believe that *Port Huron*, rather than *Amalgamated*, provides the appropriate standard for this case, we hold that plaintiffs failed to establish a past practice that amended the clear language of the CBA that an age-rated-premium structure would be implemented "at the County's option," and that the trial court erred as a result of its conclusions to the contrary.

IV. CONCLUSION

Because plaintiffs failed to meet their burden to prove a past practice, there was no express contractual right or a past practice that amended the CBA to provide a right to a flat-rate SLI premium structure in perpetuity and, therefore, nothing that could have vested. Absent a vested right, defendants could unilat-

erally modify the SLI premium rate structure without plaintiffs' consent.[6] See *Allied Chem*, 404 US at 181 n 20. Accordingly, we reverse the trial court's determination that plaintiffs are entitled to a flat-rate-premium structure on the basis of a vested contract right and remand for entry of an order consistent with this opinion. We do not retain jurisdiction.

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[6] In light of our conclusion that reversal is required because of plaintiffs' failure to prove a past practice, it is unnecessary to address the applicability of the reservation-of-rights language in the Plan.

MACKEY v DEPARTMENT OF HUMAN SERVICES

Docket No. 288966. Submitted June 15, 2010, at Lansing. Decided September 7, 2010, at 9:05 a.m.

Elizabeth A. Marden submitted an application for Medicaid benefits to the Department of Human Services (DHS). The DHS found that Marden was eligible for Medicaid but applied a divestment penalty, refusing to pay for long-term-care services for 18 months and 23 days. The DHS applied the penalty as a result of Marden's investment of $111,460 in the Marden Family L.L.C. (the LLC). Marden's daughter and attorney-in-fact, Betsy Mackey, had formed the LLC approximately one month before Marden applied for Medicaid benefits. Mackey was assigned 100 investment units of the LLC and all 100 voting units. Marden was assigned 111,460 investment units of the LLC. As the sole voting member of the LLC, Mackey disallowed the transfer of investment units during a two-year holding period from the date of investment. After two years, investment units could be sold with a guaranteed compounded two percent interest rate on the amount paid for the units from the date of purchase to the date of sale. Marden appealed the DHS's decision to apply a divestment penalty. A hearing referee affirmed the application of the penalty, concluding that Marden had not received fair market value for her money. Marden then appealed in the Grand Traverse Circuit Court. The court, Philip E. Rodgers, Jr., J., reversed, concluding that the investment was not a divestment and that Marden had received fair market value for her money. The Court of Appeals granted the DHS's application for leave to appeal. Following Marden's subsequent death, the Court of Appeals substituted Mackey, her personal representative, as appellee.

The Court of Appeals *held*:

Federal law requires that a state determining Medicaid eligibility must look back a specific period to determine if the applicant made any asset transfers solely to become eligible for Medicaid. Under 42 USC 1396p(c), a Medicaid applicant eligible for long-term-care benefits is subject to a divestment penalty if he or she transferred a resource during the applicable look-back period for less than fair market value and the transfer was not otherwise

excluded as a divestment. To determine the fair market value of a resource, one must discern the value of the resource on the open market in an arm's-length transaction. Shell transactions between relatives that have little or no economic benefit to the applicant are not for fair market value. Marden's investment units in the LLC were not purchased on the open market in an arm's-length transaction. Therefore, the transaction did not reveal a fair market value. Given that the LLC was admittedly created to make Marden eligible for Medicaid, that Marden ceded total control over the investment to her daughter and fiduciary, and that Marden would receive only a marginal return on her unsecured investment after two years, the investment was not for fair market value. The investment was a divestment, and the DHS properly applied a divestment penalty. The trial court erred by ruling otherwise.

Reversed.

SOCIAL SERVICES — MEDICAID — DIVESTMENT OF RESOURCES — FAIR MARKET VALUE — ARM'S-LENGTH TRANSACTIONS — DIVESTMENT PENALTIES.

A Medicaid applicant eligible for long-term-care benefits is subject to a divestment penalty if he or she transferred a resource during the applicable look-back period for less than fair market value and the transfer was not otherwise excluded as a divestment; to determine the fair market value of a resource, one must discern the value of the resource on the open market in an arm's-length transaction; shell transactions between relatives that have little or no economic benefit to the applicant are not for fair market value (42 USC 1396p[c]).

Rizzo & Associates, *PLC* (by *John J. Rizzo III*), for petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Jonathan S. Ludwig*, Assistant Attorney General, for respondent.

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

MURRAY, P.J. Respondent, the Department of Human Services (DHS), appeals on leave granted the circuit court order reversing the hearing referee's decision that the DHS properly imposed a Medicaid benefit divest-

ment penalty on petitioner, Elizabeth Marden.[1] We conclude that the circuit court's ruling was in error because the circumstances of petitioner's investment in a closely held L.L.C. rendered the transaction a transfer for less than fair market value. Accordingly, the circuit court's order is reversed.

I. FACTS AND PROCEEDINGS

The underlying facts are not in dispute. On November 29, 2005, petitioner and her husband applied for Medicaid, but they failed to disclose certain annuity contracts they held, which, had they been disclosed, would have rendered them ineligible for Medicaid benefits. On November 9, 2006, Mr. Marden died. Shortly thereafter, petitioner's case was due for redetermination, but was closed when she failed to return the required form.

On January 11, 2007, petitioner again applied for Medicaid, but was denied eligibility the following June because she had too much money in her bank account. After her second application had been denied, petitioner received close to $100,000 in payouts as a result of her husband's death. In preparation for submitting a third request for Medicaid benefits, petitioner's daughter and attorney-in-fact, Betsy Mackey, formed the Marden Family L.L.C. Mackey was assigned, in her own name, 100 investment (nonvoting) units of the L.L.C. and all 100 voting units. Petitioner was assigned 111,460 investment units, for which she (through Mackey's power of attorney) paid the L.L.C. $111,460. The same day, Mackey, as sole voting member of the L.L.C., acted to disallow any transfer of investment units during a

[1] Elizabeth Marden died April 23, 2009, and Betsy Mackey was substituted as the personal representative of Marden's estate. For clarity, Marden will be referred to as petitioner throughout this opinion.

two-year holding period. Thus, under the L.L.C.'s operating agreement, petitioner could not sell, transfer, or liquidate her units for two years from the date of investment without a supermajority of the voting members. After two years, the agreement permitted sale of the units and guaranteed compounding two percent interest on the amount paid for the units from the date of purchase to the date of sale. During the two years, petitioner would not receive any payments from the L.L.C.

That September, petitioner again applied for Medicaid, including a retroactive application for the month of August (the month the L.L.C. was created). The DHS found that petitioner was eligible for Medicaid, but applied a divestment penalty,[2] refusing to pay for long-term-care services for 18 months and 23 days. Petitioner appealed the DHS determination, and the hearing referee found that petitioner had not received fair market value for her money, and affirmed the decision of the DHS to apply the divestment penalty. Specifically, the hearing referee found that because petitioner's investment within the five-year "look-back" period rendered an otherwise available cash asset unavailable for two years, the investment was for less than fair market value and a divestment penalty was appropriate. Additionally, the hearing referee rejected petitioner's argument that the investment was a permissible conversion

[2] A divestment penalty is computed by dividing the uncompensated value of the resource divested ($111,432.47) by the average monthly long-term-care costs in Michigan for the applicant's baseline date ($5,938 in 2007). Family Independence Agency, Program Eligibility Manual (PEM) 405 (April 1, 2004), pp 8-9. The penalty would preclude petitioner from receiving benefits for just over 18 months. Note that the DHS, which produces the eligibility manual, was previously named the Family Independence Agency. The DHS recently renamed the Program Eligibility Manual the Bridges Eligibility Manual.

of the annuity proceeds[3] since the annuity was actually cashed out—and was thus available as a cash asset—before it was invested in the L.L.C.

Petitioner then appealed to the circuit court, which reversed the hearing referee, holding that petitioner's purchase of the L.L.C. shares was not a divestment because she received fair market value for her money. In reaching this conclusion, the court initially observed that federal law permits certain annuity purchases and asset transfers for a spouse's benefit in order to circumvent countable asset provisions and qualify for Medicaid long-term-care benefits,[4] and noted that this was the third case wherein the DHS ruled that an applicant's investment in a closely held L.L.C. guaranteeing compound interest after a set period of time was a divestment.[5] As in the prior case it had decided, the court ruled that

> the purchase of stock in the family limited liability company in this case was not, by definition, a "divestment" because the transfer was not "for less than fair market value." In fact, the value of the asset did not change — the asset merely took another form — a form that legally made it unavailable and uncountable. Based on the authority cited herein, not only is the value of the stock not countable, but the income stream from that investment is also not countable.

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[3] "Converting an asset from one form to another of equal value is **not** divestment even if the new asset is exempt. Most purchases are conversions." *Id*. at 7.

[4] The court cited § 6012(a) of the Deficit Reduction Act of 2005, PL 109-171, 120 Stat 4; 42 USC 1396p(c)(2)(B)(i); 42 USC 1396p(d)(2)(A)(ii); *Mertz v Houstoun*, 155 F Supp 2d 415, 426-427 (ED Pa, 2001); and *James v Richman*, 465 F Supp 2d 395 (MD Pa, 2006), aff'd 547 F3d 214 (CA 3, 2008).

[5] See *In re Gault*, unpublished opinion of the Grand Traverse Circuit Court, issued March 16, 2007 (File No. 06-25485-AA), and *In re Olsen*, unpublished opinion of the Manistee Circuit Court, issued June 6, 2007 (File No. 06-12519-AA). The DHS appealed neither case to this Court.

Accordingly, the court reversed the hearing referee's decision and determined that petitioner was entitled to long-term-care benefits without a divestment penalty.

We granted the DHS's application for leave to appeal, *Marden v Dep't of Human Servs*, unpublished order of the Court of Appeals, entered March 18, 2009 (Docket No. 288966), and now reverse.

II. ANALYSIS

A. GENERAL MEDICAID BACKGROUND

In 1965, Congress enacted Title XIX of the Social Security Act, commonly known as the Medicaid act. See 42 USC 1396 *et seq*. This statute created a cooperative program in which the federal government reimburses state governments for a portion of the costs to provide medical assistance to low-income individuals. *Cook v Dep't of Social Servs*, 225 Mich App 318, 320; 570 NW2d 684 (1997). Participation in Medicaid is essentially need-based, with states setting specific eligibility requirements in compliance with broad mandates imposed by federal statutes and regulations.[6] *Id*.; see also *Atkins v Rivera*, 477 US 154, 156-157; 106 S Ct 2456; 91 L Ed 2d 131 (1986), *Nat'l Bank of Detroit v Dep't of Social Servs*, 240 Mich App 348, 354-355; 614 NW2d 655 (2000), and *Gillmore v Illinois Dep't of Human Servs*, 218 Ill 2d 302, 305; 843 NE2d 336 (2006).

Like many federal programs, since its inception the cost of providing Medicaid benefits has continued to skyrocket. The act, with all of its complicated rules and regulations, has also become a legal quagmire that has resulted in the use of several "loopholes" taken advan-

[6] In Michigan, the Department of Community Health oversees the Medicaid program, which the DHS administers pursuant to the Social Welfare Act, MCL 400.1 *et seq*.

tage of by wealthier individuals to obtain government-paid long-term care they otherwise could afford. The Florida District Court of Appeal accurately described this situation, and Congress's attempt to curb such practices:

> After the Medicaid program was enacted, a field of legal counseling arose involving asset protection for future disability. The practice of "Medicaid Estate Planning," whereby "individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings," is a legal practice that involves utilization of the complex rules of Medicaid eligibility, arguably comparable to the way one uses the Internal Revenue Code to his or her advantage in preparing taxes. *See generally* Kristin A. Reich, Note, *Long-Term Care Financing Crisis—Recent Federal and State Efforts to Deter Asset Transfers as a Means to Gain Medicaid Eligibility*, 74 N.D. L.Rev. 383 (1998). Serious concern then arose over the widespread divestiture of assets by mostly wealthy individuals so that those persons could become eligible for Medicaid benefits. *Id*.; *see also Rainey v. Guardianship of Mackey*, 773 So.2d 118 (Fla. 4th DCA 2000). As a result, Congress enacted several laws to discourage the transfer of assets for Medicaid qualification purposes. *See generally* Laura Herpers Zeman, *Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly*, 13 Quinnipiac Prob. L.J. 187 (1988). Recent attempts by Congress imposed periods of ineligibility for certain Medicaid benefits where the applicant divested himself or herself of assets for less than fair market value. 42 U.S.C. § 1396p(c)(1)(A); 42 U.S.C. § 1396p(c)(1)(B)(i); Fla. Admin. Code R. 65A-1.712(3). More specifically, if a transfer of assets for less than fair market value is found within 36 months of an individual's application for Medicaid, the state must withhold payment for various long-term care services, i.e., payment for nursing home room and board, for a period of time referred to as the penalty period. Fla. Admin. Code R. 65A-1.712(3). Medicaid does not, however, prohibit eligibility altogether. It merely penalizes

> the asset transfer for a certain period of time. *See generally* Omar N. Ahmad, *Medicaid Eligibility Rules for the Elderly Long-Term Care Applicant*, 20 J. Legal Med. 251 (1999). [*Thompson v Dep't of Children & Families*, 835 So 2d 357, 359-360 (Fla App, 2003).]

In *Gillmore* the Illinois Supreme Court recognized this same history, noting that over the years (and particularly in 1993), Congress enacted certain measures to prevent persons who were not actually "needy" from making themselves eligible for Medicaid:

> In 1993, Congress sought to combat the rapidly increasing costs of Medicaid by enacting statutory provisions to ensure that persons who could pay for their own care did not receive assistance. Congress mandated that, in determining Medicaid eligibility, a state must "look-back" into a three- or five-year period, depending on the asset, before a person applied for assistance *to determine if the person made any transfers solely to become eligible for Medicaid*. See 42 U.S.C. § 1396p(c)(1)(B) (2000). If the person disposed of assets for less than fair market value during the look-back period, the person is ineligible for medical assistance for a statutory penalty period based on the value of the assets transferred. See 42 U.S.C. § 1396p(c)(1)(A) (2000). [*Gillmore*, 218 Ill 2d at 306 (emphasis added).]

See, also, *ES v Div of Med Assistance & Health Servs*, 412 NJ Super 340, 344; 990 A2d 701 (2010) (noting that the purpose of this close scrutiny while looking back is "to determine if [the asset transfers] were made for the sole purpose of Medicaid qualification").[7]

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[7] Both the executive and legislative branches have supported elimination of any loopholes that allow individuals with resources to transfer assets as a way of qualifying for Medicaid benefits. For example, when signing into law the Deficit Reduction Act of 2005, PL 109-171, 120 Stat 4, President George W. Bush stated that the act " 'tightens the loopholes that allowed people to game the system by transferring assets to their children so they can qualify for Medicaid benefits.' " See Reif, *A Penny Saved Can Be A Penalty Earned: Nursing Homes, Medicaid Planning, The Deficit Reduction Act of 2005,*

This statutory look-back period, noted in *Gillmore* and *Thompson* and contained within 42 USC 1396p(c)(1), requires a state to look back a number of years (in this case five) from the date of an asset transfer to determine if the applicant made the transfer solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value. See Family Independence Agency, Program Eligibility Manual (PEM) 405 (April 1, 2004), pp 1, 4; see also *Gillmore*, 218 Ill 2d at 306. "Less than fair market value means the compensation received in return for a resource was worth less than the fair market value of the resource." PEM 405, p 6.

A transfer for less than fair market value during the "look-back" period is referred to as a "divestment," and unless falling under one of several exclusions, subjects the applicant to a penalty period during which payment of long-term-care benefits is suspended. See, generally, PEM 405, pp 1, 4-9. "Congress's imposition of a penalty for the disposal of assets or income for less than fair market value during the look-back period is intended to maximize the resources for Medicaid for those truly in need." *ES*, 412 NJ Super at 344.

Turning to the case before us, then, the issue presented is this: whether the 93-year-old petitioner's investment of $111,460.47 in an L.L.C. formed by her daughter for the sole purpose of qualifying petitioner for Medicaid benefits constituted a divestment, and if so, is it otherwise excluded as a divestment.

B. WAS THIS A DIVESTMENT?

"This Court reviews a decision of an administrative agency in the same limited manner as does the circuit

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And The Problem of Transferring Assets, 34 NYU Rev L & Soc Change 339, 347 (2010) (citation omitted).

court." *Barker Bros Constr v Bureau of Safety & Regulation*, 212 Mich App 132, 141; 536 NW2d 845 (1995). Thus, our review

> 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. [*Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002) (citations omitted); see also MCL 24.306.]

The substantial evidence standard is indistinguishable from the clearly erroneous standard of review. *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). A finding is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id*. at 235.

At the outset we recognize that in creating the L.L.C., petitioner made no pretense that the corporation's purpose was for any reason other than circumventing Medicaid rules that would otherwise render her ineligible for long-term-care benefits for a certain period. Such a purpose flies in the face of the *general* Congressional intent in creating the Medicaid program, i.e., to provide benefits to the truly needy, and of the 1993 amendments, i.e., to preclude asset transfers by those with wealth who would rather pass on their accumulated wealth and at the same time qualify for Medicaid without penalty. See *ES*, 412 NJ Super at 352; *Estate of Gonwa v Wisconsin Dep't of Health & Family Servs*, 265 Wis 2d 913, 934-935; 668 NW2d 122 (2003), citing *Cohen v Massachusetts Comm'r of Div of Med Assistance*, 423 Mass 399, 403-404; 668 NE2d 769 (1996);

Gillmore, 218 Ill 2d at 306. Petitioner admitted at oral argument before the trial court that the purpose in establishing the L.L.C. was to allow her to qualify for Medicaid without suffering a divestment penalty.[8] That admission, coupled with the timing of the share purchase and the particulars of the transaction, make it crystal clear that the only purpose of this asset transfer was to create eligibility for Medicaid.

As one court has noted, however, Medicaid contains loopholes permitting transfers that are inconsistent with the goals of that legislation, *Mertz v Houstoun*, 155 F Supp 2d 415, 427-428 (ED Pa, 2001), and our judicial duty is to enforce the purposes of the law *as expressed in the applicable statutory provisions*, *James v Richman*, 547 F3d 214, 219 (CA 3, 2008) (in interpreting 42 USC 1396, the court noted that "we do not create rules based on our own sense of the ultimate purpose of the law . . . but rather seek to implement the purpose of Congress as expressed in the text of the statutes it passed"), not to just enforce a generalized purpose or intent. We therefore turn to the actual statutory language and the PEM rules to determine the fate of petitioner's cause.

To be eligible for Medicaid long-term-care benefits in Michigan, an individual must meet a number of criteria, including having $2,000 or less in countable assets. Department of Human Services, Bridges Eligibility Manual 400 (January 1, 2010), pp 4-5; *Ronney v Dep't of Social Servs*, 210 Mich App 312, 315; 532 NW2d 910 (1995). As previously set forth, a Medicaid applicant eligible for long-term-care benefits is subject to a divestment penalty if she transfers a resource during the five-year look-back period for less than fair market

[8] At oral argument before the trial court petitioner admitted that the intent in creating the L.L.C. was to qualify her for Medicaid long-term-care benefits, but that her intent was not relevant.

value and that resource is not otherwise excluded as a divestment. 42 USC 1396p(c)(1); PEM 405, p 1.

With respect to fair market value, PEM 405, p 6, instructs that the phrase, "[l]ess than fair market value[,] means the compensation received in return for a resource was worth less than the fair market value of the resource" and elaborates that compensation must have "tangible form" and "instrinsic value." Neither the Medicaid act nor the PEM offers a definition of "fair market value." However, this Court has explained that the common understanding of "fair market value" is "the amount of money that a ready, willing, and able buyer would pay for the asset *on the open market* . . . ." *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 325-326; 725 NW2d 80 (2006) (emphasis added). Black's Law Dictionary similarly defines "fair market value" as "[t]he price that a seller is willing to accept and a buyer is willing to pay *on the open market and in an arm's-length transaction*; the point at which supply and demand intersect." Black's Law Dictionary (7th ed), p 1549 (emphasis added). An "arm's-length" transaction, in turn, is defined as "relating to dealings between two parties who are not related . . . and who are presumed to have roughly equal bargaining power; not involving a confidential relationship[.]" *Id*. at 103.

Although no Michigan court has attempted to define the parameters of an arm's-length transaction, several courts in our sister states have indicated "that an arm[']s-length transaction is characterized by three elements: it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest." *Bison Twp v Perkins Co*, 2000 SD 38, ¶ 17; 607 NW2d 589, 593 (2000), citing *Walters v Knox Co Bd of Revision*, 47 Ohio St 3d 23, 25; 546 NE2d 932 (1989), and *Beach Prop, Inc*

v Town of Ferrisburg, 161 Vt 368, 375-376; 640 A2d 50 (1994). And, we have recognized that family members deal with each other in financial matters differently than they do "with strangers in arm[']s-length transactions . . . ." *Morrison v Secura Ins*, 286 Mich App 569, 574; 781 NW2d 151 (2009). Hence, to determine the fair market value of a resource, we must be able to discern what the value of that resource was on the open market.

While no Michigan case specifically addresses the issue before us today, other courts' treatments of asset transfers to circumvent countable asset requirements in similar contexts are instructive. For example, the Wisconsin Court of Appeals held that the purchase of a balloon annuity (an annuity where a substantial portion of the benefit is paid toward the end of the benefit term) from close relatives constituted a divestment because the transfer was for less than fair market value. *Buettner v Wisconsin Dep't of Health & Family Servs*, 2003 WI App 90, ¶¶ 1-2 and 18-19; 264 Wis 2d 700, 705-706, 716-717; 663 NW2d 282 (2003). In *Buettner*, the applicant and her spouse purchased two irrevocable balloon annuities from their children that "were non-assignable and unsecured, and were private financial instruments that paid a rate of return of less than one percent, with exceptionally low monthly income payments of fifty dollars per annuity." *Id*. at ¶ 19; 264 Wis 2d at 717. The court found that under those circumstances, an "arm's-length transaction" had not occurred because " '[n]o person of sound mind would give [$200,000] to an unrelated third party in exchange for the unsecured, low yield, and non-alienable promises in the instant document,' " and therefore the exchange constituted a transfer for less than fair market value. *Id*. at ¶¶ 19-20; 264 Wis 2d at 717-718 (alteration in *Buettner*) (citation omitted).

The Commonwealth Court of Pennsylvania decided two cases on the same day, *Pyle v Dep't of Pub Welfare*, 730 A2d 1046 (Pa Commw Ct, 1999), and *Ptashkin v Dep't of Pub Welfare*, 731 A2d 238 (Pa Commw Ct, 1999), that addressed Medicaid eligibility. In both of those cases, the court decided appeals from Pennsylvania Department of Public Welfare denials of applications for medical assistance benefits on the basis that available assets had been transferred for less than fair market value. In *Pyle*, the applicant transferred two large sums of money to a trust, the trustee of which was her daughter. In return for the lump sum payments, the applicant received from the trust a nonnegotiable promissory note that provided for a return of eight percent, plus an additional two percent premium in consideration of the fact that if Pyle died before the maturation date, the trust would have no further payment obligation. Both promissory notes required a minimal monthly payment followed by a balloon payment on the last month of the note's term. *Pyle*, 730 A2d at 1047-1048. In *Ptashkin*, the applicant's husband passed away, so the family home was sold. The applicant's two sons each executed a nonnegotiable promissory note payable to the applicant in exchange for the proceeds of the home sale. *Ptashkin*, 731 A2d at 239. These nonnegotiable promissory notes had the same eight percent and two percent interest rate provisions, with the payments being $17.18 per month with a balloon payment plus any accrued interest being payable at the maturity date of the note. *Id*. at 239-240.

In addressing these similar fact scenarios, the court utilized Pennsylvania's definition of fair market value, which is the " 'price which property could be expected to sell for on the open market or would have been expected to sell on the open market in the geographic area in which the property is located.' " *Ptashkin*, 731

A2d at 245, quoting 55 Pa Code 178.2. Focusing on the "open market" part of the definition similar to what we have in Michigan, in both cases the court concluded that the transactions involving the loan of large sums of money in exchange for low monthly payments followed by balloon payments were not fair market value transactions. Critical to the court's conclusion that both deals were "absurd" were the facts that the applicants were surrendering the principal without any security while receiving a monthly payment lower than what was required by the prescribed interest rates. *Ptashkin*, 731 A2d at 245; *Pyle*, 730 A2d at 1050. Indeed, the court noted that neither applicant was receiving any real benefit from the transaction other than to transfer large sums of money to relatives while avoiding paying for long-term care. *Ptashkin*, 731 A2d at 245; *Pyle*, 730 A2d at 1050.

Also analogous is the situation presented to the United States District Court in *Wesner v Velez*, unpublished opinion of the United States District Court for the District of New Jersey, issued April 19, 2010 (Docket No. 10-308). In that case, Wesner gave an $80,000 gift to her close friend and power of attorney, Aamland. That same month (December 2008) Wesner purchased a promissory note from Aamland for $60,000, with the payments going to Wesner to cover her nursing care for the 13 months before her request for Medicaid funds. The promissory note was not disclosed in her January 2009 application for benefits, but once the note was disclosed to the state, Wesner filed suit seeking to enjoin the state from treating the note as a prohibited trust-like device. In deciding Wesner's motion for a preliminary injunction, the court noted that the close relationship of the parties, coupled with the fiduciary duties to Wesner placed on Aamland through the power of attorney and the admission that the note was part of a

"Medicaid planning technique," showed that the transaction was likely a "sham":

> Wesner asserts that 42 U.S.C. § 1396p(c)(1)(I)(i)-(iii) was enacted by Congress to avoid "sham transactions." The transaction entered into by Wesner and Aamland appears to be a "sham transaction" designed to avoid application of the rules governing Medicaid eligibility. The loan between Wesner and Aamland has all the characteristics of a trust-like device under the POMS.[9] This was not an arm[']s-length transaction between two unrelated parties. Aamland and Wesner apparently enjoy a close friendship; Wesner gave Aamland an $80,000.00 uncompensated gift and has made Aamland her [power of attorney]. As such, Aamland owes Wesner a fiduciary duty. Further, Wesner admits that the gift/loan transaction entered into with Aamland was part of a "Medicaid planning technique." Based a [sic] review of the evidence before the Court at this time, the Court concludes that Wesner has failed to establish that she is likely to succeed on the merits of her claim; therefore, Wesner's motion for a preliminary injunction is denied. [*Wesner*, unpub op at 10-11 (citation omitted).]

Turning to the case before us, we recognize that the potential return on the sale of petitioner's interest would exceed the amount of her original investment after two years.[10] Additionally, not only does the DHS make no claim impugning the formation or legitimacy of the L.L.C. as an entity under Michigan law, see MCL 450.4201, but also, as petitioner makes clear, the

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[9] "The Social Security Administration has published a Program Operating Manual System (POMS) representing the publicly available operating instructions for processing Social Security claims. While not the product of formal rulemaking, the POMS provide guidance to the courts and warrant respect." *Wesner*, unpub op at 6 (quotation marks and citations omitted).

[10] Petitioner calculated the return on the sale of her investment to be $113,922.98, or a profit of $2,490.51.

L.L.C.'s terms of investment are consistent with relevant IRS and SEC regulations.[11]

While the DHS contests the transfer on the grounds that the two-year waiting period, alone, rendered the transaction for less than fair market value, we are hard pressed to reach that conclusion where the investment would *increase* in value over the two-year restriction period. However, that petitioner would not realize this value for two years is a relevant factor to consider, it is just not alone dispositive of this issue. In so concluding, and for the reasons detailed below, we agree with the DHS that the circuit court erred in reversing the hearing referee, as under these unique facts the purchase of the L.L.C. shares was for less than fair market value.

Utilizing the foregoing dictionary definitions and caselaw, we hold that petitioner's purchase of shares in an L.L.C. (1) that is unsecured, (2) operated exclusively by her daughter (and her attorney-in-fact), (3) that is not an approved investment vehicle under PEM 405, (4) whose shares are unavailable in the open market and are nonassignable, (5) where there is no evidence of actuarial soundness, (6) where no monthly distributions are made to petitioner during the two-year period, and (7) was purchased to make petitioner eligible for Medicaid, was not the result of an "arm's-length" transaction made on the open market. Consequently, it was a purchase for less than fair market value, and therefore the assets are subject to the divestment penalty.[12]

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[11] Specifically, petitioner points to 17 CFR 230.144(d) and IRS Revenue Ruling 59-60, § 8.

[12] Petitioner's reliance on the ruling of the United States Court of Appeals for the Third Circuit in *James* is unavailing as the central issue in that case was "whether a non-revocable, non-transferable annuity may

Indeed, these circumstances reveal that this transaction was an impermissibly abusive attempt to shelter assets. *Gillmore*, 218 Ill 2d at 324-325; see also *Thompson*, 835 So 2d at 359-360. The evidence reveals an unsecured private transaction between relatives, one of whom was the other's fiduciary, wherein a purchase of shares was made without any ability to sell or otherwise exchange the shares for a two-year period. The L.L.C. was operated exclusively by an individual who was both a close relative and fiduciary, and the L.L.C. had no real business other than to return petitioner's investment, plus two percent compounded interest, at the end of two years.[13] Additionally, and unlike the balloon annuity found deficient in *Gillmore*, the purchase of shares in the L.L.C. did not result in any monthly payments to petitioner. See *Pyle*, 730 A2d at 1050. And, we must also consider the admitted purpose in creating the L.L.C. (to make petitioner eligible for Medicaid payments without divestment) in conjunction with the fact that petitioner's daughter (who was also an attorney-in-fact for petitioner) created the L.L.C. and controlled 100 percent of the voting shares, including having unfettered discretion on expenditures of reserve funds.

In sum, taken together these facts point to the inescapable conclusion that this was not an asset that was purchased on the open market, but instead was an arrangement between relatives, not strangers in an

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be treated as an available resource by the [Pennsylvania Department of Public Welfare] for the purposes of calculating Medicaid eligibility." *James*, 547 F3d at 218. In contrast, the DHS in this case found petitioner eligible despite the transaction, but instead sought to delay the payment of benefits pending the divestment penalty period.

[13] Interestingly, the records for the Marden Family L.L.C. bank account reveal that a four percent interest rate was applied to deposited monies, highlighting the fact that the two percent rate awarded by the L.L.C. was lower than what was available on the open market.

arm's-length transaction. Thus, the compensation petitioner was ultimately to receive "was worth less than the fair market value of the resource" because nothing about this transaction revealed a fair market value, i.e., it was not made through an arm's length transaction on the open market. Accordingly, the DHS properly concluded that this particular transaction was for less than fair market value, and was subject to the divestment penalty.[14]

In making her arguments, petitioner fails to recognize, or at least appreciate, the private, non-arm's-length relationship involved in the transaction. The definitions and caselaw recited clearly indicate that shell transactions between relatives that have little or no economic benefit to the applicant, are not for fair market value. This point was made by the court in *Mertz*, a case relied upon by the trial court. There, the applicant's spouse had purchased two *commercial* annuities with $106,000 of joint assets, receiving in return just under $2,000 a month, or a 2½ percent return. In recognizing that the purchases at issue were inconsistent with the purposes of Medicaid, but not the language of the act, the court noted that private, unsecured, nonassignable transactions between relatives—like those involved in *Pyle* and *Ptashkin*—were on much different footing. *Mertz*, 155 F Supp 2d at 427-428 n 16. Likewise, petitioner's analogy to United States savings bonds misses the point, because purchasing unsecured shares in a private L.L.C. operated by a relative bears little, if any, resemblance to a purchase of savings bonds on the open market from the United States government.

Nor was the asset transfer in this case otherwise excluded as a divestment under the PEM. See PEM 405,

[14] This is not to say, however, that investment in an L.L.C. or even a closely held corporation would be a per se divestment, but only that the scheme at issue in this case constitutes a transfer for less than fair market value.

pp 6-9. While PEM 405 certainly provides numerous categories of transfers that are excluded from consideration as a divestment, PEM 405 provides no exclusion category for an asset transfer for an interest in a closely held limited liability corporation, as is the case here. Consequently, the trial court's ruling that the investment was essentially a conversion of the asset into a form rendering the asset unavailable and uncountable was incorrect.[15] Key to the definition of an asset conversion on this point is that the conversion must be "from one form to another of *equal value*." See PEM 405, p 7 (emphasis supplied). The examples provided in PEM 405 are purchases of automobiles or boats, where the applicant buys an asset on the open market and obtains the asset, presumably at market price. As previously concluded, however, given the circumstances of this transaction it was not established that what petitioner received for her assets was for fair market value, and so by definition could not be considered a conversion to a form of equal value. Indeed, to hold to the contrary would enable the exception to swallow the rule.

III. CONCLUSION

Petitioner invested a sizeable sum in the Marden Family L.L.C., which was created solely for the purpose of circumventing Medicaid eligibility requirements and

[15] Whether petitioner's investment was unavailable and uncountable on account of the transfer does not impact whether the transfer is a divestment, but rather goes to the initial determination of whether an applicant is eligible for Medicaid benefits. *ES*, 412 NJ Super at 348 (stating that "[i]f any of the applicant's resources are transferred for less than fair market value during the look-back period, they are included in the eligibility analysis as funds available to the applicant," and result in delayed eligibility and imposition of a transfer penalty); see also 42 USC 1396p(c)(1)(A).

which ceded total control to petitioner's daughter (and fiduciary) for a fraction of the cost of petitioner's investment. Under the terms of the agreement, petitioner would only receive a marginal return on her unsecured investment after two years. A willing buyer could not acquire such an asset on the open market in an arm's-length transaction. Therefore, the transaction was for less than fair market value and constituted a divestment of assets not subject to an exclusion. The hearing referee's conclusion affirming the imposition of a divestment penalty by the DHS was appropriate, albeit for the wrong reason. *Thorin v Bloomfield Hills Sch Dist*, 179 Mich App 1, 6; 445 NW2d 448 (1989) ("The familiar rule that appellate courts affirm the right result reached for the wrong reason is appropriate in the administrative context."). The circuit court erred in ruling otherwise.

Reversed.

No costs, a public question being involved.

BOYLAN v FIFTY EIGHT LIMITED LIABILITY COMPANY

Docket No. 291141. Submitted August 6, 2010, at Detroit. Decided September 7, 2010, at 9:10 a.m.

Cheryl Boylan brought an action against her landlord, Fifty Eight Limited Liability Company, in the 52-1 District Court, alleging negligence, breach of contract, and several other claims arising out of the failure of her home's septic system. Fifty Eight filed a third-party complaint against Pamar Enterprises, Inc., and Giffels-Webster Engineering, Inc., asserting claims for negligence, trespass, and "violation of Michigan's law of surface waters" and alleging that the septic system failed because Pamar had improperly graded the property when it installed a water main, eliminating a swale that diverted surface water and causing surface water to overflow and flood where it had not done before installation of the water main. Pamar had installed the water main under a contract it had with Lyon Township and had entered Fifty Eight's property in order to perform the contract. Pamar moved for summary disposition, asserting that under *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004), it owed no duty to Fifty Eight as a matter of law. Pamar also argued that it had not trespassed because it was authorized to enter the land and that Michigan's law of surface waters did not apply to the case. The court, Dennis N. Powers, J., granted Pamar's motion for summary disposition on all counts and denied Fifty Eight's request to amend its third-party complaint to add a third-party-beneficiary claim. Fifty Eight appealed in the Oakland Circuit Court, but the circuit court, Daniel P. O'Brien, J., affirmed the district court's decisions, agreeing with it that under *Fultz*, Pamar owed no duty to Fifty Eight. Fifty Eight appealed by leave granted.

The Court of Appeals *held*:

1. The lower courts erred by concluding that Pamar owed no duty to Fifty Eight. Tort liability may attach in the presence of a duty that arises separately and distinctly from a contractual agreement. Under *Fultz*, the creation of a "new hazard" during the performance of a contract may give rise to a breach of duty separate and distinct from the contract. Although Fifty Eight would have had no cause of action had the flooding been caused

only by negligent performance of the contract, Pamar bore a duty separate and distinct from that under its contract to exercise due care when it entered onto and altered private property. This entry onto Fifty Eight's land triggered a duty to avoid interfering with the physical condition of the land and a duty to avoid increasing the burden of the easement it held over the portion of Fifty Eight's property during the course of the water-main construction. In addition, Pamar's water-main construction interfered with the property's drainage, eliminating the swale and creating a new hazard that posed a danger to third persons. Viewed in the light most favorable to Fifty Eight, the record supported that Pamar breached duties owed to Fifty Eight by interfering with the drainage of the property, causing an excess of water to overflow the property, and creating a new condition that it should have foreseen could predispose the property to flooding.

2. The lower courts erred by granting Pamar summary disposition on Fifty Eight's claim for common-law trespass. When a person is authorized to use property, a common-law trespass may occur if the user's activities exceed the scope of the landowner's permission. The record showed that the property never flooded until Pamar changed the grade of the land. Fifty Eight's allegations that Pamar knew or should have known that its activities would result in a physical intrusion of water onto Fifty Eight's land and that Pamar's actions on the land exceeded the scope of its authorized use presented questions of fact.

3. Michigan's law of surface waters applies to adjoining landowners and has not been extended to impose liability on a party who neither owns nor controls a dominant estate. The circuit court properly affirmed summary disposition of this claim.

4. Not every person incidentally benefited by a contractual promise may sue for breach of the promise. The status of third-party beneficiary requires that the promisor undertook to give or do or refrain from doing something directly to or for the person. At best, Fifty Eight qualified only as an incidental beneficiary of portions of Pamar's contract with Lyon Township. Because it would have been futile to amend the third-party complaint to add a third-party-beneficiary claim, the circuit court properly affirmed the denial of Fifty Eight's motion to amend the complaint.

Affirmed in part, reversed in part, and remanded.

1. NEGLIGENCE — DUTIES TO THIRD PARTIES — NECESSITY OF AN INDEPENDENT DUTY.

Tort liability may attach in the presence of a duty that arises separately and distinctly from a contractual agreement; the cre-

ation of a new hazard during the performance of a contract may give rise to a breach of duty separate and distinct from the contract; a party entering onto private property to perform a contract may bear duties separate and distinct from those under the contract, such as a duty to exercise due care to avoid interfering with the physical condition of the land and to avoid increasing the burden of any easement it may hold over the property.

2. TRESPASS — EASEMENTS — USE OF PROPERTY IN EXCESS OF EASEMENT.

A person authorized to use property may commit a common-law trespass if the user's activities exceed the scope of the landowner's permission.

Pierce, Duke, Farrell & Tafelski, PLC (by *Mark C. Pierce*), for Fifty Eight Limited Liability Company.

Berry, Johnston, Sztykiel & Hunt, P.C. (by *James F. Hunt* and *W. James Fitzgibbons*), for Pamar Enterprises, Inc.

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

PER CURIAM. In early 2007, flooding and sewage backup damaged a residence owned by Fifty Eight Limited Liability Company (Fifty Eight). An investigation revealed that surface water pooling in the home's front yard had incapacitated the septic system. Fifty Eight concluded that during the construction of a water main for Lyon Township, Pamar Enterprises, Inc., had eliminated a swale protecting the home from surface-water runoff. We must now decide whether Pamar owed Fifty Eight any duty separate and distinct from those under Pamar's contract with Lyon Township. We find that Pamar did owe Fifty Eight a duty separate and distinct from those under the Pamar-Lyon Township contract, and on that basis we reverse the circuit court's order granting Pamar summary disposition of Fifty Eight's negligence claim. We also reverse the circuit court's order granting Pamar summary disposition of

Fifty Eight's common-law trespass count, but we affirm the circuit court's orders granting Pamar summary disposition of Fifty Eight's statutory trespass and surface-water-law claims and denying Fifty Eight's motion to file an amended third-party complaint.

I. UNDERLYING FACTS AND PROCEEDINGS

Fifty Eight owned a home located on Ten Mile Road in Lyon Township, which it rented to plaintiff Cheryl Boylan. Between January 2007 and March 2007, various portions of the home flooded and sewage backed up into the bathroom and kitchen sinks. Boylan reported the flooding to Fifty Eight, which undertook an investigation into the cause. Fifty Eight's property manager, William Clark, concluded that during Pamar's participation in the installation of a new water main for Lyon Township, Pamar had improperly graded the earth on Fifty Eight's property. An affidavit of Clark attests, in pertinent part:

> 3. . . . I have reviewed the video taken prior to construction of the property . . . and it is my opinion that the flooding experienced by the property involved in this lawsuit was directly caused by improper final grading by Defendant Pamar.
>
> 4. During the approximate [sic] ten years that we have owned the property, we never experienced any flooding in the front yard until January, 2007. As a result of the grading of our property by Pamar at the conclusion of the installation of the water main, Pamar negligently graded the property so that the surface water run-off from 10 Mile Road flowed to the house instead of to the catch basin that was on the east side of the property. Prior to the installation of the water main by Pamar, there was a swale that ran parallel to Ten Mile Road that directed the surface water run-off to a catch basin. Pamar eliminated the swale, and as a result, water ponded on the front yard of the house.

> 5. The septic system is located underneath the front yard of the house. The ponding of water on top of the septic system caused the septic system to become saturated to the point of failure. As a result, raw sewage backed up into the house . . . .

In May 2007, Boylan filed suit against Fifty Eight in the 52-1 District Court, alleging negligence, breach of contract, and several other claims. In October 2007, Fifty Eight filed a third-party complaint against Pamar and Giffels-Webster Engineering, Inc., asserting claims for negligence, trespass, and "violation of Michigan's law of surface waters."[1] According to Fifty Eight's third-party complaint, Pamar violated its duty to

> properly design the grade of the earth, and to grade the earth so as to not cause a larger volume or velocity of water to enter or flow to the Property after the completion of the Project when compared to the volume or velocity of water that entered or flowed to the Property before the Project was started.

Pamar moved for summary disposition under MCR 2.116(C)(8) and (10), contending that pursuant to *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), it owed no duty to Fifty Eight as a matter of law. Pamar further argued that because it had entered Fifty Eight's land with authorization, Fifty Eight could not prove trespass, and that Michigan's law of surface waters lacked applicability under the circumstances of this case.

The district court granted Pamar's motion for summary disposition and denied Fifty Eight's request to file an amended complaint that would have added a third-party beneficiary contract claim. Fifty Eight appealed in the Oakland Circuit Court, which affirmed the district

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[1] Fifty Eight apparently settled with Boylan and Giffels-Webster, neither of whom is a party to this appeal.

court's decisions. Both the district and circuit courts opined that pursuant to the Supreme Court's decision in *Fultz*, Pamar owed Fifty Eight no duty in tort. The circuit court concluded that Pamar's grading of the worksite on Fifty Eight's land did not give rise to "a separate and distinct duty" or a "new hazard," but instead constituted "a foreseeable consequence of the terms of the contract that caused this undisputed screw up by Pamar and it's because it trickles from the very terms of the contract that the court finds it doesn't qualify as a new hazard . . . ." We granted Fifty Eight leave to appeal.

II. SUMMARY DISPOSITION STANDARD OF REVIEW

Fifty Eight contests the circuit court's summary disposition ruling, which we review de novo.[2] *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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. "A genuine issue of material fact exists when the record, giving the benefit

[2] In the district and circuit courts, the parties attached and referred to documentary evidence and deposition testimony beyond the pleadings. The circuit court's ruling expressly referred to the contract between Pamar and Lyon Township, which the pleadings do not include. Accordingly, we treat Pamar's motion, and the circuit court's ruling, as governed by the standards set forth in MCR 2.116(C)(10).

of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

III. NEGLIGENCE

Fifty Eight first contends that the circuit court's determination that Pamar owed no duty to Fifty Eight rests on a misinterpretation of *Fultz*. Fifty Eight maintains that *Fultz* does not stand for the proposition that the mere existence of a contract between Pamar and Lyon Township completely "immunizes" Pamar from any potential tort liability relating to its construction of the water main. Pamar responds that *Fultz* plainly dictates that it owed no duty to "a third party to its contract" with Lyon Township. Because the parties argue at length concerning the interpretation and application of *Fultz*, we now turn to a careful examination of that decision.

The plaintiff in *Fultz* slipped and fell in an icy parking lot owned by Comm-Co Equities. *Fultz*, 470 Mich at 461. Comm-Co had contracted with Creative Maintenance Limited (CML) for snow removal services. *Id*. at 462. The plaintiff sued both Comm-Co and CML, claiming that CML's negligent failure to plow or salt the parking lot had caused her fall. *Id*. The plaintiff theorized that CML owed her "a common-law duty . . . to exercise reasonable care in performing its contractual duties" and that CML breached this duty by failing to perform its contractual duty of plowing or salting the parking lot. *Id*. at 463-464. The Supreme Court observed that the plaintiff had "allege[d] no duty owed to her independent of the contract," but instead relied on "common-law tort principles expressed in Restatement Torts, 2d, § 324A . . . ." *Id*. at 464, 468.

The Supreme Court held that as a matter of law, CML "owed no contractual or common-law duty to plaintiff to plow or salt the parking lot." *Id*. at 463. In reaching this conclusion, the Supreme Court rejected that a common-law duty to the plaintiff arose solely from CML's breach of its contract with Comm-Co. The Court instructed lower courts to instead analyze tort claims brought by third parties to a contract "by using a 'separate and distinct' mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id*. at 467.

The "separate and distinct duty" analysis described in *Fultz* refutes Pamar's sweeping assertion that a contractor owes no duties to any third party. Rather, *Fultz* specifically contemplated that despite the existence of a contract, under certain circumstances tort duties to third parties may lie:

> If defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made. [*Id*. at 469-470.]

Stated differently, tort liability may attach in the presence of a duty that arises separately and distinctly from the contractual agreement.

In *Fultz*, the Supreme Court posited that the creation of a "*new* hazard" may give rise to a breach of a duty separate and distinct from the contract. *Id*. at 469 (emphasis in original). *Fultz*'s "new hazard" reference derived from this Court's decision in *Osman v Summer*

Green Lawn Care, Inc, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).[3] The plaintiff in *Osman* also slipped and fell on an icy surface subject to a snow removal contract. *Osman*, 209 Mich App at 704. This Court summarized the plaintiff's allegations that the defendant

> breached its duty by negligently, carelessly, and recklessly removing snow from the premises and placing it on a portion of the premises when it knew, or should have been known or anticipated, that the snow would melt and freeze into ice on the abutting sidewalk, steps, and walkway, thus posing a dangerous and hazardous condition to individuals who traverse those areas. Plaintiff alleged that defendant was negligent in failing to keep the premises and all common areas fit for their foreseeable uses and in failing to remove ice from areas after notice of the dangerous condition, in allowing ice to build up, in maintaining a hazardous condition when it could have been reasonably discovered, and in failing to remove a dangerous condition. [*Id*.]

The defendant argued that its contract with the landowner "indicated that defendant assumed no duty or responsibilities of the premises owner," nor "any of the responsibility for damage or injury caused by slipping and falling on any pavement surface." *Id*. at 705.

This Court found that the contract at issue "allow[ed] only one interpretation," and specifically referred to the following contractual language: " 'Nothing contained in this agreement shall relieve Provider from liability for its breach of this agreement or damages

[3] In *Smith*, the Supreme Court held that in *Osman*, this Court had "erroneously applied" incorrect standards for summary disposition derived from *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). *Smith*, 460 Mich at 455 n 2. The Supreme Court clarified that *Osman* and several other cited decisions "that approve of *Rizzo*-based standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10) are overruled to the extent that they do so." *Id*. at 456 n 2.

caused to person or property as a result of Provider's, its employees', its agents' or representatives' negligence.' " *Id*. at 706-707 (emphasis omitted). The Court in *Osman* explained that when "[r]ead as a whole," the contractual language obligated the defendant "to provide snow removal services in a reasonable manner, holding defendant liable for its negligent conduct in the snow removal process." *Id*. at 707. The Court elaborated that the defendant's tort duty to the plaintiff stemmed from two sources:

> Not only did the contract articulate that defendant would remain liable for its negligent conduct, but such duty also arose out of defendant's undertaking to perform the task of snow plowing. The duty allegedly owing is that which accompanies every contract, a common-law duty to perform with ordinary care the things agreed to be done. Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. [*Id*. at 707-708 (citation omitted).]

The common-law duty of care existed "separate and apart from the contract itself" as part of "a general duty owed by defendant to the public of which plaintiff is a part." *Id*. at 710.

In *Fultz*, the Supreme Court declined to overrule this portion of *Osman*. The Supreme Court reasoned that in *Osman*, the defendant had created a new hazard by placing snow near pedestrian walkways, in an area where melting and freezing snow foreseeably created a danger " 'to individuals who traverse those areas.' " *Fultz*, 470 Mich at 469, quoting *Osman*, 209 Mich App at 704. The *Fultz* Court emphasized that unlike the defendant in *Osman*, "CML's failure to carry out its snow-removal duties owed to [Comm-Co] created no new hazard to plaintiff." *Fultz*, 470 Mich at 469.

The subject of Pamar's contract with Lyon Township was the installation of a new water main. By virtue of the contract, Pamar assumed a duty to construct the water main according to certain detailed specifications. Presumably, Pamar fulfilled its contractual obligations by successfully installing the water main. Notwithstanding that the new water main would potentially benefit neighboring property owners, *Fultz* teaches that no duty to perform the water-main contract existed with respect to Pamar and third parties. Alternatively phrased, Fifty Eight would have no cause of action had the flooding occurred simply because Pamar neglected to install the water main. However, separate and distinct from Pamar's contract to install a new water main for Lyon Township, Pamar bore a duty to exercise reasonable care when it entered onto and altered private property. Pamar's contract with Lyon Township for "[i]nstallation of approximately 6,600 linear feet of [16-inch] water main along Ten Mile Road, intersecting Milford Road, in Lyon Township, Michigan," neither created this separate duty of care nor eliminated it.

In contrast with the facts described in *Fultz*, Fifty Eight's tort claim against Pamar did not arise solely from Pamar's performance under the contract with Lyon Township. Irrespective of the existence of a contract, Pamar's entry onto Fifty Eight's land triggered several separate and distinct common-law duties to avoid permanently damaging the property. The common law indisputably recognizes a landowner's right to the full enjoyment of his or her land. For example, the private nuisance doctrine penalizes

> an interference with the occupation or use of land or an interference with servitudes relating to land. There are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences

> of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment. The essence of private nuisance is the protection of a property owner's or occupier's reasonable comfort in occupation of the land in question. [*Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992).]

Furthermore, the parties agree that Pamar held an easement over a portion of Fifty Eight's property in the course of the water-main construction. "An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement." *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997). "A principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). Viewed in the light most favorable to Fifty Eight, Pamar's elimination of the swale materially increased the easement's burden by predisposing the land to flooding.

The existence of these separate and distinct duties of care readily distinguish this case from *Banaszak v Northwest Airlines, Inc*, 477 Mich 895 (2006). In that case, the Supreme Court held that a contract required a defendant "to provide a cover over the 'wellway,' an opening at the end of the moving walkway that contains the mechanical elements. The purpose of the cover was to protect persons using that area." *Id*. Because the hazard created by the defendant's failure to properly install the cover "was the subject of the . . . contract," the Supreme Court held that the defendant "owed no duty to plaintiff that was 'separate and distinct' from its

duties under the contract." *Id*. Fifty Eight asserts that Pamar entered onto Fifty Eight's land, disrupted the drainage contours, failed to recognize this error, and neglected to correct it. And no evidence of record suggests that maintenance of surface drainage contours served as "the subject of the contract" between Pamar and Lyon Township.

Additionally, Pamar's water-main-construction work created a new hazard consisting of interference with the property's drainage system. Record evidence established that in the course of constructing the water main, Pamar entered onto Fifty Eight's property, graded the land, and eliminated a swale that had been present before the water-main work commenced. *Fultz* explained that a party to a contract breaches a duty separate and distinct from the contract when it creates a new hazard that it should have anticipated would pose a dangerous condition to third persons. *Fultz*, 470 Mich at 468-469. Viewed in the light most favorable to Fifty Eight, the facts reasonably support that Pamar's rearrangement of the soil on Fifty Eight's premises and Pamar's elimination of a preexisting swale created a new condition on the premises that it should have foreseen could predispose the property to flooding.

Notably, the Pamar-Lyon Township contract itself envisions that the parties intended Pamar to shoulder responsibility for remedying damage to residential property. The contract directed Pamar to:

> 6.20 . . . take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:
>
> * * *
>
> 6.20.3 other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, road-

> ways, structures, utilities and Underground Facilities not designated for removal, relocation or replacement in the course of construction.
>
> . . . All damage, injury or loss to any property referred to in paragraph 6.20.2 or 6.20.3 caused, directly or indirectly, in whole or in part, by CONTRACTOR . . . shall be remedied by CONTRACTOR . . . .

Like the contract in *Osman*, this language reinforces the contract's contemplation that Pamar would conduct its operations in a reasonable manner and that the contract does not shield Pamar from liability. See *Osman*, 209 Mich App at 707, 709-710. Viewed in the light most favorable to Fifty Eight, Pamar violated a recognized tort duty, independent of its contract with Lyon Township, when it interfered with the drainage on Fifty Eight's property. Consequently, we conclude that the circuit court erred by affirming the district court's order granting Pamar summary disposition of Fifty Eight's negligence claim.

In reaching our conclusions, we specifically reject Pamar's assertion that the Supreme Court overruled *Osman* through its peremptory order in *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007). In that brief order, the Supreme Court specifically invoked *Fultz* in support of its holding that "[t]he defendant did not owe any duty to the plaintiffs separate and distinct from the contractual promise made under its snow removal contract with the premises owner." *Id*. As in *Banaszak*, the Supreme Court's statement in *Mierzejewski* signals that any purported "new hazard" created by the snow removal contractor in fact fell within the scope of the contract's performance requirements and therefore did not arise from the breach of a separate and distinct duty of care. In contrast, Pamar has failed to identify any portion of its contract with Lyon Town-

ship that obligated it to alter or influence the drainage characteristics of Fifty Eight's land.

IV. TRESPASS

Fifty Eight next challenges the circuit court's affirmance of summary disposition regarding Fifty Eight's trespass claim. Fifty Eight asserts that Pamar committed a "direct trespass" by changing the grade of the land in the absence of any authority, thereby "caus[ing] water to enter [Fifty Eight's] property." Pamar replies that because it had authorization to enter onto Fifty Eight's land, Fifty Eight cannot establish a trespass.

"Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). "[A] 'direct or immediate' invasion for purposes of trespass is one that is accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of the plaintiff's land." *Id*. at 71. Damages may be recovered for "any *appreciable* intrusion." *Id*. at 72. Surface-water diversion may effect an intrusion onto land. See *Kernen v Homestead Dev Co*, 232 Mich App 503, 512; 591 NW2d 369 (1998).

Notwithstanding Pamar's authority to enter onto Fifty Eight's land, a common-law trespass may occur if the user's activities exceeded the scope of the landowner's permission. In *Embrey v Weissman*, 74 Mich App 138, 140; 253 NW2d 687 (1977), the plaintiff, a landowner, granted Oakland County an easement for construction of a sewer line. The county hired the defendant, Weissman Contracting Corporation, to install the sewer line. *Id*. The plaintiff alleged that Weissman's

activities "seriously disturbed the land" and sued under theories including trespass, negligence, and breach of contract. *Id*. Although this Court reversed a jury verdict awarding treble damages for a statutory trespass under MCL 600.2919(1), *id*. at 141-142, we recognized that a properly instructed jury nevertheless could have found that Weissman committed a common-law trespass:

> The use of the land was controlled by the contract between plaintiff and the county, and it is certainly possible that the corporation's activities, beyond the scope of the use created, injured the interest plaintiff retained as owner of the construction area. An easement is an interest that can be limited not only in area, but also in use. *Cf*. *Carlton v Warner*, 46 Mich App 60; 207 NW2d 465 (1973). The court's instruction, however, should have made clear that, within the construction area, only those activities that went beyond the reasonable exercise of the use granted could constitute trespass. See 3 Tiffany, Real Property, § 802, p 322. [*Id*. at 142-143.]

See also *Schadewald*, 225 Mich App at 40 (observing that activities exceeding the "reasonable exercise of the use granted by the easement may constitute a trespass").

Clark's affidavit attested that the front yard of Fifty Eight's property never flooded before Pamar changed the grade of the land. Although Pamar entered the land with authority, Fifty Eight's allegations that (1) Pamar knew or reasonably should have known that its activities would result in a physical intrusion of water onto Fifty Eight's land and (2) Pamar's actions on the land exceeded the scope of its authorized use present questions of fact appropriate for jury determination. Therefore, we conclude that the circuit court erred by affirming the district court's order granting Pamar summary disposition of Fifty Eight's common-law trespass claim.

Fifty Eight's complaint also sets forth a trespass claim under MCL 600.2919(1), which provides in relevant part:

> Any person who:
>
> (a) cuts down or carries off any wood, underwood, trees, or timber or despoils or injures any trees on another's lands, or
>
> (b) digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands, or
>
> (c) cuts down or carries away any grass, hay, or any kind of grain from another's lands
>
> without the permission of the owner of the lands, or on the lands or commons of any city, township, village, or other public corporation without license to do so, is liable to the owner of the land or the public corporation for 3 times the amount of actual damages. If upon the trial of an action under this provision or any other action for trespass on lands it appears that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own, or that the wood, trees, or timber taken were taken for the purpose of making or repairing any public road or bridge judgment shall be given for the amount of single damages only.

Imposition of treble damages for statutory trespass requires a showing "that the trespass was intentional and with knowledge that it was without right." *Kelly v Fine*, 354 Mich 384, 387; 92 NW2d 511 (1958) (construing 1948 CL 692.451, a predecessor statute with substantially similar language). If the trespass "was casual and involuntary," treble damages are inappropriate. MCL 600.2919(1)(c); see also *Embrey*, 74 Mich App at 141.

"[A] trespasser's good faith and honest belief that he possessed the legal authority to commit the

complained-of act are sufficient to avoid treble damage liability." *Governale v City of Owosso*, 59 Mich App 756, 759; 229 NW2d 918 (1975). "Treble damages under MCL 600.2919 . . . may not . . . be awarded where the trespass was merely negligent." *Iacobelli Constr Co, Inc v Western Cas & Surety Co*, 130 Mich App 255, 262; 343 NW2d 517 (1983). Under the statute, a plaintiff need not show that a defendant acted with malice or an intent to injure the land, but must substantiate that the trespass occurred as the result of more than mere negligence. *Id*. at 262-263. No evidence of record in this case tends to suggest that Pamar intentionally changed the drainage contours on Fifty Eight's property or that Pamar intended that its actions would have an impact on Fifty Eight's property drainage. We conclude that the circuit court correctly affirmed the district court's order granting Pamar summary disposition of Fifty Eight's statutory trespass claim.

V. SURFACE-WATER DIVERSION

Fifty Eight asserts that the circuit court incorrectly affirmed summary disposition of its claim invoking Michigan's surface-water laws. Fifty Eight believes that a question of fact exists concerning whether Pamar altered the surface-water runoff in a fashion that diverted water onto Fifty Eight's property. Pamar contends that surface-water-law principles do not apply, given that it does not own any adjacent or neighboring property.

> The owner of the lower or servient estate must accept surface water from the upper or dominant estate in its natural flow. By the same token, the owner of the dominant estate may not, by changing conditions on his land, put a greater burden on the servient estate by increasing and

> concentrating the volume and velocity of the surface water. [*Lewallen v City of Niles*, 86 Mich App 332, 334; 272 NW2d 350 (1978).]

Michigan's law of surface waters applies to adjoining landowners, but has never been extended to impose liability on a party who neither owns nor controls a dominant estate. Because no caselaw supports Fifty Eight's assertion that the law of surface waters affords a cause of action under the facts presented, we conclude that the circuit court correctly affirmed summary disposition of this claim.

VI. AMENDMENT OF FIFTY EIGHT'S THIRD-PARTY COMPLAINT

Lastly, Fifty Eight challenges the circuit court's decision to deny its motion to amend the third-party complaint to add a third-party-beneficiary claim. We review for an abuse of discretion a circuit court's decision to grant or deny leave to amend a pleading; we will only reverse the court's ruling if it occasions an injustice. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 400-401; 729 NW2d 277 (2006). A court does not abuse its discretion if it selects an outcome falling within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Fifty Eight sought to amend its third-party complaint in conformity with MCR 2.116(I)(5), which states, "If the grounds asserted are 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." Except in limited circumstances, a "party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when

justice so requires." MCR 2.118(A)(2). A court should freely grant the nonprevailing party leave to amend the pleadings unless the amendment would be futile or otherwise unjustified. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). Motions to amend a complaint should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the part of the movant, a repeated failure to cure deficiencies in the pleadings, undue prejudice to the opposing party by virtue of allowing the amendment, or the futility of amendment. *Casey*, 273 Mich App at 401.

In MCL 600.1405, the Legislature has defined, in relevant part as follows, who may claim third-party-beneficiary status with respect to an agreement entered into by other parties:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

The Michigan Supreme Court has summarized that

> the plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise, but rather only if the promisor has "undertaken to give or to do or refrain from doing something *directly* to or for said person." [*Brunsell v City of Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002).]

"By using the modifier 'directly,' the Legislature intended 'to assure that contracting parties are clearly aware that the scope of their contractual undertakings

encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.' " *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003), quoting *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999). When determining whether MCL 600.1405 applies to a purported third-party beneficiary, "a court should look no further than the form and meaning of the contract itself" and should view the contract objectively. *Schmalfeldt*, 469 Mich at 428 (quotation marks omitted).

In *Kisiel v Holz*, 272 Mich App 168; 725 NW2d 67 (2006), this Court considered facts somewhat analogous to those presented here. The plaintiff in *Kisiel* contracted with the Holz Building Company, Inc, for the construction of a home. *Id*. at 169. Holz's owner subcontracted with GFA Development, Inc., for excavation and concrete work. *Id*. When numerous cracks appeared in the basement walls and floor, the plaintiff sued Holz and several other defendants, contending that he was an intended third-party beneficiary under the agreement between Holz and GFA. *Id*. at 169-170. This Court rejected the argument that the plaintiff could maintain a contract action "merely because he or she would receive a benefit from its performance or would be injured by its breach." *Id*. at 170-171.

> In general, although work performed by a subcontractor on a given parcel of property ultimately benefits the property owner, the property owner is not an intended third-party beneficiary of the contract between the general contractor and the subcontractor. 9 Corbin, Contracts (interim ed), § 779D, p 41; see also 2 Restatement Contracts, 2d, § 302, comment e, illustration 19, p 444 (property owner is only an incidental beneficiary of construction subcontract between general contractor and subcontractor). Absent clear contractual language to the contrary, a

> property owner does not attain intended third-party-beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would ultimately benefit the property owner. [*Id*. at 171.]

After reviewing the language employed in the contract between Pamar and Lyon Township in light of these governing legal principles, we discern no support for Fifty Eight's contention that it qualifies as a third-party beneficiary of this agreement. The contract nowhere refers to Fifty Eight. At best, Fifty Eight qualifies as an incidental beneficiary of the portion of the contract requiring Pamar to "provide the necessary protection to prevent damage, injury or loss to . . . other property at the site . . . ." Because amendment of Fifty Eight's complaint to add a third-party-beneficiary claim would have proved futile, we conclude that the circuit court correctly affirmed the district court's denial of Fifty Eight's motion to amend its third-party complaint.

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

WHITE v TAYLOR DISTRIBUTING COMPANY, INC

Docket No. 292066. Submitted July 14, 2010, at Detroit. Decided September 9, 2010, at 9:00 a.m.

Sherita and Derrick White brought a negligence action in the Oakland Circuit Court against Taylor Distributing Company, Inc., Penske Truck Leasing Company, L.P., and James Birkenheuer after a tractor-trailer Birkenheuer was driving struck a van Sherita White was driving when Birkenheuer allegedly passed out following a severe gastrointestinal disturbance. The court, Deborah G. Tyner, J., granted defendants' motion for summary disposition on the basis of the sudden-emergency doctrine, and plaintiffs appealed. The Court of Appeals, MARKEY, P.J., and MURPHY, J. (K. F. KELLY, J., dissenting), held that the trial court erred by granting summary disposition in favor of defendants. 275 Mich App 615 (2007). Defendants applied for leave to appeal, which the Supreme Court granted. 480 Mich 961 (2007). The Supreme Court affirmed the decision of the Court of Appeals and remanded the case to the trial court, concluding that there was a genuine issue of material fact regarding whether the sudden-emergency doctrine applied. 482 Mich 136 (2008). On remand, the trial court, Daniel Patrick O'Brien, J., again granted summary disposition in favor of defendants. The trial court concluded that a release Sherita White had signed when she settled a first-party action against her no-fault insurer, which stated that the release referred to "any and all . . . claims/benefits" arising out of the accident, also released defendants from liability. Plaintiffs appealed.

The Court of Appeals *held*:

To create a third-party beneficiary, a contract must expressly contain a promise to act to the benefit of the third party. While the release in this case identified the insurer and its agents, it made no mention of other persons, including defendants. Consequently, the question was whether a sufficiently designated class existed in the release for the direct benefit of whom Sherita White demonstrated an undertaking. The trial court conflated who was being released with what was being released. The language at issue, which stated that the release referred to "any and all . . . claims/benefits"

arising out of the accident, only underscored the absolute immunity that the express beneficiaries of the release—Sherita White's insurer and those who might be subject to liability because of a relationship with her insurer—enjoyed. It did not release all potential defendants from liability.

Reversed and remanded.

RELEASE — SCOPE — THIRD-PARTY BENEFICIARIES.

To create a third-party beneficiary, a release must expressly promise to act to benefit a third party or a sufficiently designated class.

Gursten, *Koltonow*, *Gursten*, *Christensen & Raitt*, *P.C.* (by *Steven M. Gursten*, *Ian M. Freed*, and *Kathleen E. Johnson*), for plaintiffs.

Kopka, *Pinkus*, *Dolin & Eads*, *P.L.C.* (by *John T. Eads*, *III*, and *John M. Callahan*), for defendants.

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

PER CURIAM. In this automobile negligence action, plaintiffs appeal as of right the trial court's order granting summary disposition to defendants—an individual, his employer, and the owner of the truck the individual was driving when the underlying accident occurred. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On March 15, 2004, plaintiff[1] was stopped in her van when defendant James Birkenheuer, driving a tractor-trailer owned by defendant Penske Truck Leasing Company, L.P., in the course of his employment with defendant Taylor Distributing Company, Inc., collided with the rear of plaintiff's vehicle, allegedly causing serious injury. Birkenheuer maintained that the sudden onset

[1] Because plaintiff Derrick White's interest in this case is derivative of that of plaintiff Sherita White, in this opinion use of the singular "plaintiff" will refer to the latter.

of a medical condition caused him unexpectedly to faint before he was able to stop.

The trial court initially granted summary disposition in favor of defendants on the ground that the accident was the result of a sudden emergency, but this Court reversed. *White v Taylor Distrib Company*, *Inc.*, 275 Mich App 615, 631; 739 NW2d 132 (2007), aff'd 482 Mich 136 (2008).

On remand, defendants argued that a release plaintiff signed when settling a first-party action with her no-fault insurer, Amex Insurance Company, relieved defendants of liability in this matter. That release included the following provisions:

> IN CONSIDERATION of the payment to the undersigned, . . . [plaintiff] does hereby release and forever discharge AMEX INSURANCE COMPANY . . . , and their officers, employees, principals, shareholders, executors, administrators, agents, successors, insurers and assigns of and from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses and/or compensation on account of, or in any way growing out of, any and all known and unknown personal injures and property damage resulting or to result from an accident that occurred on or about March 15, 2004.
>
> IT IS expressly agreed that this Release also refers to any and all (past, present and future) claims/benefits arising or that may arise from the March 15, 2004 accident.
>
> * * *
>
> THIS release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.

In construing this release as precluding plaintiff's recovering from defendants, the trial court stated, "I find that the court's decision is . . . dictated by appellate

law by precedent and in this instance I find that the case of *Romska* [*v Opper*, 234 Mich App 512; 594 NW2d 853 (1999)], or the cases upon which it[']s based is stare decisis to this case," but expressed doubts that this ruling reflected plaintiff's actual intent in signing the release.[2]

This Court reviews de novo a trial court's decision on a motion for summary disposition as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Contract interpretation likewise presents a question of law, calling for review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). When construing a contract, this Court will read it as a whole and attempt to apply its plain language. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). Accordingly, the various parts of a contract should be read together. See *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 170; 600 NW2d 617 (1999); *First Baptist Church of Dearborn v Solner*, 341 Mich 209, 215; 67 NW2d 252 (1954).

Defendants are nonparties to the release and thus are claiming rights under it as third-party beneficiaries. In Michigan, a third-party beneficiary of a contract "stands in the shoes of the promisee" and thus may enforce the contract against the promisor. *Koppers Co, Inc v Garling & Langlois*, 594 F2d 1094, 1098 (CA 6, 1979), citing MCL 600.1405. However, to create a third-party beneficiary, a contract must expressly contain a promise to act to benefit the third party. *Dynamic Constr Co v Barton Malow Co*, 214 Mich App 425, 427-428; 543 NW2d 31 (1995), citing MCL 600.1405.

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[2] See n 3 of this opinion.

The instant release identified plaintiff's insurer and its agents in great detail, but made no mention of any other persons, including defendants. The question, then, is whether defendants were members of a class somehow identified within the release. "[T]o qualify as third-party beneficiaries, the language of the release[] must have demonstrated an undertaking by plaintiff *directly* for the benefit of [defendants] or for a sufficiently designated class that would include [defendants]." *Shay v Aldrich*, 487 Mich 648, 663; 790 NW2d 629 (2010).

In *Romska*, the release language interpreted as applying to all potential defendants was " 'I/we hereby release and discharge [two named individuals] . . . and *all other parties, firms, or corporations who are or might be liable*, from all claims . . . .' " 234 Mich App at 514.[3] As plaintiff points out, this language, indicating who was released, was broader than anything found in the instant release. In the latter, the only class described was plaintiff's insurance company and its "officers, employees, principals, shareholders, executors, administrators, agents, successors, insurers and assigns . . . ." This description was an attempt to identify those persons or entities who might be subject to liability because of a relationship with the insurer. There is no way to read that description as including defendants.

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[3] In *Shay*, 487 Mich at 651, 653-654, 660-661, our Supreme Court overruled *Romska*'s prohibition on parol evidence in interpreting generic "all other persons" language. Accordingly, determinations of what parties are intended to be included by ambiguous "all other persons" language is now determined on a case-by-case basis. However, because the language of the present release unambiguously excluded defendants, *Romska* as it existed before *Shay* was inapplicable to the instant case, and we need not remand for a determination in light of parol evidence under *Shay*.

Defendants persuaded the trial court to interpret the second paragraph of the release as applying to any potential defendant, thus including themselves: "IT IS expressly agreed that this Release also refers to any and all (past, present and future) claims/benefits arising or that may arise from the March 15, 2004 accident." Defendants argued, and the trial court agreed, that "any and all . . . claims/benefits" meant all such claims in connection with any defendant. We disagree that this language invoked all humanity as released from potential liability and instead agree with plaintiffs that it in fact underscored the absolute immunity that the specified class was to enjoy.

By interpreting the second paragraph to universally release any potential defendant, the trial court confused and conflated *who* was being released with *what* was being released. We read the second paragraph's specification of release from "any and all . . . claims/benefits" as comporting with the first paragraph's listing of "any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses and/or compensation on account of, or in any way growing out of, any and all known and unknown personal injures and property damage resulting or to result from an accident" by way of supplementing that list of particulars with a general provision intended to ensure that plaintiff would thereafter place no demands whatever on the specified persons or entities.

Supporting this reasoning is *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 650; 624 NW2d 903 (2001), in which our Supreme Court held that broad language describing what was released—" 'all consequences of the injuries, losses and damages sustained,' "—applied to the more narrowly identified persons and entities being released.

For these reasons, the trial court erred by granting defendants summary disposition pursuant to MCR 2.116(C)(7) (claim barred by release). We therefore vacate that order and remand this case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

SAAD, J. (*concurring*). I concur in the result only.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered July 20, 2010:

PEOPLE v BRYANT, Docket No. 280073. The Court orders that the June 22, 2010, opinion is hereby vacated, and a new opinion is attached.*

The June 22, 2010, opinion indicated that the prosecution did not file a brief on appeal. In fact, the prosecution did file a brief on appeal, which this Court received the first day of the case call to which this case was assigned. The new opinion merely omits references to the fact that the prosecution did not file a brief on appeal.

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* Reported at 289 Mich App 260—REPORTER.

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thereby fail to constitute a fair cross section of the community. *People v Bryant*, 289 Mich App 260.

5. A prima facie showing that a jury was not selected from a fair cross section of the community is made when the defendant shows that the group alleged to be excluded was a distinctive group in the community, the representation of this group in venires from which juries were selected was not fair and reasonable in relation to the number of such persons in the community, and this underrepresentation was attributable to systematic exclusion of the group in the jury-selection process; systematic exclusion is exclusion inherent in the particular jury-selection process utilized and is not shown by one or two incidents of disproportionate venires; once a defendant establishes a prima facie violation of the fair-cross-section requirement, the government may overcome the right to a proper jury by proffering a significant state interest that manifestly and primarily advances those aspects of the jury-selection process that would result in the disproportionate exclusion of a distinctive group. *People v Bryant*, 289 Mich App 260.
6. The United States Supreme Court has not specified the preferred method for measuring whether representation of a distinctive group in a jury venire is fair and reasonable; courts have applied three different methods, the absolute-disparity test, the comparative-disparity test, and the standard-deviation test, but, because each test has been criticized, no individual method should be used to the exclusion of the others, and a case-by-case approach should be employed; provided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable. *People v Bryant*, 289 Mich App 260.

CONTRACTS

INTERPRETATION OF CONTRACTS

1. *Ajax Paving Industries, Inc v Vanopdenbosch Construction Co*, 289 Mich App 639.

PAST-PRACTICE DOCTRINE

2. When a past practice of the parties to a contract is clearly contrary to the clear language of the contract, the clear language controls unless the past practice is so widely acknowledged and mutually accepted that it

amends the contract; the party seeking to supplant the contract language must show that the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract. *Butler v Wayne County*, 289 Mich App 664.

CONTROLLED SUBSTANCES—*See*

CRIMINAL LAW 2

CORPORATE OFFICERS—*See*

PRETRIAL PROCEDURE 2

COURT OF CLAIMS—*See*

COURTS 1

COURTS

COURT OF CLAIMS

1. The Court of Claims has original and exclusive jurisdiction over actions for the recovery of monetary damages brought by the owner of any extinguished recorded or unrecorded interest in a parcel of property who claims after a judgment of foreclosure that he or she did not receive any notice required under the General Property Tax Act regardless of whether the defendant is a governmental entity (MCL 211.78*l*). *River Investment Group, LLC v Casab*, 289 Mich App 353.

CRIMES AGAINST A PERSON—*See*

SENTENCES 1

CRIMINAL-ACT EXCLUSIONS—*See*

INSURANCE 1

CRIMINAL CONTEMPT—*See*

GARNISHMENT 1

CRIMINAL LAW

CHILD PROTECTION LAW

1. The purpose of the Child Protection Law is, in part, to require the reporting of child abuse and neglect by certain persons; the act requires the reporting of suspected child abuse to Children's Protective Services by various enumerated professional disciplines only if the perpetrator is the parent, legal guardian, teacher, teach-

er's aide, clergyman, "or any other person responsible for the child's health or welfare," including a "nonparent adult," as those terms are defined in the act; the duty to report is based not on the occurrence of such abuse, but on the type of relationship the alleged perpetrator had with the minor child (MCL 722.622[f],[t], and [u]; MCL 722.623[1][a]). *Doe v Doe (On Rem)*, 289 Mich App 211.

CONTROLLED SUBSTANCES

2. The affirmative defense provided under the Michigan Medical Marihuana Act for defendants facing marijuana-related criminal charges applies only to offenses committed on or after December 4, 2008 (MCL 333.26428). *People v Campbell*, 289 Mich App 533.

NEW TRIAL

3. A codefendant's posttrial or postconviction testimony does not constitute newly discovered evidence sufficient to warrant a new trial when the defendant was aware of the evidence before trial; such evidence is not newly discovered, but merely newly available, even when the codefendant invoked his or her Fifth Amendment right to not testify at trial (MCR 6.431[B]). *People v Terrell*, 289 Mich App 553.

DAMAGES

INTEREST

1. A plaintiff is entitled to prejudgment interest on an award for past noneconomic damages, not on an award for future noneconomic damages; when the jury finds that the plaintiff has past noneconomic damages in excess of the applicable cap on noneconomic damages in a medical malpractice action, the plaintiff is entitled to prejudgment interest on the full amount of the capped award, regardless of whether the jury also awarded the plaintiff future noneconomic damages; if the past noneconomic damages do not exceed the cap, the plaintiff is entitled to interest on the actual amount of past noneconomic damages awarded (MCL 600.1483, 600.6013). *Dawe v Dr Reuven Bar-Levav & Associates, PC (On Remand)*, 289 Mich App 380.

DECEDENTS' ESTATES

AGREEMENTS TO MAKE MUTUAL WILLS

1. Michigan does not recognize a cause of action for breach of an implied covenant of good faith and fair dealing and does

petition for modification was given to the payer or recipient of support; the modification may not take effect before the time the petition to modify was filed (MCL 552.603[2]). *Cipriano v Cipriano*, 289 Mich App 361.

DOMESTIC RELATIONS ARBITRATION ACT—*See*

ARBITRATION 2

DUTIES TO THIRD PARTIES—*See*

NEGLIGENCE 1

DUTY TO WARN OR PROTECT PATIENTS—*See*

NEGLIGENCE 4

EASEMENTS

See, also, NEGLIGENCE 1
TRESPASS 1

LAND DIVISION ACT

1. The Land Division Act does not define the extent to which a public utility may use an easement for public utilities dedicated under the act (MCL 560.190). *D'Andrea v AT&T Michigan*, 289 Mich App 70.

TRESPASS

2. Activities by the owner of the dominant estate that go beyond the reasonable exercise of the use granted by an easement may constitute a trespass to the owner of the servient estate. *D'Andrea v AT&T Michigan*, 289 Mich App 70.

EFFECT OF BANKRUPTCY PETITION BY A DEBTOR—*See*

GARNISHMENT 1

EFFECTIVE DATES OF STATUTES—*See*

CRIMINAL LAW 2

EMINENT DOMAIN

JUST COMPENSATION

1. Just compensation for the taking of property includes business-interruption damages; business-interruption damages may include moving and relocation expenses, but do not include lost profits resulting from a business

against the debtor; after the debtor has filed a bankruptcy petition, a court may not enter a contempt judgment against a garnishee in favor of the creditor for the amount of the debtor's judgment debt because doing so would violate the automatic stay issued by the bankruptcy court (11 USC 362; MCR 3.101). *Vanderpool v Pineview Estates L.C.*, 289 Mich App 119.

GOOD-FAITH EXCEPTION—*See*

SEARCHES AND SEIZURES 2

GOVERNMENTAL EMPLOYEES—*See*

GOVERNMENTAL IMMUNITY 2, 3

GOVERNMENTAL IMMUNITY

EXCEPTIONS

1. The "medical care or treatment" exception to governmental immunity is not limited to the medical care or treatment of physical illness or disease alone, but includes the care or treatment of mental illness or disease (MCL 691.1407[4]). *McLean v McElhaney*, 289 Mich App 592.

GOVERNMENTAL EMPLOYEES

2. A plaintiff must present evidence sufficient for a reasonable finder of fact to conclude that a governmental employee was grossly negligent in order to survive a motion for summary disposition premised on the immunity afforded to governmental employees; the court may decide the question as a matter of law if there is no question of fact about whether the allegedly negligent conduct rises to the level of gross negligence; evidence of ordinary negligence does not create a material question of fact concerning gross negligence; to find gross negligence, there must be evidence that the governmental employee engaged in conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result (MCL 691.1407 [2][c], [7][a]). *LaMeau v Royal Oak*, 289 Mich App 153.
3. A governmental employee is immune from tort liability if the employee is acting (or reasonably believes that he or she is acting) within the scope of the employee's authority and if the governmental agency is engaged in the exercise or discharge of a governmental function unless the employee's conduct amounted to gross negligence and that

gross negligence was the proximate cause of the injury or damage, that is, the one most immediate, efficient, and direct cause of the injury or damage (MCL 691.1407[2][c]). *LaMeau v Royal Oak*, 289 Mich App 153.

HIGHWAY EXCEPTION

4. A municipality must maintain its public highways, roads, and streets, including the bridges, sidewalks, trailways, crosswalks, and culverts on the highway, in reasonable repair; a municipality does not have a duty to maintain in reasonable repair alleys, trees, and utility poles; the fact that a municipality does not have a duty to maintain utility poles in reasonable repair does not relieve the municipality of its duty to maintain its sidewalks in reasonable repair even when a utility pole causes a sidewalk's state of disrepair (MCL 691.1401[e], 691.1402[1]). *LaMeau v Royal Oak*, 289 Mich App 153.

SIDEWALKS

5. The governmental tort liability act imposes liability on municipalities for injuries caused by defects in sidewalks over which they have jurisdiction even if the defects are occasioned by the presence of a structure that the municipality would normally not have a duty to maintain in reasonable repair (MCL 691.1401[e], 691.1402[1]). *LaMeau v Royal Oak*, 289 Mich App 153.

GRIEVANCE INVESTIGATIONS—*See*

MASTER AND SERVANT 1

GROSS NEGLIGENCE—*See*

GOVERNMENTAL IMMUNITY 2, 3

HEARINGS—*See*

SOCIAL SECURITY 1, 2

HIGHWAY EXCEPTION—*See*

GOVERNMENTAL IMMUNITY 4

IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING—*See*

DECEDENTS' ESTATES 1

IMPLIED LIMITATIONS ON TRANSFERS OF ASSETS—*See*

DECEDENTS' ESTATES 1

276 Mich App 551 (2007), which held that a first-party insured is entitled to 12 percent penalty interest if a claim is not timely paid, irrespective of whether the claim is reasonably in dispute, applies retroactively. *McNeel v Farm Bureau General Ins Co of Michigan*, 289 Mich App 76.

INTENTIONAL ACTS—*See*

INSURANCE 1

INTEREST—*See*

DAMAGES 1

INTERPRETATION OF CONTRACTS—*See*

CONTRACTS 1

INTERPRETATION OF INDEMNITY CONTRACTS—*See*

INDEMNITY 1

JOINDER OF PARTIES—*See*

WORKERS' COMPENSATION 2

JUDGMENTS

RELIEF FROM JUDGMENTS

1. The statutory right to seek modification of a spousal-support provision may be waived by the parties to a divorce when the parties specifically forgo that right and agree in a consent judgment that the spousal-support provision is nonmodifiable; when the parties to a consent judgment have chosen to make the judgment nonmodifiable, a court considering granting relief from the judgment must strictly apply the factors limiting relief from a judgment; the motion may only be granted in extraordinary situations not otherwise specifically enumerated by the court rule, and courts must refrain from vacating the judgment if doing so would detrimentally affect the substantial rights of the opposing party (MCR 2.612[C][1][f]). *Rose v Rose*, 289 Mich App 45.

JUDICIAL CONSTRUCTION OF POLICIES—*See*

INSURANCE 1

JURISDICTION—*See*

COURTS 1

ditional compensation, or disciplinary action, so notes from a grievance investigation of a disciplinary action fall within the grievance-investigation exclusion (MCL 423.501[2][c][*vi*]). *Wright v Kellogg Co*, 289 Mich App 63.

PENSIONS

2. Vested retirement rights may not be altered without the pensioner's consent; a retiree's contractual rights vest, if at all, at the time of retirement absent explicit contractual language to the contrary; a retiree relying on the past-practice doctrine to show that a past practice may have amended a contract covering the retiree before the retiree retired must show that the past practice had modified the contract under which the retiree retired; a claim based on the past-practice doctrine must fail if any of the actions upon which the retiree relies to assert a past practice occurred after the retiree's date of retirement. *Butler v Wayne County*, 289 Mich App 664.

of care at issue in a medical-practice action, but they are admissible when they are relevant to the standard of care and to the injury alleged. *Jilek v Stockson*, 289 Mich App 291.

MENTAL-HEALTH PROFESSIONALS

4. A psychiatrist-patient relationship is a special relationship that imposes a duty on the psychiatrist to protect the patient from harm by a third party and to treat the patient within the standard of care applicable to medical professionals; when the patient is among the class of persons who could foreseeably be harmed by the psychiatrist's decision to place a third party in group therapy, the psychiatrist owes the patient a duty to take reasonable precautions to ensure that the third party is suitable for group therapy. *Dawe v Dr Reuven Bar-Levav & Associates, PC (On Remand)*, 289 Mich App 380.

parties in one proceeding, and the doctrine of res judicata may not be applied to bar the employee's action against his or her statutory employer even though his or her direct employer has already been ordered to pay benefits in a separate action (MCL 418.171). *Bennett v Mackinac Bridge Auth*, 289 Mich App 616.

WORKERS' COMPENSATION BENEFITS—*See*

DIVORCE 1

WRITS OF GARNISHMENT—*See*

GARNISHMENT 1

WRONGFUL DISCHARGE—*See*

ACTIONS 1