STATE OF MICHIGAN

IN THE SUPREME COURT

ARNEATA CHANTELL COBBS, LISA MOORE, KRISTA ANSON, JORDAN SEPULVEDA, NICHOLE THOMAS, KRYSTLE ANN BEGLEY, NAKYRRA HOGAN, ANNETTE MARTIN, SHANNA KATRELL MCELROY, ~~NADAWA ALI~~, and RACHEL LYNN MILLER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v

WAYNE COUNTY, SHERIFF RAPHAEL WASHINGTON, and DEPUTY TERRI GRAHAM, in their official and individual capacities, jointly and severally,

Defendants-Appellees.

MSC 167262

COA No. 362259
LC No. 20-016367-CZ
(Wayne County Circuit Court)
Hon. Susan L. Hubbard

_____/

DEFENDANTS-APPELLEES' WAYNE COUNTY, SHERIFF RAPHAEL WASHINGTON, AND DEPUTY TERRI GRAHAM'S SUPPLEMENTAL BRIEF IN THE SUPREME COURT

PLUNKETT COONEY

By: MARY MASSARON (P43885)
BRIANA L. COMBS (P85366)
Attorneys for Defendants-Appellees
38505 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Miscellaneous

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to review Plaintiffs' application for leave to appeal under MCR 7.303 and 7.305. On June 13, 2025, this Court directed the Clerk to schedule oral argument on the application and ordered the parties to file supplemental briefs. (June 13, 2025 Order, Appellees' APX 0660b). This Court has discretion to grant or deny leave to appeal after oral argument or to issue other relief.

STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER DISMISSAL OF PLAINTIFFS' CLAIMS BASED ON FAILURE TO COMPLY WITH THE PRISON LITIGATION REFORM ACT, MCL 600.5501 *ET SEQ.*, MUST BE WITH PREJUDICE UNDER MCL 600.5503(1), MCL 600.5507(2), AND MCL 600.5507(3)(b)?

Plaintiffs-Appellants Nakyrra Hogan, Annette Martin, Shanna Katrell McElroy, Lisa Moore, Krista Anson, Krystle Ann Begley, Rachel Lynn Miller, Nadawa Ali, Arneata Chantell Cobbs, Jordan Sepulveda, and Nichole Thomas answer: "No."

Defendants-Appellees Wayne County, Sheriff Raphael Washington, and Deputy Terri Graham answer: "Yes."

The Wayne County Circuit Court answered: "Yes."

The Michigan Court of Appeals answered: "Yes."

II.

WHETHER PLAINTIFF, KRISTA ANSON, WAS A "PRISONER" UNDER MCL 600.5531(e) SUBJECT TO THE PRISON LITIGATION REFORM ACT WHERE SHE WAS BOOKED INTO WAYNE COUNTY JAIL HOURS AFTER THIS LAWSUIT WAS FILED?

Plaintiffs-Appellants Nakyrra Hogan, Annette Martin, Shanna Katrell McElroy, Lisa Moore, Krista Anson, Krystle Ann Begley, Rachel Lynn Miller, Nadawa Ali, Arneata Chantell Cobbs, Jordan Sepulveda, and Nichole Thomas answer: "No."

Defendants-Appellees Wayne County, Sheriff Raphael Washington, and Deputy Terri Graham answer: "Yes."

The Wayne County Circuit Court did not answer this question.

The Michigan Court of Appeals did not answer this question.

STATEMENT OF FACTS

A. THE SAME NAMED PLAINTIFFS AND THE SAME POOL OF INMATES HAVE SUED MULTIPLE TIMES UNSUCCESSFULLY RAISING CLAIMS ABOUT IMPROPRIETIES DURING ROUTINE STRIP SEARCHES

This is the seventh putative class action lawsuit filed since 2012 by the same attorneys on behalf of the same pool of former Wayne County Jail inmates alleging improprieties and verbal abuse during routine strip searches of female inmates performed at the Wayne County Jail Division I in Detroit, Michigan. Four prior lawsuits were filed in federal court. Three have been dismissed. See *Weathington v Cnty of Wayne*, report and recommendation of the United States District Court for the Eastern District of Michigan, issued May 22, 2015 (No. 12-13573), report and recommendation adopted sub nom. *Weathington v City of Detroit*, order of the United States District Court for the Eastern District of Michigan, issued June 17, 2015 (No. 12-13573); *Sumpter v Wayne Cnty*, 868 F3d 473, 478 (6th Cir 2017); *Sepulveda v Cnty of Wayne*, order of the United States District Court for the Eastern District of Michigan, issued October 25, 2019 (No. 19-11407).[1]

The fourth lawsuit was extensively litigated in federal court since November 2017. The district court certified a class that would include all named plaintiffs in this suit. (*Woodall v Wayne County*, Case No. 17-13707, 1/23/20 Order, Appellees' APX 0052b-0069b). The Sixth Circuit later reversed the district court's decision to certify the class for the same kind of problems as with the proposed putative class here. *Woodall v Wayne Cnty, Michigan*, No. 20-1705, 2021 WL 5298537 (6th Cir Nov 15, 2021).

[1] All the *Sepulveda* plaintiffs are now plaintiffs here.

The fifth and sixth lawsuits, *Hogan v Wayne County*, Wayne County Circuit Court Case No 20-003830-CZ, and *Hogan v Wayne County*, Wayne County Circuit Court Case No. 20-014725-CZ, were voluntarily dismissed without prejudice. These suits were dismissed at the pleading stage in part for pleading deficiencies under Michigan's Prison Litigation Reform Act that would have otherwise required dismissal of some named plaintiffs.

B. ALL THE NAMED PLAINTIFFS EXCEPT ONE WERE INCARCERATED OR ON PROBATION OR PAROLE WHEN THIS LAWSUIT WAS FILED

Multiple named plaintiffs, including Nakyrra Hogan, Annette Martin, Shanna Katrell McElroy, Krystle Ann Begley, and Krista Anson were incarcerated on the date when the complaint in this lawsuit was filed. (Offender Profiles of Hogan, Martin, McElroy, and Begley, Appellees' APX 0144b-0156b; Anson Booking Record, Appellees' APX 0158b). Lisa Moore and Rachel Lynn Miller were on parole when this Complaint was filed. (Offender Profiles of Moore and Miller, Appellees' APX 0166b-0176b). Nadawa Ali, Jordan Sepulveda, and Nichole Thomas were on probation when this Complaint was filed. (Offender Profiles of Ali, Sepulveda, and Thomas, APX 0178b-0189b). Of the named plaintiffs, only one, Arneata Chantell Cobbs, had been discharged from jail at the time suit was filed. (Brief in Support of Defendants' Pre-Answer Motion to Dismiss in Lieu of an Answer or For Stay, p 3, Appellees' APX 0102b).

C. PLAINTIFFS' ALLEGED ELLIOTT-LARSEN CIVIL RIGHTS ACT CLAIMS IN THE COMPLAINT

Plaintiffs alleged that during their incarceration in Wayne County Jail, they were strip searched in common areas, in view of male officers and other inmates. (Complaint, p 10 ¶ 37, Appellees' APX 0010b). They claimed they were strip searched in an embarrassing fashion during some of their menstrual cycles. (*Id.* ¶ 39). They also claimed that they faced derogatory remarks during those searches, could see and hear male officers laughing and

mocking them, and that the strip searches were conducted under unsanitary conditions so that blood and other bodily fluids were discharged in the common areas. (*Id.* at pp 5-6 ¶¶ 2-12, Appellees' APX 0005b-0006b). The inmates allegedly could "often" see men through a window in the "L" shaped area where searches occurred, when inmates were taken to and from courts. (Plaintiffs' Application, pp 3-4).

Plaintiffs also alleged that Wayne County and Wayne County Sheriff Napoleon[2] failed to take adequate steps to stop the purported abuse and sexual harassment, which they allegedly knew about since 2012. (Complaint, pp 9-10 ¶¶ 32-36, Appellees' APX 0009b-0010b). Plaintiffs asserted the "mechanisms for addressing grievances through an administrative process are both ineffective and futile[.]" (*Id.* at p 12 ¶ 53, Appellees' APX 0012b). Plaintiffs also alleged they could not file grievances challenging policies, procedures, or issues affecting the entire jail population. (*Id.* ¶ 54). Plaintiffs claimed the Wayne County defendants and their agents failed to ensure they were provided grievance forms, routinely refused to timely process grievances, and regularly failed to ensure responses to grievances. (*Id.* ¶ 55).

The complaint states materially different claims for each named plaintiff under the Elliot-Larsen Civil Rights Act arising out of purportedly actionable prison conditions. (*Id.* at pp 13-19 ¶¶ 58-108, Appellees' APX 0013b-0019b).

The four counts in the complaint are: (1) creating a hostile sexual environment under the Elliott-Larsen Civil Rights Act (Count I); (2) failing to prevent and remedy [a] sexually hostile prison environment under the Elliott-Larsen Civil Rights Act (Count II); (3)

[2] The parties stipulated to, and the lower court entered an order on June 22, 2022, substituting Sheriff Raphael Washington for Sheriff Benny Napoleon following the death of Sheriff Napoleon.

aiding and abetting violations of the Elliott-Larsen Civil Rights Act (Count III); and (4) race discrimination under the Elliot-Larsen Civil Rights Act (Count IV). (Complaint, pp 19-23, Appellees' APX 0019b-0023b).

D. DEFENDANTS MOVED TO DISMISS THE COMPLAINT RATHER THAN FILE AN ANSWER AND LATER RENEWED THEIR MOTION

Defendants moved to dismiss the complaint rather than file an answer. (Defendants-Appellees' Pre-Answer Motion to Dismiss In Lieu of Answer Or For Stay, 3/3/21).[3] They did so because this is the seventh putative class action filed since 2012 by the same attorneys on behalf of the same pool of former Wayne County jail inmates, alleging improprieties and verbal abuse during routine strip searches of female inmates performed at the Wayne County Jail Division I in Detroit, Michigan.

Defendants argued the Michigan Legislature exempted prison services from being governed by the Elliott-Larsen Civil Rights Act, and that the controlling decision striking it down as unconstitutional was erroneously decided and subject to reversal by the Michigan Supreme Court. (*Id.*). They also asserted that suing in Michigan was an impermissible effort to split their cause of action, since named plaintiffs were also members of a certified class action, *Woodall v Wayne County*, United States District Court for the Eastern District of Michigan Case No. 17-13707, already pending in federal court. (*Id.*). They also contended that the Michigan Prison Litigation Reform Act barred the suit based on several provisions in that statute. (*Id.*). In the alternative, Defendants requested a stay pending completion of the class certification appeal pending before the Sixth Circuit. (*Id*.).

[3] To keep the Appellee Appendix from being too voluminous, Appellees are not attaching the older filings. The filings are referenced for procedural background only.

Later, the circuit court ordered that Plaintiffs file a response to the motion and scheduled oral argument. (Summary Disposition Scheduling Order, 3/9/21; Adjourned Summary Disposition Scheduling Order, 3/29/21).

Plaintiffs opposed the motion, contending none of the named plaintiffs were "prisoners" under the Michigan Prison Litigation Reform Act. (Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss in Lieu of Answer or for Stay, 4/26/21). They read the definition of "prisoner" under the Michigan statute narrowly, insisting that if they were not detained as prisoners in the Wayne County Jail when they filed suit, the statute does not apply. (*Id.* at pp 1-6). They also argued in the alternative that they complied with the disclosure requirements of the statute. (*Id.* at pp 6-14). They disagreed with defendants about whether they must show physical injury to assert claims under the statute. (*Id.* at pp 15-16).

Defendants replied. (Defendants' Reply, 4/30/21). Later, the circuit court entered a stipulated order for a stay of proceedings. (Stipulated Order for Stay of Proceedings, 5/20/21, Appellees' APX 0070b-0072b). In that order, the circuit court denied the motion to dismiss without prejudice and stayed the matter until class certification in *Woodall v Wayne County* was resolved by the Sixth Circuit. (*Id.* at p 2, Appellees' APX 0071b).

The Sixth Circuit reversed the trial court's certification of a putative class in that action. (*Woodall v Wayne County*, Sixth Circuit Docket No. 20-1705, 11/15/21 Opinion, Appellees' APX 0073b-0086b). The Sixth Circuit concluded that the putative class should not be certified because the named plaintiffs' claims were not common or typical but depended on an individualized determination about each plaintiff. (*Id.* at pp 7-8, APX

0079b-0080b). The Sixth Circuit recognized that the County's policy prohibited conduct that was unconstitutional. (*Id.* at p 7, Appellees' APX 0079b).

After the Sixth Circuit decision in *Woodall*, the parties agreed to lift the stay. (Stipulated Order to Lift Stay of Proceedings, 1/04/22, Appellees' APX 0087b-0089b). The circuit court issued a scheduling order allowing the parties to renew their motions, and Defendants renewed their motion to dismiss the case. (Defendants' Renewed Pre-Answer Motion to Dismiss in Lieu of Answer, Appellees' APX 0091b-0229b). Plaintiffs opposed the renewed motion to dismiss. (Plaintiffs' Response in Opposition to Defendants' Pre-Answer Motion to Dismiss in Lieu of Answer, Appellees' APX 0230b-0326b). Defendants replied and again urged dismissal. (Defendants' Reply in Support of Renewed Pre-Answer Motion to Dismiss in Lieu of Answer, Appellees' APX 0327b-0384b).

E. PLAINTIFFS MOVED TO CERTIFY THE PUTATIVE CLASS ACTION

Plaintiffs moved to certify the putative class early on. (Plaintiffs' Motion for Class Certification, 2/5/21).[4] They sought certification of a class of women housed in the Wayne County Jail in any of three divisions since March 11, 2017 who have experienced sexual harassment or racial discrimination in the Wayne County Jail. (*Id.*). Defendants opposed certification. (Response Opposing Motion for Class Certification, 2/22/21).

The circuit court denied the first motion to certify the class. (Order, 3/2/21). Then, Plaintiffs renewed their motion for class certification. (Renewed Motion for Class Certification, 3/17/21). Defendants again opposed certification. (Response Opposing Renewed Motion for Class Certification, 4/5/21). They pointed out that Plaintiffs' renewed

[4] See footnote 3.

motion for certification suffered from the same defects and raised the same arguments unsuccessfully raised in the first motion.

More briefing took place after Plaintiffs revised their class definition to try to respond to Defendants' argument that their initial definition lacked objective criteria to identify who was in the class. (Plaintiffs' Revised Renewed Motion for Class Certification, 5/10/21). Defendants also filed a revised response. (Revised Response to Class Certification, 5/07/21).

The circuit court did not rule on the renewed motion for class certification. Thus, Plaintiffs filed yet another motion for class certification. (Plaintiffs' Second Renewed Motion for Class Certification, Appellees' APX 0385b-0407b). Defendants again responded and opposed certification. (Response Opposing Second Renewed Motion for Class Certification, Appellees' APX 0408b-0527b). And Plaintiffs replied in support of their request. (Plaintiffs' Reply in Support of Second Renewed Motion for Class Certification, APX 0528b-0534b).

F. THE CIRCUIT COURT HELD A LENGTHY HEARING, DENIED CERTIFICATION, AND GRANTED THE MOTION TO DISMISS AS TO ALL BUT ONE PLAINTIFF

The circuit court issued a detailed written opinion denying Plaintiffs' renewed motion for class certification and granting Defendants' renewed motion for dismissal. (Opinion and Order, 4/27/22, APX 0025b-0051b). The circuit court explained the procedural history and background of the litigation, including the two other cases involving the same claims and parties, which were voluntarily dismissed without prejudice, and the court's earlier decision to grant in part and deny in part the motion to dismiss in an earlier case:

> Preliminarily, it should be noted that two other cases involving the same claims and parties had been filed in this Court, but were voluntarily dismissed without prejudice. *Hogan v Wayne County*, Case No. 20-003830-CZ; *Hogan v Wayne County*, Case No. 20-014725-CZ.[1] The Court also granted in part and denied in part Defendants' motion to dismiss in Case No. 20-003830-CZ. In that order, the Court granted the motion and dismissed without prejudice Plaintiffs Hogan, Martin, McElroy, Moore, Begley, Miller, and Anson for failure to comply with the Prisoner Litigation Reform Act, MCL 600.5501 *et seq* ("the PLRA"). The Court denied the motion as to Plaintiffs Ali, Cobbs, Sepulveda, and Thomas. In addition, the Court denied Plaintiffs' motion for class certification as to this case on March 2, 2021.
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> These plaintiffs were also plaintiffs in a federal district court case, which alleged constitutional violations under 42 USC 1983 for violations of the 4th Amendment, which prohibits unreasonable searches. *Woodall v Co of Wayne*, No. 17-13707; 2020 WL 373073 (ED Mich, January 23, 2020). After the U.S. District Court granted Plaintiffs' motion for class certification, Defendant Wayne County appealed. This Court stayed the instant case pending the outcome of the appeal. The Sixth Circuit Court of Appeals reversed the decision of the U.S. District Court, finding: "The district court failed to apply the correct legal framework here and therefore abused its discretion. The record is clear that class adjudication is not proper." *Woodall v Wane Co, Michigan*, No. 20-1705, 2021 WL 5298537, at *8 (CA 6, November 15, 2021) [Footnote omitted].
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> [1] According to Defendants, "[t]his is the seventh putative Class action lawsuit filed since 2012 by the same attorneys on behalf of the same pool of former Wayne County jail inmates alleging improprieties and verbal abuse during routine strip searches of female inmates performed at the Wayne County Jail Division I in Detroit, Michigan. Four prior lawsuits were filed in federal court. Three have been dismissed." The fourth case is the 6th Circuit appeal for which the Court stayed the instant case.

(*Id.* at p 2, APX 0026b).

The circuit court found that Plaintiffs failed to satisfy the standards for certification under MCR 3.501(A)(1) and denied Plaintiffs' motion for class certification. (*Id.* at pp 4-13, APX 0028b-0037b). The court held Plaintiffs "failed to demonstrate the 'commonality,' 'typicality,' and 'superiority' requirements of MCR 3.501(A)(1)." (*Id.* at p 13, Appellees' APX 0037b).

Then the court addressed Defendants' renewed pre-answer motion to dismiss. The court analyzed each Plaintiff, stating: "Plaintiffs Hogan, Martin, McElroy, and Begley are currently incarcerated in prison[,]" "Plaintiffs Ali and Sepulveda are currently probationers[,]" Moore was on parole at the time the complaint was filed, "Anson was released from the jail on January 28, 2021[,]" Miller was on parole until June 23, 2021, and Thomas was on probation until February 28, 2021. (*Id.* at pp 17-18, Appellees' APX 0041b-0042b). The court identified that Cobbs "is the only plaintiff who was released before the filing of this complaint." (*Id.* at p 18, Appellees' APX 0042b). Thus, the court held "all Plaintiffs, except Plaintiff Cobbs, are subject to the PLRA." (*Id.*).

The court then analyzed the Prison Litigation Reform Act's disclosure requirement under MCL 600.5507(2). (*Id.* at pp 19-23, Appellees' APX 0043b-0047b). The court held that "Plaintiffs should have disclosed all federal cases in which they are or were named plaintiffs and cases which involve prison conditions[,]" that Plaintiffs failed to comply with the disclosure requirements of the statute, and that as a result, the case should be dismissed. (*Id.* at p 23, Appellees' APX 0047b). The court also analyzed the exhaustion requirement under MCL 600.5503(1), holding that Plaintiffs also failed to exhaust their administrative remedies. (*Id.* at pp 23-25, Appellees' APX 0047b-0049b). The court explained:

> . . . Defendants have submitted two affidavits, one executed by Michelle Boehmer, Director of Classification for the Wayne County Sheriff's Office and another executed by Dennis Ramel, Deputy Chief for the Wayne County Sheriff's Office. Director Boehmer avers that, after a diligent search of records, she found that Plaintiffs Hogan, Martin, McElroy, Moore, Begley, Miller, Ali, Cobbs, and Thomas never filed grievances regarding the manner in which they were searched during their stay at the jail. Director Boehmer also states that her records indicate that Plaintiffs Anson and Sepulveda each filed grievances regarding the searches. She states that the grievances were investigated and closed and that neither pursued any further action. Hence,

> Anson and Sepulveda failed to exhaust their administrative remedies by appealing this decision and seeing it through the completion. The other Plaintiffs never attempted to pursue their administrative remedies, much less exhaust them.

(*Id.* at p 24, Appellees' APX 0048b) (citation omitted).

Defendants also argued the complaint should be dismissed because Plaintiffs did not plead and cannot show physical injury under MCL 600.5511(1). But the circuit court determined it need not address that issue, since it already determined that "Plaintiffs are subject to the PLRA and have failed to satisfy the PLRA in other respects." (*Id.* at p 26, Appellees' APX 0050b). The court then denied Plaintiffs' second renewed motion for class certification and granted Defendants' renewed pre-answer motion to dismiss in lieu of an answer, except as to Plaintiff Cobbs. (*Id.*). The court dismissed all Plaintiffs (except for Plaintiff Cobbs) from the case with prejudice. (*Id.*).

G. THE COURT OF APPEALS GRANTED LEAVE TO APPEAL LIMITED TO THE ISSUES INCLUDED IN PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL AND BRIEF IN SUPPORT AND AFFIRMED THE DENIAL OF CLASS CERTIFICATION AND THE DISMISSAL WITH PREJUDICE OF THE PLAINTIFFS WHO WERE "PRISONERS" UNDER THE PRISON LITIGATION REFORM ACT

Plaintiffs sought interlocutory review of the circuit court decision. Although Defendants opposed a grant of leave, the Court of Appeals granted leave to appeal, limited to the issues in Plaintiffs' application for leave to appeal and brief in support. After full briefing and oral argument, the Court of Appeals decided the appeal, partially reversing and partially affirming and remanding for further proceedings consistent with its decision. *Hogan v Wayne Cnty*, unpublished per curiam decision of the Michigan Court of Appeals, issued May 30, 2024 (Docket No. 362259) (Appellees' APX 0643b-0659b).

The Court of Appeals narrowed the circuit court's ruling as to which Plaintiffs qualify "prisoners" under the Michigan statute. The Court held that individuals on parole or probation were not "prisoners" because they were not physically incarcerated when the lawsuit was filed. (*Id.* at p 10, Appellees' APX 0652b). But the Court of Appeals agreed with the circuit court that current detainees, even those incarcerated with the Department of Corrections or other prisons, fall within the statutory definition of "prisoner" and are required to comply with the statute. (*Id.*).

The Court of Appeals also affirmed the trial court's dismissal with prejudice. (*Id.* at pp 10-13, Appellees' APX 0652b-0655b). The court noted that Plaintiffs "do not challenge the trial court's determination of noncompliance with the PLRA and the dismissal of their complaint based on that noncompliance." (*Id.* at p 10, Appellees' APX 0652a). Thus, the Court limited its consideration to whether the dismissal with prejudice was proper, reasoning that "[i]f a party may not amend their complaint because dismissal is mandatory, then it follows that dismissal must be with prejudice." (*Id.* at p 12, Appellees' APX 0654b). The Court also affirmed the circuit court's denial of Plaintiffs' motion for class certification, holding Plaintiffs failed to satisfy the requirements of commonality, typicality, and superiority. (*Id.* at p 13, Appellees' APX 0655b).

Plaintiffs now seek interlocutory review of that opinion. This Court granted oral argument on the application for leave to appeal, limited to the following two questions:

> (1) [W]hether dismissal of a claim based on failure to comply with the Prison Litigation Reform Act (PLRA), MCL 600.5501 *et seq.*, must be with prejudice, see MCL 600.5503(1); MCL [6]00.5507(2); MCL 600.5507(3)(b); and
>
> (2) Whether plaintiff Krista Anson is a "prisoner" subject to the PLRA where she was not booked into Wayne County Jail until several hours after this lawsuit was filed. See MCL 600.5531(e).

(June 13, 2025 Order, Appellees' APX 0660b).

STANDARD OF REVIEW

The grant or denial of summary disposition is reviewed de novo based on the entire record to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817, 822 (1999). The interpretation of statutes and court rules are also reviewed de novo. *Estes v Titus,* 481 Mich 573, 578–79; 751 NW2d 493, 496 (2008). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case." *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102, 106 (1999). This Court "must give the words used by the Legislature their common, ordinary meaning." *Id.* When giving effect to the Legislature's intent, a court "may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Cnty Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663, 667 (2002).

INTRODUCTION

This Court's June 13, 2025 order asks the parties to address two issues: 1) whether a dismissal under the Prison Litigation Reform Act must be with or without prejudice, and 2) whether Plaintiff, Krista Anson, was a "prisoner" under the Prison Litigation Reform Act at the time this lawsuit was filed.

As to the first question, the Prison Litigation Reform Act specifically requires dismissal where a prisoner fails to comply with the act's disclosure requirements. MCL 600.5507(3)(b). And under Michigan law, the general rule is that an involuntary dismissal operates as an adjudication on the merits unless the court otherwise specifies in its dismissal order. MCR 2.504(B)(3). The Legislature is presumed to know of and legislate in harmony with existing laws. Thus, the Legislature knew when including the "shall dismiss" language in MCL 600.5507(3)(b) that such a dismissal would operate as a dismissal on the merits under the default involuntary dismissal rule. If the Legislature intended dismissal under the statute to be without prejudice, it would have included explicit "without prejudice" language (as it has in other statutes). The Legislature is presumed to be aware of the consequences of its use or omission of statutory language.

Dismissal with prejudice is also proper under the circumstances of this case, where this is the seventh putative class action lawsuit filed since 2012 by the same attorneys on behalf of the same pool of former Wayne County Jail inmates, and the third action filed in Wayne County Circuit Court. When repeated complaints are filed by an attorney for the same plaintiffs and the actions repeatedly violate the requirements for filing prisoner complaints under the Prison Litigation Reform Act, a dismissal with prejudice is not only appropriate, but necessary, to effectuate the Legislature's goal of lessening prisoner

litigation. Here, multiple actions were filed in federal court on behalf of the same pool of former Wayne County Jail inmates, some of which resulted in dismissal because of the plaintiffs' failure to comply with the federal Prison Litigation Reform Act, 42 U.S.C. § 1997e. Two other suits were filed in the same circuit court as this action and voluntarily dismissed at the pleading stage due in part to pleading deficiencies under Michigan's Prison Reform Act. Then Plaintiffs filed this suit and argue this Court should graft federal case law onto the Michigan statute to fashion a way for them to proceed. Their effort should be resisted because it would undercut the Legislature's plan. And their effort is particularly problematic when these same plaintiffs and their attorney have already filed prior actions in both state and federal court that either failed to satisfy the requirements of the federal Prison Litigation Reform Act or were voluntarily dismissed.

Plaintiffs ignore the statute's text and instead rely on non-binding federal law. But this is wrong for several reasons. First, the Michigan statute, MCL 600.5507(3)(b), explicitly requires dismissal under these circumstances. Further, lower federal court decisions are not binding on this Court, and this Court is not bound to interpret a Michigan statute in the same way federal courts interpret a federal statute. The federal cases Plaintiffs rely on discuss the failure to exhaust administrative remedies. But the trial court's dismissal in this case was also based on Plaintiffs' additional failure to satisfy the disclosure requirements—a failure that requires dismissal under the Michigan statute. Moreover, the Michigan court rules likewise contemplate an involuntary dismissal with prejudice under MCR 2.504(B)(3) when, for example, a plaintiff files multiple suits that arise out of the same facts and are dismissed.

The underlying purpose of Michigan's Prison Litigation Reform Act is to manage the overall number of suits prisoners initiate, and Plaintiffs' position—advocating for the continued filing and refiling of suits—directly contradicts that purpose.

As to the second question and Krista Anson's status as a "prisoner" under MCL 600.5531(e), Anson qualifies as a "prisoner" for several reasons. Anson qualifies as a "prisoner" under the broad, "subject to" language of the statute. She was subject to "incarceration, detention, or admission to a prison" within the meaning of the statute once she was taken into custody. Plaintiffs base their argument on the time of Anson's booking, but well-established principles of statutory interpretation confirm that a party may not write language into a statute that is not there. The statute contains no language qualifying a person's status as a prisoner based on when they are formally "booked" into the jail. Anson also qualifies as a "prisoner" under the plain meaning of the term, which is defined as including: an individual who has been apprehended by a law enforcement officer and is in custody, regardless of whether that individual has been put in prison, and someone who is "taken by force and kept somewhere." And Anson qualifies as a "prisoner" under the common law and cases interpreting the meaning of the term in other contexts, all of which the Legislature was deemed to know about when it wrote the statute.

ARGUMENT I

DISMISSAL OF PLAINTIFFS' CLAIMS BASED ON FAILURE TO COMPLY WITH THE PRISON LITIGATION REFORM ACT, MCL 600.5501 *ET SEQ.*, SHOULD BE WITH PREJUDICE UNDER MCL 600.5503(1), MCL 600.5507(2), AND MCL 600.5507(3)(b)

A. PLAINTIFFS WAIVED THE ISSUE

Plaintiffs did not raise the issue of dismissal with prejudice in their statement of the questions presented in their application. The two questions presented in Plaintiffs' application for leave to appeal state as follows, ignoring the issue of dismissal with prejudice:

> I. Should this Court grant leave to appeal to consider the following question of first impression involving the statutory interpretation of Michigan's Prison Litigation Reform Act ("PLRA"); that is, whether Plaintiffs, all of whom were *former inmates* of the Wayne County Jail at the time of filing suit, were nonetheless "prisoners" under Michigan's PLRA and thus subject to the Act's administrative exhaustion requirement prior to filing suit?
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> Plaintiffs/Appellants answer[] "YES"
>
> Defendants/Appellees answer "NO"
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> The Trial Court would answer "NO"
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> II. Should this Court grant leave to appeal from the lower court's denial of class certification where Plaintiffs submitted more than 600 declarations from former inmates of the Wayne County Jail all of whom attested to being sexually harassed during strip searches and seek to assert identical claims under Michigan's ELCRA but where the trial court denied class certification under an erroneous interpretation of the "commonality," "typicality," and "superiority" requirements under MCR 3.501(A)(1)?
>
> Plaintiffs/Appellants answer[] "YES"
>
> Defendants/Appellees answer "NO"
>
> The Trial Court would answer "NO"

(Plaintiffs' Application, p ix). Instead, Plaintiffs bury the argument about dismissal without prejudice on pages 20-22 of their application. (*Id.* at pp 20-22). Plaintiffs also did not include the issue in the questions presented section of their application for leave to appeal in the Court of Appeals or in their appellant brief on leave granted. Thus, it is not properly preserved. This Court should not, at the leave to appeal stage in the Court of last resort, pull a buried and unpreserved argument out of an application and use it to try to make new law.

Under MCR 7.305, an application for leave to appeal to this Court must contain "the questions presented for review[,]" and the argument section of the application must address "each of the stated questions[.]" MCR 7.305(A)(1)(b), (e). As this Court has held, "'ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved.'" *Sebastian v Sherwood*, 270 Mich 339, 342–43; 259 NW 287, 288 (1935). See also *River Inv Grp v Casab*, 289 Mich App 353, 360; 797 NW2d 1, 4 (2010) ("This issue is waived because plaintiff failed to state it in the statement of questions presented in its brief on appeal"); *Eng v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523, 530 (2004) ("An issue not contained in the statement of questions presented is waived on appeal."). Thus, this Court should decline to consider this issue where Plaintiffs did not properly raise it in the Court of Appeals or in their application for leave to appeal to this Court.

In any event though, if this Court considers the argument despite Plaintiffs' failure to properly raise it, the trial court's dismissal with prejudice is correctly affirmed.

B. THE PRISON LITIGATION REFORM ACT REQUIRES DISMISSAL WHERE A PRISONER FAILS TO COMPLY WITH THE ACT'S DISCLOSURE REQUIREMENTS AND, IN ANY EVENT, AN INVOLUNTARY DISMISSAL IS ORDINARILY READ TO MEAN WITH PREJUDICE

The purpose of Michigan's Prison Litigation Reform Act "is to manage the overall number of suits prisoners initiate." *Doe v Dep't of Corr*, 312 Mich App 97; 878 NW2d 293, 303 (2015), judgment vacated in part (on other grounds), appeal denied in part, 499 Mich 886; 876 NW2d 570 (2016). Consistent with this purpose, the act imposes various prefiling requirements and authorizes courts to dismiss actions that are frivolous or based on immunity. See MCL 600.5509(2). Among the prefiling requirements are the exhaustion and disclosure requirements, both of which these Plaintiffs flouted.

The exhaustion requirement under MCL 600.5503(1) states: "A prisoner shall not file an action concerning prison conditions until the prisoner has exhausted all available administrative remedies." An additional disclosure requirement also exists under MCL 600.5507(2), which states: "A prisoner who brings a civil action or appeals a judgment concerning prison conditions shall, upon commencement of the action or initiation of the appeal, disclose the number of civil actions and appeals that the prisoner has previously initiated." The act requires dismissal of the action if the plaintiff does not comply with the disclosure requirement. MCL 600.5507(3)(b) states: "The court shall dismiss a civil action or appeal at any time, regardless of any filing fee that may have been paid, if the court finds any of the following . . . [t]he prisoner fails to comply with the disclosure requirements of subsection (2)." See also *Komejan v Dep't of Corr*, 270 Mich App 398, 399; 715 NW2d 375, 376 (2006), citing MCL 600.5507(3)(b) ("If a prisoner fails to disclose the number of previous suits, the statute explicitly instructs the court to dismiss the action.").

Here, the trial court granted Defendants' motion to dismiss for two reasons. The court held that Plaintiffs failed to comply with the disclosure requirements under MCL 600.5507(2) (Opinion and Order, 4/27/22, p 23, Appellees' APX 0047b), and the court also held Plaintiffs failed to exhaust their administrative remedies. (*Id.* at p 25, Appellees' APX 0049b). Plaintiffs' supplemental brief focuses on federal case law discussing the failure to exhaust administrative remedies, ignoring the explicit statutory language under the disclosure statute, MCL 600.5507, requiring dismissal where a prisoner does not comply with the Act's disclosure requirements. MCL 600.5507(3)(b).

Under Michigan Law, the general rule is that an involuntary dismissal operates as an adjudication on the merits. MCR 2.504(B)(3). The rule is an important tool in assuring the finality of litigation. That is, when someone brings a suit, they cannot keep bringing the same suit over and over again because they are not happy with the outcome. Thus, an involuntary dismissal ordinarily operates as a dismissal on the merits.

Plaintiffs' analysis of the Michigan court rule is flawed. Plaintiffs argue the court rule generally provides that a dismissal is without prejudice except in certain circumstances, such as a dismissal for lack of jurisdiction. (See Plaintiffs' Supplemental Brief, p 3). Not so —the rule says the opposite. MCR 2.504(B)(3) states:

> Unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits.

Thus, the default under the court rule is that an involuntary dismissal is *with* prejudice, not without prejudice, unless certain circumstances, such as a dismissal for lack of jurisdiction, are present. And "the PLRA [Prison Litigation Reform Act] exhaustion requirement is not jurisdictional[.]" *Woodford v Ngo*, 548 US 81, 101 (2006).

As this Court explained, where a party moves for summary disposition under MCR 2.116 (as Defendants did here), the involuntary dismissal rule—MCR 2.504(B)(3)—applies, and dismissal under that rule operates as an adjudication on the merits unless the trial court otherwise specifies:

> Because Rengachary moved for summary disposition under MCR 2.116(C)(3) and (C)(7), MCR 2.504(B)(3) applies. Moreover, the trial court did not dismiss for "lack of jurisdiction or for failure to join a party under MCR 2.205," or "otherwise specif[y]" that the order of dismissal was something other than a dismissal on the merits. Rather, the trial court stated in its order that the dismissal was "with prejudice." Therefore, under MCR 2.504(B)(3), the dismissal of the claims against Rengachary "operates as an adjudication on the merits."

Al-Shimmari v Detroit Med Ctr, 477 Mich 280, 295; 731 NW2d 29, 36–37 (2007).

Further, the statute, MCL 600.5507(3)(b), explicitly states that the court "shall dismiss" a civil action if a prisoner fails to comply with the Prison Litigation Reform Act's disclosure requirements. "The Legislature's use of the word 'shall' generally indicates a mandatory directive, not a discretionary act." *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875, 884 (2013). The purpose of the involuntary dismissal rule (MCR 2.504(B)(3)) "is to classify those dismissals entered by a court that are silent regarding their effect." *Avery v Demetropoulos*, 209 Mich App 500, 502; 531 NW2d 720, 721 (1994). When the Legislature enacted MCL 600.5507(3)(b), it was presumed to know that an involuntary dismissal operates as an adjudication on the merits under MCR 2.504(B)(3) unless otherwise specified by the trial court in its dismissal order. It is a general rule of statutory construction that "'lawmakers are presumed to know of and legislate in harmony with existing laws.'" *People v Veling*, 443 Mich 23, 36 n 15; 504 NW2d 456, 462 (1993).

Simply put, the Legislature would have known, before enacting the Prison Litigation Reform Act, that by including the "shall dismiss" language in the statute, it was telling the

courts that such a dismissal could be a dismissal with prejudice. This is especially true where the statute does not specify that the mandatory dismissal must be "without" prejudice. Use of explicit "without prejudice" language in other statutes confirms the Legislature knows how to include such language if that is its intent. See, e.g., MCL 169.313(5) (specifying that dismissal of a complaint by the secretary of state must be "without prejudice" if the secretary of state determines the complaint is "frivolous, illegible, indefinite, or unsigned, or does not identify an alleged violator, allege a violation of the act, or contain a verification statement"); MCL 450.5007 (requiring that an order of dismissal "shall be without prejudice" where a foreign limited liability company does not have a certificate of authority). "The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, *to be aware of the consequences of its use or omission of statutory language*[.]" *In re MKK*, 286 Mich App 546, 556; 781 NW2d 132, 139 (2009) (emphasis added). See also *Johnson v Pastoriza*, 491 Mich 417, 431; 818 NW2d 279, 286 (2012) ("The Legislature was cognizant of the operative language necessary to apply any particular provision in the amendatory act retroactively but did not include such language in 2005 PA 270.").

Ultimately, where the Legislature chose to include a mandatory dismissal requirement under MCL 600.5507 without any qualifying language requiring that such dismissal be "without" prejudice, and where the default rule under MCR 2.504(B)(3) is that an involuntary dismissal operates as an adjudication on the merits, the trial court's dismissal with prejudice was proper. Plaintiffs' failure to address MCL 600.5507(3)(b), and its mandatory dismissal language, is telling.

In *Lovely v Dep't of Corr*, unpublished per curiam decision of the Michigan Court of Appeals, issued June 21, 2007 (Docket No. 271404) (Appellees' APX 0719b-0721b), the Court of Appeals affirmed the trial court's dismissal *with prejudice* under MCL 691.1407(2) and MCL 600.5509(2)(b)—a provision of the Michigan Prison Litigation Reform Act requiring dismissal based on immunity. *Id.* at *2. The provision of the Michigan Prison Litigation Reform Act the court relied on in *Lovely* to dismiss with prejudice—MCL 600.5509(2)(b)—contains the same "shall dismiss" language as the disclosure statute relied on by the trial court here to dismiss Plaintiffs' claims (MCL 600.5507(3)(b)). And "unless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute." *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171, 181 (2010).

C. DISMISSAL WITH PREJUDICE IS PROPER WHERE THIS IS NOW THE SEVENTH PUTATIVE CLASS ACTION LAWSUIT FILED SINCE 2012 BY THE SAME ATTORNEYS ON BEHALF OF THE SAME POOL OF FORMER WAYNE COUNTY JAIL INMATES, AND THE THIRD ACTION FILED IN WAYNE COUNTY CIRCUIT COURT

Plaintiffs' supplemental brief does not analyze the specific circumstances presented here, but generally argues that under federal law, the dismissal of Plaintiffs' complaint should have been without prejudice. (Plaintiffs' Supplemental Brief, pp 1-4, citing to federal cases). Plaintiffs' failure to consider the circumstances of this case is key, because the circumstances confirm a dismissal with prejudice is the proper outcome here.

This is the seventh putative class action lawsuit filed since 2012 by the same attorneys on behalf of the same pool of former Wayne County Jail inmates alleging improprieties and verbal abuse during routine strip searches of female inmates performed at the Wayne County Jail Division I in Detroit, Michigan. (See Brief in Support of

Defendants' Pre-Answer Motion to Dismiss in Lieu of Answer or For Stay, pp 1-2, Appellees' APX 0100b-0101b). Four prior lawsuits were filed in federal court, and three were dismissed. See *Weathington v Cnty of Wayne*, report and recommendation of the United States District Court for the Eastern District of Michigan, issued May 22, 2015 (No. 12-13573), report and recommendation adopted sub nom. *Weathington v City of Detroit*, order of the United States District Court for the Eastern District of Michigan, issued June 17, 2015 (No. 12-13573) (dismissing suit because lead plaintiff failed to exhaust her administrative remedies under the federal Prison Litigation Reform Act); *Sumpter v Wayne Cnty*, 868 F3d 473, 478 (6th Cir 2017) (affirming dismissal on the merits of former Wayne County inmate's claims of unconstitutional group strip searches and verbal harassment); *Sepulveda v Cnty of Wayne*, order of the United States District Court for the Eastern District of Michigan, issued October 25, 2019 (No. 19-11407) (dismissing plaintiffs' claims under the federal Prison Litigation Reform Act for failure to exhaust administrative remedies). In the fourth lawsuit—extensively litigated in federal court since November 2017—the Sixth Circuit reversed the district court's decision to certify the class for the same kind of problems as with the proposed putative class here. *Woodall v Wayne Cnty, Michigan*, No. 20-1705, 2021 WL 5298537 (6th Cir Nov 15, 2021).

The fifth and sixth lawsuits, *Hogan v Wayne County*, Wayne County Circuit Court Case No. 20-003830-CZ, and *Hogan v Wayne County*, Wayne County Circuit Court Case No. 20-014725-CZ, were both filed in the same circuit court as this action and voluntarily dismissed without prejudice. The same group of 11 plaintiffs here initiated Case No. 20-003830-CZ in March 2020, and that case was voluntarily dismissed. (Register of Actions for Case No. 20-003830-CZ, Appellees' APX 0711b-0713b). Seven of those same plaintiffs filed

another action in Wayne County Circuit Court in November 2020 (*Hogan v Wayne County*, Wayne County Circuit Court Case No. 20-014725-CZ), and that action was also voluntarily dismissed. (Register of Actions for Case No. 20-014725-CZ, Appellees' APX 0714b-0715b).

As this Court recognized, "the decision whether or not to dismiss with prejudice is a matter within the discretion of the trial court[.]" *Cent Contracting Co v Goldman*, 48 Mich App 604, 608; 210 NW2d 901, 903 (1973). "A determination that a dismissal is with prejudice will be upheld on appeal if the record made below indicates that the trial court has not abused its discretion." *North v Dep't of Mental Health*, 427 Mich 659, 661; 397 NW2d 793, 794 (1986). The involuntary dismissal rule, MCR 2.504(B)(3), "has been used to bar lawsuits involving the same matters and parties as those in prior lawsuits under principles of res judicata." *Avery*, 209 Mich App at 502. Those type of circumstances are present here, confirming the circuit court did not abuse its discretion when dismissing Plaintiffs' claims with prejudice.

The trial court's dismissal of Plaintiffs' claims is also supported by the purpose of Michigan's Prison Litigation Reform Act. The underlying purpose of the Act "is to manage the overall number of suits prisoners initiate." *Doe*, 878 NW2d at 303. A dismissal without prejudice here—where this is now the seventh putative class action lawsuit since 2012 and the third action filed in Wayne County Circuit Court against the same defendants—would directly contradict the purpose of the act. Interpreting the mandatory dismissal language under MCL 600.5507(3)(b) only to mean a dismissal without prejudice would encourage the filing and refiling of repeated lawsuits involving the same plaintiffs and claims. But the purpose of the Prison Litigation Reform Act is to avoid vexatious litigation, not to encourage it.

Ultimately, "the plainest and most substantial justice" dictates that "litigation should have an end, and that no person should be unnecessarily harassed with a multiplicity of suits." *Jensen v Gamble*, 191 Mich 233, 238; 157 NW 440, 442 (1916). A dismissal without prejudice here would work against that principle and encourage the repeated filing of the same claims by the same plaintiffs against the same group of defendants. Both prior actions filed in Wayne County Circuit Court alleged the same four claims that Plaintiffs now assert again, for a third time, in this action. (See Complaint, pp 19-23, Appellees' APX 0019b-0023b; Complaint, Case No. 20-003830-CZ, pp 17-20, Appellees' APX 0678b-0681b; Complaint, Case No. 20-014725-CZ, pp 16-20, Appellees' APX 0702b-0706b).

A trial court does not abuse its discretion when dismissing an action with prejudice if, were the action to be dismissed without prejudice, the defendants "would be legally prejudiced by potentially having to defend another lawsuit filed by plaintiff over this same issue, even though he legally cannot succeed." See *Newman v Real Time Resols, Inc*, 342 Mich App 405, 415; 994 NW2d 852, 858 (2022). Those circumstances are present here—Defendants should not have to face yet *another* lawsuit alleging the same claims where those claims are now barred by the statute of limitations. See *Garg*, cited below.

D. PLAINTIFFS IGNORE THE TEXT OF THE MICHIGAN STATUTE AND INSTEAD RELY ON NON-BINDING FEDERAL LAW

In their supplemental brief, Plaintiffs rely on federal case law on the exhaustion of administrative remedies. (Plaintiffs' Supplemental Brief, pp 1-4). This is wrong for several reasons.

First, as explained above, the trial court granted Defendants' motion to dismiss on two bases: 1) Plaintiffs' failure to comply with the disclosure requirements under

Michigan's Prison Litigation Reform Act (Trial Court Opinion, pp 19-23, Appellees' APX 0043b-0047b), and 2) Plaintiffs' failure to exhaust their administrative remedies. (*Id.* at pp 23-25, Appellees' APX 0047b-0049b). Plaintiffs ignore the trial court's dismissal for failure to comply with the disclosure requirements and the statute's mandatory dismissal provision under MCL 600.5507(3)(b) for failure to comply with those disclosure requirements.

Second, "decisions of the lower federal courts are not binding on this Court[.]" *People v Covey*, 510 Mich 938, 939 n 4; 979 NW2d 331, 333 (2022). Federal law is not controlling here where the act mandating dismissal of Plaintiffs' claims is a Michigan statute drafted by the Michigan Legislature. This Court has explicitly stated that it "do[es] not impute knowledge of federal common law to the Michigan Legislature." *McMaster v DTE Energy Co*, 509 Mich 423, 441; 984 NW2d 91, 100 (2022). This Court is not bound to interpret a Michigan statute just like federal courts interpret a federal statute. See *Haynie v State*, 468 Mich 302, 319; 664 NW2d 129, 139 (2003) ("we disagree with the dissent's assertion that this Court is somehow bound to interpret Michigan's Civil Rights Act in accordance with the federal courts' interpretation of the federal civil rights act."). Even where the Michigan Legislature creates a law that is similar to a federal law, the two laws need not be interpreted to mean the same thing. See *id.* at 320 ("We cannot agree that any time the Michigan Legislature creates a law that is 'similar' to a federal law, it must be made identical, and the two laws must be interpreted to mean exactly the same thing.").

Plaintiffs' strict reliance on federal law is especially misplaced where the cases Plaintiffs rely on discuss the exhaustion of administrative remedies, but the trial court's dismissal was also based on Plaintiffs' failure to comply with the Michigan statute's

separate disclosure requirement—a failure that requires dismissal under MCL 600.5507(3)(b). And under the Michigan court rules, an involuntary dismissal generally operates as an adjudication on the merits. MCR 2.504(B)(3).

Plaintiffs cite to *McCloy v Correction Med Servs*, 794 F Supp 2d 743 (ED Mich 2011), but that case involved discussion of the exhaustion requirement under the federal statute. It did not involve the Michigan statute or the mandatory dismissal provision in MCL 600.5507(3)(b) for failure to comply with the disclosure requirements of MCL 600.5507(2). Plaintiffs also cite *Teal v Potter*, 559 F3d 687 (7th Cir 2009), *McGuinness v United States Postal Service*, 744 F2d 1318 (7th Cir 1984), *Boos v Runyon*, 201 F3d 178 (2d Cir 2000), *Greene v Meese*, 875 F2d 639, 643 (7th Cir 1989), and *Costello v United States*, 365 US 265 (1961), but none of those cases involved discussion of the Prison Litigation Reform Act.[5]

[5] In their application, Plaintiffs also cited *Adams v Smith*, 166 F App'x 201 (6th Cir 2006) and other non-binding cases that rely on *Adams*, including: *Freeman v Kentucky Parole Bd*, memorandum and order of the United States District Court for the Western District of Kentucky, issued February 5, 2018 (No. 5:17CV-P71-GNS); *Moore v Maly*, report and recommendation of the United States District Court for the Eastern District of Michigan, issued March 25, 2022 (No. 4:18-CV-13845); *Marsh v Anderson*, report and recommendation of the United States District Court for the Eastern District of Michigan, issued February 17, 2022 (No. 21-10348). (Plaintiffs' Application, p 21). But *Adams* involved a failure to exhaust administrative remedies under the federal Prison Litigation Reform Act and did not involve the Michigan statute or the mandatory dismissal provision under MCL 600.5507(3)(b). *Adams* is also distinguishable because unlike Plaintiffs Hogan, Martin, McElroy, Moore, Begley, Miller, Ali, Cobbs, and Thomas, who failed to file grievances (Affidavit of Michelle Boehmer, pp 2-3 ¶¶ 5-14, Appellees' APX 0190b-0191b), the plaintiff in *Adams* made some attempt to go through the prison's grievance procedures. *Adams*, 166 F App'x at 204. Plaintiffs also cite *Brown v Toombs*, 139 F3d 1102 (6th Cir 1998) (Plaintiffs' Application, p 21), but that decision again discussed exhaustion under the federal statute and was also abrogated by *Jones v Bock*, 549 US 199 (2007).

E. EVEN UNDER FEDERAL LAW, DISMISSAL WITH PREJUDICE IS WARRANTED UNDER THE CIRCUMSTANCES

The Court of Appeals determined that current detainees—even those previously housed at the Wayne County Jail but incarcerated elsewhere at the time of filing—are "prisoners" under the Prison Litigation Reform Act. (Court of Appeals Opinion, p 10, Appellees' APX 0652b). The evidence confirms that Plaintiffs Hogan, Martin, McElroy, and Begley are "prisoners" where they had been transferred from the Wayne County Jail to another correctional facility—Huron Valley Women's Complex—at the time this suit was filed. (See Offender Profiles of Hogan, Martin, McElroy, and Begley, Appellees' APX 0144b-0156b). Plaintiffs admitted this in their response to Defendants' motion to dismiss, stating: "Plaintiffs Hogan, Martin, McElroy, and Begley were incarcerated by MDOC at the time of filing suit[.]" (Plaintiffs' Response in Opposition to Defendants' Pre-Answer Motion to Dismiss in Lieu of Answer, p 2 of Brief in Support, APX 0233b). The transfer of these Plaintiffs out of the Wayne County Jail and to another correctional facility confirms dismissal of their claims with prejudice was proper.

A dismissal for failure to exhaust under the federal Prison Litigation Reform Act may be without prejudice particularly when "the dismissal is based on a curable, procedural flaw." *Allah v Adams*, 573 F Supp 3d 904, 912 n 3 (WDNY 2021). See also *Greene v Desousa*, No 14CV6290SJFAYS, 2016 WL 3460376, at *3 (EDNY June 21, 2016), citing *Snider v Melindez*, 199 F3d 108, 111 (2d Cir 1999) ("Whether dismissal should be with or without prejudice depends upon plaintiff's ability to cure what is 'often a temporary, curable, procedural flaw.'"). But where, as here, "an inmate can no longer exhaust administrative remedies because he has been transferred . . . and [she] had ample opportunity to exhaust

prior to being transferred, but failed to do so, dismissal with prejudice is proper." *Hernandez v Doe 1-7*, 416 F Supp 3d 163, 166 (EDNY 2018). See also *Greene*, at *3 ("As plaintiff is no longer in custody at the NCCC and she can no longer exhaust administrative remedies, the complaint is dismissed with prejudice"); *Berry v Kerik*, 366 F3d 85, 88 (2d Cir 2004) ("his failure to pursue administrative remedies while they were available precluded his federal lawsuits, and they were properly dismissed with prejudice.").

Based on Plaintiffs' own allegations in the complaint, Plaintiffs Hogan, Martin, McElroy, and Begley had the opportunity to exhaust their administrative remedies while housed at the Wayne County Jail but chose not to. The complaint admits that Hogan was housed as a pretrial detainee at the Wayne County Jail "[b]eginning on or about April 8, 2019 until about March 3, 2020[.]" (Complaint, p 13, Appellees' APX 0013b). The complaint further admits that Martin remained at the Wayne County Jail from "March 2017 through July 2017[,]" that McElroy was housed at Wayne County Jail during April 2018, and that Begley was a detainee at the Wayne County Jail from March 2018 through September 2018. (*Id.* at pp 14, 16, Appellees' APX 0014b, 0016b). Yet none of these Plaintiffs filed grievances regarding the way they were searched at the Wayne County Jail. (Affidavit of Michelle Boehmer, p 2, Appellees' APX 0192b).

The possibility of a dismissal with prejudice ensures the intent of the Prison Litigation Reform Act is upheld. As the court explained in *Rocky v Vittorie*, 813 F2d 734 (5th Cir 1987), "[t]o further Congress's intent to foster expeditious and congenial resolution of prisoner grievances, we believe a district court must have the power to enforce the exhaustion requirement with the threat of a dismissal with prejudice." *Id.* at 736. In *Rocky*, the court held that "before dismissing a suit with prejudice under section 1997e, the

district court must determine whether the plaintiff 'made a good faith attempt to exhaust his administrative remedies.'" *Marsh v Jones*, 53 F3d 707, 710 (5th Cir 1995). Here, no good-faith attempt was made—the evidence confirms Hogan, Martin, McElroy, and Begley made no effort to exhaust their administrative remedies via the filing of a grievance. (Affidavit of Michelle Boehmer, p 2, Appellees' APX 0192b)

Without citing to any evidence, Plaintiffs argue that "many of the dismissed-Plaintiffs in this case were released from prison and/or jail after the filing of the Complaint[.]" (Plaintiffs' Supplemental Brief, p 2). But this argument cannot save their claims. Plaintiffs admitted in their response to Defendants' motion to dismiss that "Hogan, Martin, McElroy, and Begley were incarcerated by MDOC at the time of filing suit" (Plaintiffs' Response in Opposition to Defendants' Pre-Answer Motion to Dismiss in Lieu of Answer, p 2 of Brief in Support, APX 0233b), and application of the Prison Litigation Reform Act depends on "the individual's status when an action is filed." *Anderson v Myers*, 268 Mich App 713, 717; 709 NW2d 171, 174 (2005). This argument also does not help Plaintiffs because the statute of limitations is long expired on their Elliott-Larsen Civil Rights Act claims. The statute of limitations for a claim under the Civil Rights Act is three years. *Garg v Macomb Cnty Cmty Mental Health Servs*, 472 Mich 263, 284; 696 NW2d 646, 659 (2005).[6] The complaint alleges Hogan, Martin, McElroy, and Begley experienced sexual

[6] Plaintiffs' citation to *Saunders v Kummer*, memorandum opinion and order of the United States District Court SD West Virginia, issued February 15, 2023 (No. CV 2:22-00173) (Plaintiffs' Supplemental Brief, p 4) does not change this analysis. *Sanders* involved a plaintiff who filed a new complaint after he was released from custody, and the court held that second action was timely based on a specific West Virginia savings statute. See *id.* at *6. The West Virginia savings statute permitted a party to refile an action within one year from the date of an order dismissing an action for any reason not based on the merits. *Id.* at *5. But here, Plaintiffs cite to no savings statute which could save their claims.

harassment between March 2017 and March 2020—confirming these claims would be barred by the statute of limitations in a subsequent action. (See Complaint, pp 13-16, Appellees' APX 013b-0016b). This argument by Plaintiffs is also an attempt to circumvent the disclosure and exhaustion requirements under MCL 600.5507(2) and MCL 600.5503(1), despite admitting that Hogan, Martin, McElroy, and Begley were all incarcerated at the time this action was filed.

The trial court also properly dismissed Plaintiff Krista Anson's claims with prejudice where the evidence shows Anson filed a grievance regarding the way she was searched, and the grievance was investigated and closed. (Affidavit of Michelle Boehmer, p 3 ¶¶ 15-16, Appellees' APX 0193b). The evidence further confirms that Anson did not pursue any additional administrative remedies regarding her grievance to challenge the outcome of the investigation or to appeal the decision. (*Id.* ¶ 17). Anson failed to do so despite the Wayne County Jail rules and regulations, which required that an unsatisfied grievant file an appeal within 10 days of receiving the grievance response. (Affidavit of Dennis Ramel – Ex. A, Wayne County Jail Inmate Rules and Regulations Handbook, p 17, Appellees' APX 0214b). The trial court thus correctly held that Anson failed to exhaust her administrative remedies where she failed to appeal the response to her grievance. (Trial Court Opinion and Order, pp 24-25, Appellees' APX 0048b-0049b).

In *Kikumura v Osagie*, 461 F3d 1269 (10th Cir 2006), the court explained that "[o]nce a prison formally denies an inmate's grievance [for untimeliness], and either the inmate does not challenge the basis for that decision or the court upholds the decision, the inmate's failure to exhaust is no longer 'a temporary, curable, procedural flaw.'" *Id.* at 1290, overruled on other grounds, *Robbins v Okla*, 519 F3d 1242 (10th Cir 2008). In those

circumstances, the court explained, "[s]uch a claim should be dismissed with prejudice." *Id.* See also *Murphy v Lockhart*, 826 F Supp 2d 1016, 1030 (ED Mich 2011), amended in part (Oct 14, 2011) (adopting the magistrate's recommendation based on the reasoning that "because an untimely grievance cannot be revived, the matter is at an end and the dismissal of the claim should be with prejudice[.]").

The same reasoning should apply here, where Anson's grievance was considered and dismissed by the prison grievance system, and Anson did not file a timely appeal from that decision. And regardless, Anson cannot pursue a new action based on the same claims now—the statute of limitations is long expired on her Elliott-Larsen Civil Rights Act claims. Plaintiffs cite no savings statute which could save their claims.

ARGUMENT II

PLAINTIFF, KRISTA ANSON, WAS A "PRISONER" UNDER MCL 600.5531(e) SUBJECT TO THE PRISON LITIGATION REFORM ACT AT THE TIME THIS LAWSUIT WAS FILED

Plaintiffs waived the issue of Krista Anson's status as a "prisoner" under MCL 600.5531(e) by failing to adequately raise the issue on appeal. But even if this Court considers it, Anson was a "prisoner" under the "subject to" language in the statute, under the plain meaning of the term, and under the common law.

A. PLAINTIFFS WAIVED THE ISSUE

As explained in Defendants' prior supplemental brief filed on December 18, 2024, Plaintiffs waived the argument that Anson was not a "prisoner" under the Prison Litigation Reform Act when this action was filed based on the time of her booking. An issue is waived if a plaintiff fails to state it in the statement of questions presented in the brief on appeal. See *Sebastian*, 270 Mich at 342–43; *River Inv Grp*, 289 Mich App at 360. Plaintiffs did not

mention Anson, or the time of her booking, in the questions presented in their application for leave to appeal in the Court of Appeals or in the questions presented section of their appellant brief on leave granted. As a result, the Court of Appeals did not address the issue in its opinion, and Plaintiffs admit this in their application. (Plaintiffs' Application, p 16). In their application for leave to appeal to this Court, Plaintiffs similarly fail to mention Anson or raise the issue of the time of her booking in their questions presented.

B. ANSON WAS A "PRISONER" UNDER MCL 600.5531(e) SUBJECT TO THE PRISON LITIGATION REFORM ACT AT THE TIME THIS LAWSUIT WAS FILED

1. Anson was a "prisoner" under the "subject to" language in the statute

Even if this Court considers the issue despite Plaintiffs' failure to properly raise it, Plaintiffs' contention that Anson did not qualify as a "prisoner" based on the time of her booking is properly rejected. Michigan's Prison Litigation Reform Act defines a "prisoner" as "a person subject to incarceration, detention, or admission to a prison who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of state or local law or the terms and conditions of parole, probation, pretrial release, or a diversionary program." MCL 600.5531(e). Under the unambiguous language of the statute, "the definition applies to 'a person *subject to* ... detention[.]'" *Anderson*, 268 Mich App at 717 (emphasis added). "Subject to" is defined as: 1) "affected by or possibly affected by (something)"; 2) "likely to do, have, or suffer from (something)"; 3) "dependent on something else to happen or be true[.]"[7] In other words, "subject to" connotes the happening of something else—i.e., "incarceration, detention, or admission to a prison[,]" MCL 600.5531(e)—in the future. The Legislature's use of "subject to" in the statute thus confirms that Anson was a "prisoner" at

[7] See https://www.merriam-webster.com/dictionary/subject%20to

the time this lawsuit was filed, even where she was not officially booked into the jail from an administrative standpoint until later that same day.

If the Legislature intended the definition of "prisoner" to apply only to those individuals who are already incarcerated, detained, or admitted to a prison, the "subject to" language would not appear in the statute. A court "will not interpret a statute in a way that renders any statutory language surplusage or nugatory." *Michigan Deferred Presentment Servs Ass'n v Comm'r of Off of Fin & Ins Regul*, 287 Mich App 326, 333; 788 NW2d 842, 846 (2010). A court "should presume that every word has some meaning[.]" *People v Fox*, 232 Mich App 541, 553; 591 NW2d 384, 390 (1998). By including the "subject to" language, the Legislature suggested a broader range of individuals than just those who have already been formally incarcerated, detained, or admitted.

Plaintiffs attempt to write language into the statute that is not there by focusing on when Anson was officially "booked" into the jail. But MCL 600.5531(e) contains no language conditioning an individual's qualification as a prisoner based on when that individual is "booked." The rules of statutory interpretation on this point are clear—"[t]he court cannot read into a statute anything 'that is not within the manifest intent of the Legislature as gathered from the act itself.'" *Rinke v Potrzebowski*, 254 Mich App 411, 414 n 3; 657 NW2d 169, 171 (2002).

2. Anson was a "prisoner" under the plain meaning of the term

The "subject to" language used in MCL 600.5531(e) is consistent with the plain meaning of the term. Black's Law Dictionary defines "prisoner" as someone "who *is being* confined in prison[,]" "[s]omeone who has been apprehended by a law-enforcement officer and is in custody, *regardless of whether the person has yet been put in prison*[,]" and

"[s]omeone who is *taken by force and kept somewhere*." PRISONER, Black's Law Dictionary (12th ed. 2024) (emphasis added). Black's Law Dictionary adds that the term "prisoner" applies more broadly than simply to those who have been formally processed in the jail's system:

> If an officer arrests an offender and takes him to jail the layman does not think of the offender as being 'in prison' until he is safely behind locked doors, *but no one hesitates to speak of him as a prisoner from the moment of apprehension. He is a prisoner because he is in prison … whether he were actually in the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him*[.]

PRISONER, Black's Law Dictionary (12th ed. 2024) (quotations omitted) (emphasis added), citing Rollin M. Perkins & Ronald N. Boyce, Criminal Law 566 (3d ed. 1982) (quoting 2 Hawk. P.C. ch. 18, § 1 (6th ed. 1788)). This definition of "prisoner" supports Defendants' reading of MCL 600.5531(e) to include Anson.

3. Anson was a "prisoner" under the common law

Also instructive here is *People v Taylor*, 238 Mich App 259; 604 NW2d 783 (1999). In that case, the defendant was taken to the Saginaw County Jail following his arrest, and upon his arrival, "the police transferred custody of [the] defendant to jail intake officers, who placed [the] defendant in a holding cell." *Id.* at 260. Then, "[b]efore the intake officers could process [the] defendant (i.e., photograph, fingerprint, search, and take information from him)[,]" the defendant escaped. *Id.* The court held that "an individual may be charged under the jail escape statute [even] where the escape occurs before the individual has been formally processed by jail authorities." *Id.* (emphasis added). In reaching that holding, the *Taylor* court looked to authority from other jurisdictions for guidance, and relied on the reasoning that "it is the confinement in a jail, *not necessarily the completion of formal*

booking procedures, that establishes an arrestee's status as a 'prisoner[.]'" *Id.* at 263 (emphasis added).

Also instructive here is the court's reasoning in *Taylor* that "[a]bsent some legislative directive in the statute, we decline to establish which, if any, processing procedures must be completed before one may be deemed 'lawfully' imprisoned within the meaning of the statue." *Id.* at 265. The same rationale applies here—absent any language in MCL 600.5531(e) conditioning one's status as a "prisoner" on the completion of booking procedures, the court should decline to establish which, if any, booking procedures must be completed before one may be deemed a "prisoner."

Further support for the broad reach of the term "prisoner" can be found in MCL 801.4. Under that statute, an individual may be deemed a "prisoner" simply "if his liberty has been 'restrained by state authorities.'" *Munson Med Ctr v Cnty of Roscommon*, unpublished per curiam decision of the Michigan Court of Appeals, issued May 26, 2015 (Docket No. 320398), at *2 (Appellees' APX 0716b-0718b).[8]

In their supplemental brief, Plaintiffs cite no authority in support of their argument that Anson did not qualify as a "prisoner" under MCL 600.5531(e), aside from the statute itself. Plaintiffs' own subjective interpretation of how they would like the statute to be read cannot supersede the authority cited above and clearly established rules of statutory interpretation. Plaintiffs contend there is a "fact question" as to whether Anson was "actually 'in' the jail" when this action was filed (Plaintiffs' Supplemental Brief, p 6), but status as a prisoner does not hinge on whether an individual is "in" the jail. See PRISONER, Black's Law Dictionary (12th ed. 2024), defining "prisoner" as "[s]omeone who has been

[8] *Munson* is cited for its discussion of the term "prisoner" under another Michigan statute.

apprehended by a law-enforcement officer and is in custody, *regardless of whether the person has yet been put in prison*[.]" (Emphasis added). Based on this definition, the other authority cited above, and the broad, unambiguous language in MCL 600.5531(e), Anson qualified as a "prisoner" at the time this action was filed and was required to abide by the Prison Litigation Reform Act's requirements.

RELIEF

WHEREFORE, Defendants-Appellees Wayne County, Sheriff Raphael Washington, and Deputy Terri Graham respectfully request that this Court to deny leave to appeal and grant them all other relief to which they are entitled in law and equity.

Respectfully submitted,

PLUNKETT COONEY

By: */s/Mary Massaron*

MARY MASSARON (P43885)
BRIANA L. COMBS (P85366)
Attorneys for Defendants-Appellees
38505 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

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WORD COUNT CERTIFICATE

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached brief;

2. The brief prepared by her office complies with the print type requirements;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 12 font; and

4. The word processing system counts the number of words in the brief as 10,852.

/s/Mary Massaron
MARY MASSARON

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